1 Thursday, 8 December 2016

2 (10.15 am)

3 Submissions by THE LORD ADVOCATE (continued)

4 THE PRESIDENT: Lord Advocate.

5 THE LORD ADVOCATE: Thank you, my Lord. My Lady, my Lords,
6 before I start, my learned friend Lord Pannick has asked
7 me to mention that the case of Matadeen to which you
8 referred yesterday is now available to the court.

9 THE PRESIDENT: Thank you very much.

10 THE LORD ADVOCATE: What I propose to do with the court's
11 permission is to seek to summarise my position in
12 relation to the matter I was addressing at the close
13 yesterday and then to make some short submissions on
14 some particular points that have arisen.

15 If the court could have before it again section 28
16 of the Scotland Act at MS 4359, volume 12, tab 124.

17 I am going to articulate a set of propositions.

18 THE PRESIDENT: Thank you.

19 THE LORD ADVOCATE: First of all I say that because this is
20 a statutory provision, any question as to its scope and
21 legal effect is in principle justiciable. The question
22 of what legal effect and what meaning to be given to the
23 different parts of in particular section 28(8) is
24 a matter for the court. To say that the subsection is
25 justiciable does not mean that Parliament intended that

1 the court would decide whether a particular situation is
2 normal. The use of the word "normally" in the context
3 of section 28(7) indicates that there are some
4 situations in which the United Kingdom Parliament will
5 legislate with regard to devolved matters without the
6 consent of the Scottish Parliament. I referred
7 yesterday to the background principles, Article 9 of the
8 Bill of Rights and the Pickin rule.
9 But that is not an issue that the court needs to
10 address in this case. The question that arises at this
11 stage is whether or not the convention applies at all;
12 namely whether or not a bill to withdraw the
13 United Kingdom from the European Union falls within the
14 scope of the convention. That depends on the meaning
15 and effect to be attached to the phrase "with regard to
16 devolved matters".
17 Although that is a phrase which is not replicated
18 elsewhere in the Scotland Act, it is a phrase of
19 a character which is capable of resolution by a court.
20 So there is nothing inherent in the phrase itself which
21 makes it unsuitable for adjudication.
22 I say that if there is a dispute about whether
23 legislation of a particular kind is or is not
24 legislation with regard to devolved matters, it is
25 constitutionally permissible for the court to resolve

1 that dispute.

2 In doing that, the court would be saying no more and
3 no less than that the convention is engaged; and that
4 the question of whether legislative consent is required
5 is a constitutionally relevant one. That is what the
6 court, this court, would be saying if it were to
7 indicate that the legislative consent convention is part
8 of the United Kingdom's constitutional requirements for
9 a decision to withdraw from the European Union.

10 If it is correct, as I submit, that a bill to make
11 that determination would engage the convention, then the
12 constitution passes to the political actors, to the
13 United Kingdom Parliament and indeed no doubt also the
14 Scottish Parliament, to address whether or not this is
15 a case in which exceptionally the United Kingdom would
16 or would not legislate without the consent of the
17 Scottish Parliament.

18 Or if that consent were not to be given, and one
19 should not prejudge any of these things, or if that
20 consent were not to be given, whether or not it would be
21 for the United Kingdom Parliament to determine whether
22 or not to legislate without -- in the face of that
23 refusal of consent. There would be no legal sanction
24 should the United Kingdom Parliament choose to do that.

25 I have set out in my case in detail what I say is

1 the practice in relation to the scope and application of
2 the legislative consent convention. It is perhaps worth
3 making the point that it is a routine part of the way
4 that matters are addressed between the United Kingdom
5 and Scottish governments between -- and it -- between
6 the two parliaments.
7 I say that looking to that practice, a bill which
8 determined to withdraw the United Kingdom from the
9 European Union would engage the convention, because of
10 the effects that it would have with regard to devolved
11 matters.
12 In these circumstances, and this comes to the main
13 point in the appeal, in these circumstances it would be
14 surprising if the same result could be achieved by
15 an unilateral action of the Crown under the prerogative.
16 Such action would not be legislation and therefore would
17 not trigger the convention. The result, if the
18 prerogative could be so exercised, would be to elide the
19 need, I say the need for the relevant constitutional
20 actors, those actors who have power to change the law of
21 Scotland, namely the Scottish Parliament and the
22 United Kingdom Parliament, even to address whether the
23 Scottish Parliament's consent should be sought and
24 obtained. I say that if that were the law, and I say it
25 is not the law for other reasons, then that would bypass

1 an important constitutional requirement of the
2 United Kingdom.
3 Fundamentally I say this case is about who has the
4 power to change the law of the land. In Scotland there
5 are three legislatures, there is the United Kingdom
6 Parliament, there is the European legislature, there is
7 the Scottish Parliament; and as between the
8 United Kingdom Parliament and the Scottish Parliament,
9 the convention -- convention constrains the
10 United Kingdom Parliament in the exercise of its legal
11 powers in order to respect the authority which the
12 Scottish Parliament has.
13 LORD MANCE: Can you point to a case, Lord Advocate, where
14 the courts have ever determined the preconditions, the
15 existence or not of the preconditions to exercise of --
16 or application of a convention, in circumstances where
17 actual exercise is, you accept, entirely a political
18 matter, not reviewable? It is a pretty odd exercise,
19 isn't it?
20 THE LORD ADVOCATE: I say not, my Lord. I say it is the
21 court adjudicating on that part of the section which is
22 eminently suitable for adjudication by the court.
23 LORD MANCE: I can see that as a question -- if it led to
24 something, that is a justiciable question, but here you
25 are accepting it doesn't lead to anything, and there

1 must be presumably many constitutional conventions which
2 depend upon the existence of certain situations. You
3 say that the court can intervene in any of them and
4 determine whether the situation exists and then hand
5 over to the politicians?
6 LADY HALE: As I understood it, Lord Advocate, and if I have
7 misunderstood I would like to be reassured, you are
8 saying that what the court can interpret are the words,
9 "with regard to devolved matters".
10 THE LORD ADVOCATE: Yes.
11 LADY HALE: We cannot say anything about whether this is
12 a normal situation or not.
13 THE LORD ADVOCATE: No.
14 LADY HALE: That is for the political actors.
15 THE LORD ADVOCATE: Indeed. It is the only issue that
16 arises at this stage; after all I accept we don't have
17 a bill, I am proceeding on a hypothesis. But can I say
18 it is part of the current constitutional context within
19 which questions as to whether the Crown can change the
20 law of the land by the prerogative, or indeed whether
21 resolutions of either or both Houses of Parliament can
22 be relevant to the legal question the court has to
23 address, fall to be considered, because part of what the
24 legislative consent convention does is to ensure that
25 where it is properly engaged, the question is relevantly

1 asked: does the devolved legislature agree or not agree
2 with the effects of this, with regard to devolved
3 matters? That is one of the reasons why I say that
4 ultimately what is required here is an act of Parliament
5 to make the decision under Article 50.
6 LADY HALE: Do you also say that "with regard to" means
7 something different from "relate to"?
8 THE LORD ADVOCATE: It is certainly a different phrase, my
9 Lady, and I did make the point yesterday that this
10 phrase doesn't use the language used elsewhere in the
11 Act; it points back to the language used in the --
12 originally in the memorandum of understanding, and which
13 I say in turn is explicated by the practice which I have
14 set out in my --
15 LADY HALE: You have to say it means something different
16 from "relate to", I think, don't you? Because this
17 court has given "relate to" -- when considering whether
18 the Scottish Parliament has acted within its powers, it
19 has given "relate to" a very specific meaning. You have
20 to say it means something different.
21 THE LORD ADVOCATE: Indeed, and I have made the submission
22 that the mere fact, and it is demonstrated by the
23 examples I gave yesterday, that a bill relates to
24 a reserved matter does not necessarily mean that the
25 legislative consent convention is not engaged. That is

1 seen in the practice that has been followed very notably
2 in the two Scotland Acts, as recognised in the
3 explanatory notes that I took the court to yesterday.
4 It is seen also routinely when the United Kingdom
5 Parliament legislates in an entirely reserved field, but
6 gives powers in that regard to the Scottish Government
7 which is not by any means an unusual circumstance;
8 again, routinely legislative consent is sought and if
9 granted, then the Act proceeds.
10 LORD REED: If we accept your submissions, it follows that
11 if notification under Article 50 requires legislation,
12 then on your submissions, if that legislation is, with
13 regard to devolved matters, then the convention -- then
14 it falls within the scope of the convention.
15 THE LORD ADVOCATE: Indeed.
16 LORD REED: Yes.
17 If on the other hand we accept that notification
18 does not require legislation, then plainly the
19 convention could not apply. It rather sounds as though
20 the practical significance of this submission depends on
21 the view we take on the primary issue between the
22 appellants and the first and second respondents.
23 THE LORD ADVOCATE: It does, my Lord. Although, for the
24 reasons I have sought to articulate, I say that if one
25 is testing that constitutional issue in light of our

1 current constitutional circumstances, then it is the
2 existence of the devolved legislatures, the impact on
3 them, on their competences and on policy areas with
4 which they are concerned, and (Inaudible) of this
5 convention are all part of the current constitutional
6 context for the question -- in which the main question
7 needs to be addressed.
8 Can I then make a short submission on the phrase "it
9 is recognised that", which my Lord Hodge asked me about
10 yesterday. In my submission, that is a phrase which
11 again refers one back, it tells us that Parliament is
12 referring to something that already exists. It is
13 a phrase -- we have had a search done -- and it is
14 a phrase -- not a phrase that appears to be very much
15 used. It has been used in the context of two
16 constitutional orders which I am afraid I do not have
17 with me but I will make available to the court, the
18 Gibraltar constitution order and the Virgin Islands
19 constitution order. In the former there is a provision
20 that states:
21 "It is hereby recognised and declared that in
22 Gibraltar there have existed and shall continue to exist
23 each and all of the following human rights and freedoms,
24 recognised and declared."
25 Likewise in the Virgin Islands constitution order,

1 in a similar context, in relation to the enactment of
2 fundamental rights and freedoms, there is a set of
3 provisions that include:
4 "Whereas it is recognised that those fundamental
5 rights and freedoms apply subject to respect for the
6 rights and freedoms of others ..."
7 And so on, namely, and then they are enumerated. So
8 those are examples of the phrase being used, in a way
9 recognising something which is said already to exist,
10 but which is being brought into a particular legal and
11 constitutional framework.
12 LORD SUMPTION: They are declaratory of some legal
13 propositions in both of those cases, whereas the unusual
14 feature of this subsection is that it is declaratory of
15 a political intention.
16 THE LORD ADVOCATE: Well, my short submission is that the
17 fact that the provision is declaratory, as indicated by
18 the phrase "it is recognised" is neutral as to the -- or
19 doesn't point to any particular conclusion as to its
20 juridical effect. The juridical effect is -- plainly
21 the status of the rule has changed, it has become part
22 of an act of Parliament.
23 LORD SUMPTION: Its juridical effect is going to depend on
24 what it is that has been recognised.
25 THE LORD ADVOCATE: Well I don't say it is irrelevant that

1 it is now in an Act of Parliament. To take the example
2 of fundamental rights, there is a nice passage in the
3 case of Higgs, which the court has at MS 2763, where
4 Lord Cooke of Thorndon, speaking of the right not to be
5 subjected to inhuman treatment, said:
6 "It is recognised rather than created by
7 international human rights instruments."
8 It doesn't mean that it is irrelevant that it is
9 then enacted or brought in with human rights
10 instruments.
11 I entirely take my Lord's point that at the end of
12 the day, it will be a matter of construction for the
13 court to decide what the implications are of the change
14 in, what I say is a change in juridical status of the
15 rule.
16 LORD HODGE: Lord Advocate, you are not disputing that what
17 has been recognised is a convention, and that the court
18 cannot adjudicate on the question of what is normal.
19 THE LORD ADVOCATE: I accept all of that, my Lord.
20 LADY HALE: Lord Advocate, I think the phrase "it is hereby
21 recognised and declared" is common to a great many
22 Commonwealth independence constitutions. I have just
23 got up the constitution of Trinidad and Tobago,
24 section 4 of which -- with which we are very familiar
25 because we encounter it regularly in another

1 jurisdiction:

2 "It is hereby recognised and declared that in

3 Trinidad and Tobago, there have existed and shall

4 continue to exist ... following rights ..."

5 So it is very common, recognising an existing state

6 of affairs and in that case giving it legal effect.

7 THE LORD ADVOCATE: I entirely take the point, and my Lord

8 Sumption's point, that it begs questions rather than

9 answers them.

10 THE PRESIDENT: We ought to let you move on I think.

11 THE LORD ADVOCATE: Indeed.

12 Yes, if I could just make two short points in

13 response to issues -- sorry, I should make this point,

14 that if I -- I would be making this submission, even if

15 it wasn't for the statutory enactment, so I say it is

16 not critical, and I point the court to the

17 Patriation Reference case from Canada, volume 25,

18 tab 305.

19 The approach that I would say of the majority of the

20 court in that case to a question of the justiciability

21 of a convention not dissimilar to the one before this

22 court, did not in my submission depend on any specialty

23 of the Canadian jurisdiction. I draw the court's

24 attention to MS 8846 to 8847 where the Canadian Supreme

25 Court, the majority bites directly on the justiciability

1 question.

2 I may say that was a case where the convention was

3 not enshrined in statute. If I am wrong in all of that,

4 and the court were to take the view that the point is

5 not justiciable, then the court would decline to answer

6 the Advocate General for Northern Ireland's second

7 question. The court would say that Mr Justice Maguire

8 was wrong to express a view as to the scope of the

9 convention, and in effect the court would be leaving to

10 other constitutional actors the question of whether or

11 not the constitutional requirements of the

12 United Kingdom include in the present circumstances this

13 convention.

14 If I could make two short points in response to

15 issues raised by the Advocate General for Scotland, he

16 made a point that there is no bill before us and

17 ordinarily this is a question which would not be

18 addressed without a bill because the question of whether

19 the convention is engaged or not, may depend critically

20 on the particular provisions of a particular piece of

21 legislation; and it is entirely possible, no doubt, that

22 a bill determining to leave the EU could also contain

23 other provisions which (Inaudible).

24 I have sought to test the matter in a way most

25 favourable to the United Kingdom, by assuming the

1 simplest possible bill. He pointed out that there was
2 no legislative consent motion in relation to a string of
3 previous pieces of legislation relating to the EU.
4 I will say it is entirely consistent with the
5 United Kingdom Government's ambulatory theory that
6 changes to the content of EU law were not thought to
7 engage the convention, far less, far less, changes in
8 the institutional procedures of the European Union; and
9 I say that the hypothetical bill withdrawing us from the
10 EU with the significant radical consequences with regard
11 to devolved matters that I alluded to yesterday is quite
12 different in kind. It is really the same point that the
13 court discussed with my learned friend Mr Eadie on Day
14 1, that we are dealing with something that is not simply
15 a change in scope, it is something which is quite
16 different in kind.
17 My Lord, Lord Hodge asked me whether the power given
18 to Parliament in Article 18 of the treaty of European
19 Union was given to Parliament exclusively and I do say,
20 I do say that, exclusively to Parliament and to those
21 authorised by Parliament. Against the background of the
22 claim of right, and the Bill of Rights, it would have
23 been extraordinary if the power to change the laws in
24 use within the Kingdom of Scotland, which is the phrase
25 in the Act of Treaty of Union, had been given to the

1 Crown.

2 The question of who had authority, as regards Scots
3 law, was a matter of significance to the framers of the
4 union legislation. I say it is not a matter simply of
5 footnoting to note that the power to change the laws of
6 Scotland were given to Parliament and of course to those
7 whom Parliament has authorised, and not to the Crown.

8 I say that is consistent with what I say is the
9 limiting rule of constitutional law, that sets bounds to
10 the use of the prerogative and precludes the
11 United Kingdom Government from asserting the power to
12 make the significant changes, or to make the significant
13 changes to the laws of the land by virtue of the
14 prerogative that they claim in this case.

15 Unless there are other matters that I can assist the
16 court with, those are the submissions which I wish to
17 lay before the court.

18 THE PRESIDENT: Thank you very much, Lord Advocate. Thank
19 you.

20 Mr Gordon.

21 Submissions by MR GORDON

22 MR GORDON: My Lords and my Lady, on behalf of the Counsel
23 General for Wales who sits next to me, I want to make it
24 clear at the outset if I may that the position of the
25 Welsh Government and the Counsel General is that the

1 result of the referendum to leave the European Union
2 should be respected. Uniquely of those parts of the
3 United Kingdom exercising devolved powers, the vote in
4 Wales, as this court will know, was a vote to leave the
5 European Union. May I therefore put it bluntly. Wales
6 is not here because it wants either to stop or to stall
7 Brexit or the implementation of Brexit. It is here
8 precisely because the constitutional issues at stake go
9 far beyond Brexit, as indeed, with the greatest respect
10 to this court, many of the questions have shown.
11 In the time available and subject to your Lordship's
12 approval I would like to do three things. First of all,
13 to state what we believe to be the fault line that lies
14 through the whole of the Government's arguments, and the
15 consequences in law of that flawed reasoning, and I can
16 do that very quickly but it is a point that has not yet
17 emerged very clearly.
18 Secondly, to make some general points about the
19 constitutional principle at stake and why that is so
20 important in the context of devolution.
21 Thirdly, your Lordships will have seen the two core
22 propositions of law for which we contend at paragraph 4
23 of our case, to develop those two points.
24 So can I start with the fault line that we that we
25 say lies through the Government's approach to this case.

1 As we understand it, the whole case has been advanced on
2 the premise that the treaty-making prerogative is as
3 wide as Mr Eadie asserts. That is to say that the
4 analytical starting point for consideration of the power
5 he claims is a treaty prerogative to make and unmake
6 treaties. Full stop.
7 Now, at first sound, that seems plausible but it
8 ignores the most basic and elementary constitutional
9 principle of all, which is that whatever else the
10 prerogative may do, it may not dispense with laws passed
11 by Parliament and I will call that, if I may, the
12 dispensing principle: that constitutional principle has
13 been with us since the Bill of Rights, it has never been
14 modified and it cannot be modified by a court in our
15 very respectful submission, even if to do so may be
16 temporarily expedient in the interests of a flexible
17 constitution.
18 The argument by my learned friend Mr Eadie simply
19 forgets that principle. In forgetting it, he is able to
20 derive false comfort from a raft of cases, De Keyser and
21 all the rest of them, and by doing so he has nothing
22 whatever in terms of principle to answer the case
23 against him and as I hope to show, this can be developed
24 in nine short propositions. I am not going to develop
25 the propositions, I am just going to state them because

1 they are building blocks to understand why this case is
2 flawed.
3 First of all, proposition one, this is a case about
4 a claimed power to trigger Article 50 under the
5 prerogative. So it is a claim of a power, a prerogative
6 power. Not a statutory power, the prerogative power.
7 Secondly, there is no dispute that the Government
8 enjoys a prerogative power to make and unmake treaties.
9 Third point, perhaps the critical point, however,
10 there are certain general prior constraints, legal
11 constraints that apply to all types of prerogative
12 powers.
13 Fourth point, the most fundamental prior constraint
14 is that the prerogative may not be used to dispense with
15 laws. That principle is at least nominally understood
16 to be accepted by the Government.
17 Fifth point, there are other constraints, other
18 legal constraints, and this court will recall Lord
19 Pannick's invocation of many principles. They include
20 the principle that the prerogative may not be used to
21 nullify rights or frustrate statutory schemes, but the
22 dispensing principle goes beyond rights, it goes beyond
23 subverting statutory schemes, and it extends to altering
24 the content, or, as we would put it, striking a line
25 through a statutory provision.

1 Sixth point, again, in our submission critical,
2 where there is no existing prerogative power, no
3 question of whether Parliament has abrogated or revived
4 the power arises. This is elementary, a child of six,
5 with respect, could understand this point.
6 THE PRESIDENT: That is very well put.
7 MR GORDON: I say a child of six could understand this
8 point, because if you tell a child it cannot go out and
9 play in the garden but it can play in the house, it has
10 no power, the analogue, to going out in the garden. If
11 you have not got a particular power to do something,
12 because to do so would violate a prior constraint, you
13 simply don't have the prerogative power. So to accept
14 that there is a treaty-making power, does not mean that
15 there is a treaty-making power to dispense with laws or
16 to subvert statutory schemes, or to crucify human
17 rights.
18 My Lord, the seventh point, the first stage of
19 analysis, therefore, is whether triggering Article 50
20 will dispense with laws. We say that it will with
21 reference to the Government of Wales Act 2006. Lord
22 Pannick has put forward arguments we endorse, that
23 fundamental rights are overridden by reference to the
24 European Communities Act. So, proposition eight.
25 LORD CARNWATH: Mr Gordon, can I stop you. You seem to be

1 saying there is an important difference between whether
2 you have the power and whether you are abusing the
3 power.
4 MR GORDON: I do.
5 LORD CARNWATH: I mean, your child analogy does not really
6 work, because obviously the child is told he cannot go
7 out in the garden, still has the power to go out in the
8 garden, and indeed he may well disobey the constraint
9 and do it. So I am not sure that gets you very far.
10 But in this context, why do you say this goes to the
11 existence of the prerogative power rather than simply
12 being constraint imposed by the common law on the
13 exercise of it; does it matter?
14 MR GORDON: It doesn't matter, because if Parliament
15 legislates, envisaging the exercise of prerogative
16 power, which is my learned friend's case, you have to
17 ask yourself, can Parliament possibly have legislated
18 for the exercise of an illegitimate power, to which the
19 answer is obviously no. If in fact prerogative power
20 cannot be used to dispense with laws, it is
21 inconceivable that the European Communities Act could
22 have legislated for what Mr Eadie called the rest being
23 the prerogative, to take us out of the European Union.
24 So the distinction, the semantic, with respect in my
25 submission, distinction between illegitimate exercise of

1 a power and the existence of a power falls away when one
2 appreciates that there simply could not be a legislative
3 intention to contain within a statute an illegitimate
4 use -- envisage illegitimate use of the prerogative.
5 LORD CARNWATH: Sorry, I don't want to press you but you
6 said there was a simple principle, which is that you
7 cannot use -- a prerogative cannot be used to dispense
8 with law.
9 MR GORDON: My Lord, yes.
10 LORD CARNWATH: That is backed up over centuries. I don't
11 think anyone disputes that.
12 MR GORDON: Nor do I.
13 LORD SUMPTION: Why do you need to put it in other forms,
14 like frustrating intention? All these are really
15 different ways of expressing the same point, which is
16 a clear principle of law, that you cannot use the
17 prerogative to dispense with laws.
18 MR GORDON: My Lord, we rely on the dispensing principle
19 because of its particular application to devolution.
20 LORD CARNWATH: Yes.
21 MR GORDON: But you are absolutely right to say whichever
22 one or more of Lord Pannick's principles we take, the
23 analysis will still be the same.
24 LORD CARNWATH: Yes, I mean I find personally confusing to
25 start talking about frustrating intentions and this sort

1 of thing, when what you are arguing for is a simple
2 principle that you can not use prerogative to dispense
3 with laws, see Bill of Rights and so on.
4 MR GORDON: See also my learned friend's case.
5 LORD CARNWATH: Dispensing with laws in Wales.
6 MR GORDON: Yes, absolutely.
7 LORD HODGE: But those are your fourth and fifth
8 propositions that you have given us, in effect, that it
9 is all encompassed in the prohibition against
10 dispensation.
11 MR GORDON: What I am trying to do is provide a suggested
12 analysis for structuring the arguments that we have
13 heard. The last point is this.
14 LORD KERR: I think we have only got to seven.
15 MR GORDON: I am up to nine, my Lords.
16 LADY HALE: You had got to number seven, you said you had
17 eight.
18 MR GORDON: I've got nine now. Proposition seven.
19 THE PRESIDENT: Quality not quantity we are concerned with.
20 MR GORDON: Proposition seven is the first stage of analysis
21 is whether triggering Article 50 will dispense with
22 laws. That is the overarching principle. Proposition
23 eight, if triggering Article 50 will dispense with one
24 or more laws, that is the end of the matter; the
25 question of abrogation simply does not arise. Why

1 doesn't it arise? Because there is no relevant
2 prerogative or use of prerogative for it to arise.
3 Nothing is being abrogated. The abrogation has started
4 with the immediate bar to a prerogative power ever being
5 used, capable of being used to dispense with laws.
6 THE PRESIDENT: I think Mr Eadie would say you are bypassing
7 or eliding a question of importance on this aspect of
8 the case, which he says is the proper construction of
9 the 1972 Act, what is its effect; and he says that
10 properly read and applied in context, it does permit the
11 Government to do this. You are starting almost with the
12 assumption that it doesn't.
13 MR GORDON: No, I am not starting with that assumption,
14 my Lord.
15 THE PRESIDENT: Then haven't we got to consider the Act, and
16 consider whether you are right in your assumption or
17 your assumption that the Government cannot change the
18 law, cannot take away rights, whereas Mr Eadie says it
19 is inherent in the statutory scheme that it can.
20 MR GORDON: Yes, can I come back to your Lordship's question
21 after giving the ninth proposition. The ninth
22 proposition is that if we are right so far, the
23 Secretary of State's reliance on De Keyser and the
24 entire statutory scheme following the 1972 Act, that is
25 all the other acts we have been talking about in this

1 case, is also misconceived because it jumps the first
2 stage of analysis. That is the prior constraints.
3 Coming back to your Lordship's question, I have not
4 elided it, because proposition seven is that we say that
5 use of the prerogative will dispense with laws.
6 Now, if -- and this is why I wanted to put it in
7 that way -- if we are right about that, we win and the
8 Government loses. If the proper construction of the
9 1972 Act is that, and I will put it in colloquial
10 language and I think your Lordships and your Ladyship
11 will follow it, if there is a clamp on the conduit pipe,
12 so that there are no relevant laws, rights, whatever,
13 that could ever be dispensed with, then I would accept
14 that the Government would win the case.
15 In other words, there is a question of construction,
16 your Lordship are right but may I at this stage seek to
17 clarify a real confusion that has crept into the
18 language of this case, and that is the use of this word
19 "clamp", because there is no relevant use of the word
20 "clamp" that can relate to the prerogative. Either the
21 prerogative exists when the legislation is enacted or it
22 does not.
23 There is a relevant use of the word "clamp" on the
24 narrow point of construction, as to whether rights are
25 as contingent as Mr Eadie contends for. So using the

1 word "clamp" on prerogative is a very dangerous
2 analytical, in our submission analytical mistake. If we
3 are right on this analysis, the only question for your
4 Lordships and your Ladyship, given the concessions that
5 have been made and given what we know about Article 50,
6 what is the real meaning of the 1972 Act.
7 LORD MANCE: Can I just interpose there. You are focusing
8 in answer to my Lord on the 1972 Act, and looking at the
9 Counsel General's case, I thought that some new issue
10 was being addressed, which related to the devolution
11 legislation. I don't see any focus really on anything
12 else. We have had a lot of argument about the 1972 Act,
13 Mr Eadie has made extensive submissions and Lord Pannick
14 has replied.
15 But I thought that your case was a separate case,
16 namely to say that even if the 1972 Act didn't -- will
17 allow the use of the prerogative in the way that
18 Mr Eadie submits, nonetheless the devolution legislation
19 makes it impossible; that is also part of your case, is
20 it?
21 MR GORDON: It is part of it, but I think the most important
22 part of it is this: that the Advocate General for
23 Scotland seeks to knock out our case by saying, if
24 Mr Eadie is right on the construction of the 1972 Act,
25 the dominoes fall and we must lose.

1 The answer to that is not necessarily but more
2 importantly, you cannot view the 1972 Act in isolation.
3 Because when we get to the devolution legislation, our
4 point, and simple point, is that the detailed machinery
5 of conferment of power in that statute can be read
6 alongside -- in fact all the statutes in relation to
7 this point need to be read in pari materia.
8 But the simple point here is that the devolution
9 legislation has deliberately prescribed a legislative
10 scheme relating to the competence of the Assembly,
11 a constraint that one cannot act incompatibly with EU
12 law. The Advocate General says you don't need that
13 provision, never needed to legislate that. There was
14 a deliberate choice to put that provision in, and it was
15 put in in full knowledge of the 1972 legislation and
16 what it meant.
17 So the devolution legislation is highly relevant,
18 both in terms of the framework of that Act, and also in
19 terms of its impact on the proper interpretation of the
20 1972 Act. That is how we put it.
21 LORD MANCE: That is quite a bold submission, isn't it? How
22 can the devolution legislation construe an act passed
23 over 20 years before?
24 MR GORDON: My Lord, we simply say that -- when I get to it
25 hopefully the submission will be a little clearer, but

1 we simply say that when you look at the detailed
2 machinery of the Government of Wales Act, what you have
3 is a supervision by Parliament and/or Parliament and the
4 National Assembly for Wales, of all legislative, all
5 changes to competence within schedule 7. It would be
6 astonishing if the prerogative could be used to effect
7 a legislative change much greater than the ones in
8 schedule 7. So as a matter of statutory interpretation,
9 certainly we say that is the effect of the Government of
10 Wales Act.
11 THE PRESIDENT: That is similar to what the Lord Advocate
12 said towards the end of his submissions this morning.
13 MR GORDON: Absolutely, but the point being, in our
14 submission anyway, and maybe I don't even have to get
15 into this because we are not revisiting the 1972 Act;
16 that is a matter on which Lord Pannick has argued his
17 case. We say he is right. But in any event, we do
18 respectfully submit that the -- sorry, my Lord -- we do
19 respectfully submit that the construction of the
20 Government of Wales Act 2006 is all of a piece or is
21 likely to be considered to be all of a piece with
22 interlocking legislation. We say that interlocking
23 legislation gives the clue, or actually it decides
24 certainly in our favour what the Government of Wales Act
25 means, but it may be useful in your Lordships and your

1 Ladyship looking at what the 1972 Act means.

2 My Lord, may I then move on to say this, that if we
3 are right in this suggested analysis and if your
4 Lordships were with us on the point of construction on
5 the 1972 Act and/or the Government of Wales Act, and/or,
6 I should add, taking up Lord Carnwath's point, any of
7 the other principles that Lord Pannick has developed and
8 articulated, and ditto for Mr Chambers, as far as, then
9 we cannot see how the De Keyser line of cases has any
10 relevance to these appeals.

11 They are analytically irrelevant because nothing is
12 being abrogated and picking up the language of clamp to
13 deconstruct it, nothing is being clamped because there
14 is nothing to clamp. The principle of non-dispensation
15 has already aborted the possibility of using prerogative
16 power in that way.

17 So if we are right so far, the difficulties for my
18 learned friend Mr Eadie go even further, because he has
19 not put forward any competing principle. What was
20 astonishing in the divisional court -- we were
21 spectators there because we had a noting brief, we were
22 noting down what was said; at one stage in the argument
23 in the divisional court, Mr Eadie was suggesting to the
24 divisional court that they should prefer the De Keyser
25 line of case law over the common law principle of

1 legality, but if the De Keyser line of cases is
2 analytically irrelevant, there is nothing to compete
3 with all the principles that have been articulated so
4 far.
5 What we say is that these points all crystallised
6 when, on the first day, my learned friend Mr Eadie was
7 asked: isn't it important -- asked, I think, by Lord
8 Sumption -- isn't it important to know what we are
9 talking about. The answer is in the transcript, but we
10 had understood Mr Eadie simply to go back in circular
11 fashion to say: well, it is a very wide power; in other
12 words he didn't put forward anything that I can
13 deconstruct because there is nothing to deconstruct.
14 So that is stage one of my submissions. The fault
15 line running through the Government's whole argument.
16 The second area that I just wanted to make a few
17 points about is the constitutional principle at stake.
18 Of course in one sense we all think we know what the
19 constitutional principle at stake is. But may I suggest
20 two broad questions which your Lordships and your
21 Ladyship may wish to consider in analysing all these
22 cases, and they are at a very high level, a very general
23 level.
24 First of all, is there a fundamental constitutional
25 principle against which the legality of using the

1 prerogative can be tested, an overarching principle, and
2 this court knows what I have suggested.
3 Secondly, and this is where Sewel comes in, excuse
4 me, independently of the answer to that question, how
5 should the common law approach the legal scope of the
6 treaty-making prerogative in a context such as this?
7 What I mean by that is, there is no doubt whatever
8 that even if none of the principles I contended for were
9 relevant, that is to say the non-dispensation principle
10 hadn't been breached, none of the other principles had
11 been breached, we are still looking at a situation in
12 which prerogative power is being sought to be used to
13 drive through the most major constitutional change in
14 our system for -- at least since 1972.
15 One has to analyse, one has to put it in this way,
16 which is the way we do put it, we do not put Sewel in
17 the way that the learned Lord Advocate does. Nothing
18 I say is intended to diminish any of his submissions,
19 any of the force of his submissions.
20 What we do say is that when one is lacking at the
21 legal scope of prerogative power, it is essential to
22 analyse it against a common law framework. Whether or
23 not the prerogative is a creature of the common law,
24 undoubtedly its limits are bounded by the common law,
25 and there are many ways in which the scope of

1 prerogative power can be tested against common law
2 thresholds.
3 One threshold is what the books say, and I am not
4 going to repeat the Diceyian views which now have become
5 perhaps something of a cliche, but are nonetheless
6 important, but the prerogative power is residual. It
7 does not mean it is not important, but it is residual.
8 One looks at the books first of all to consider what
9 are the criteria of determining the legal scope of
10 prerogative power, but one looks and I agree, we agree
11 with my learned friend Mr Eadie about this, one looks at
12 the fact that we are in a modern evolving constitution.
13 In the last 50 years or so, it is axiomatic that we
14 have developed a constitutional consciousness; witnessed
15 the development of the common law notion of
16 constitutional statutes; witnessed since 1960 the
17 development of modern judicial review; witnessed the
18 bringing into force of the Human Rights Act. But most
19 of all from our perspective, witnessed the emerging and
20 fragile, at the moment, devolutionary development. And
21 then look at the trajectory of the prerogative against
22 the trajectory of these developments.
23 We respectfully submit, and one doesn't need to go
24 into detailed documents to arrive at this conclusion,
25 that the prerogative is declining; there is undoubtedly

1 a wish, we see it as recently as 2008, the Brown
2 Government wanted to make all prerogative powers
3 statutory at one stage. Indeed, I think Ms Mountfield
4 and I were both on a committee which had to respond to
5 a consultation.
6 The prerogative measured against the trajectory of
7 devolution simply does not match, and yet what is being
8 said here is that as a matter of common law, the
9 prerogative can be used, as I say, without any recourse
10 to Parliament, to drive through the most major
11 constitutional change certainly of the last, I would
12 say, 40 years.
13 It has become the motor of our constitution, rather
14 than the secondary residual power, but this fits in very
15 much to our argument about Sewel, which I want to make
16 in this way.
17 Sewel is a convention, nobody doubts it. The
18 convention, and I will use this phrase again, I am sorry
19 because I am fast forwarding to what I am going to say
20 later but the convention is a very important force,
21 constitutional force in our society. The reason why it
22 is such a constitutional force is that it is the glue
23 and the only glue that can really hold an unwritten
24 constitution together.
25 We do not have rules, we have laws, we have

1 an aggregation of laws. How does our constitution
2 develop? It develops through incremental practices, and
3 the Sewel convention in the emerging context of
4 devolution is a very important constitutional force. We
5 say, when we get to it, that the courts, the common law,
6 can take cognisance of conventions in a way that has
7 nothing to do with the legal enforceability of those
8 conventions and, with great respect to the advantage
9 Scotland has over us in one sense, has nothing to do
10 with whether it is in a statute. But if it is in
11 a statute, and it soon will be in the Government of
12 Wales Act, we think, if that happens, that shows the way
13 things are beginning to solidify.
14 So can I come back to what at heart these appeals
15 are really about. They are really about the proper
16 distribution of power between Parliament and the
17 executive in our society. What I wanted to say was each
18 of the organs, each of the institutions of our state, of
19 our constitution, play complementary roles; no one
20 dominates the other but each one dominates the other in
21 its own sphere.
22 So the judiciary are the total judges of the
23 interpretation of law and the development of the common
24 law. The executive is totally supreme in giving effect
25 to policy, provided that policy is enshrined in law.

1 And Parliament is supreme in making law.

2 That is why the overarching principle that I have
3 tried to articulate, under the broad umbrella of the
4 non-dispensing principle, is so important; and the
5 legislative supremacy of Parliament over the executive
6 is an axiom in our society. Indeed, my Lord, Lord
7 Neuberger, in a case decided as recently as 13 July this
8 year, in the context of subordinate legislation said
9 this. It is the Public Law Project case, paragraph 23:

10 "In declaring subordinate legislation to be invalid,
11 the court is upholding the supremacy of Parliament over
12 the executive."

13 So, my Lords, what is really clear, if one just has
14 one's feet on the ground for a moment, in the context of
15 the Brexit vote, the Brexit vote split the
16 United Kingdom. It split it into four parts. We have
17 absolutely no quarrel with the vote. It is
18 an United Kingdom vote. And it is a majority for the
19 implementation of Brexit. But the point is this. It is
20 almost the most divisive political event that has
21 happened over the last several decades, and who is going
22 to judge what happens next, according to law?

23 In our submission, whether one approaches this
24 matter from the perspective of the dispensing principle,
25 or whether you approach this matter from the perspective

1 of the common law, it must be Parliament. All the
2 recent events have nothing to do with this case, in
3 particular, and I say it very respectfully, but in
4 particular the Referendum Act of 2015 has absolutely
5 nothing to do with the legal issues in this case.
6 The referendum results, I think, was discussed in
7 argument yesterday. It is a statute that has died, it
8 has fulfilled its purpose and you cannot revive a corpse
9 by tearing up the death certificate. You cannot revive
10 the 2015 Act and give it a separate purpose, which is to
11 in some way become a normative statute, because to do
12 that is to give a statutory power and not a prerogative
13 power. There is nothing in the 2015 Act that can say
14 anything sensible about the prerogative.
15 LORD MANCE: Can I just ask you then, in relation to the
16 1972 Act, assume that we were to take the approach that
17 Mr Eadie suggests, namely that the royal prerogative to
18 make and unmake treaties continues to be available, so
19 that effectively the operation of the treaties, at least
20 their direct operation and the regulations under them,
21 ceases; you then have to argue that the devolution
22 legislation makes a difference. You were just arguing
23 that the 2015 Act makes no difference.
24 What provisions in the devolution legislation make
25 a change in that basic position, on that hypothesis?

1 Your case refers to the restrictions on competence, by
2 reference to EU law but -- and also the Welsh
3 authorities' inability to continue to fulfil certain
4 functions given them by domestic regulations under EU
5 law, but that sort of change will operate across the
6 country. Lots of people will no longer be bound by EU
7 law, or have EU competences. What is there in the
8 devolution legislation which you say demonstrates that
9 the royal prerogative is no longer available if it is
10 available under the 1972 Act?
11 MR GORDON: Well, I will come back to it when we get to it
12 but the answer in short, your Lordship may or may not
13 accept the answer because I appreciate that our case is
14 different if you read the ECA in a particular way --
15 LORD MANCE: If you read the ECA against Mr Eadie and in
16 favour of Lord Pannick, then your case is largely
17 unnecessary, except insofar as you rely on the Sewel
18 convention.
19 MR GORDON: Yes. Yes.
20 What I think I would say is that the detail of the
21 Government of Wales Act, and it is not that much detail,
22 it is actually the combinations of sections 108 and 109,
23 so you have the constraint in 108, and I will come to
24 this --
25 LORD MANCE: I see you are going to come to it, yes.

1 MR GORDON: 109 essentially sets out a mechanism for changes
2 to legislative competence, and it is a detailed
3 legislative mechanism which depends upon the scrutiny of
4 either Parliament alone, in the sense of enactment of
5 primary legislation, or the joint collaboration, to use
6 a word we used earlier, between Parliament and the
7 Assembly, where it comes to changes within schedule 7 by
8 means of standing orders.
9 So these are, and I don't want to provide too much
10 of a categoric hierarchy but I think one can see if you
11 have a change to the forestry or agricultural provisions
12 of schedule 7, that is no doubt an important change in
13 many instances, but it is not seismic, but what is
14 seismic is taking out the EU component. And yet this is
15 said, it is said to be Parliament's intention in GOWA,
16 the acronym for the Government of Wales Act, that this
17 can be done by the prerogative. We say that is -- and
18 that is a deliberate choice to put that in the
19 legislation, because the point raised against us by the
20 Advocate General, we didn't(?) need to do it. Well, you
21 did it; and why did you do it? Answer: because it was
22 felt to be important for the permanence of the
23 devolution settlement to contain statutory provisions
24 setting out detailed mechanisms for changes of
25 competence.

1 So we say that it cannot be other than that
2 Parliament intended in the Government of Wales Act to
3 provide for statutory changes in the event of seismic
4 changes to, radical changes to, legislative competence.
5 THE PRESIDENT: So even if we reject Mr Pannick's case on
6 the 1972 Act, you say primary legislation would still be
7 needed because of the Government of Wales Act and
8 similarly Scotland and Northern Ireland.
9 MR GORDON: Yes.
10 THE PRESIDENT: Thank you.
11 MR GORDON: We say, and I think your Lordships and your
12 Ladyship will have this point, even if that were wrong,
13 the Sewel convention then comes in, because in any
14 event, there is a radical change in legislative
15 competence.
16 THE PRESIDENT: On another view you could say the Sewel
17 convention point reinforces the point rather than being
18 a separate point.
19 MR GORDON: Sorry, my Lord?
20 THE PRESIDENT: On the other hand, you could say that the
21 Sewel convention argument reinforces the first point
22 rather than being a freestanding point.
23 MR GORDON: You could, but of course the Sewel convention is
24 also dealing with the potential for changes to --
25 THE PRESIDENT: Exactly, that is why.

1 MR GORDON: Absolutely.
2 My Lord, that is the second stage of our argument,
3 and now I can deal with the third stage relatively
4 quickly, because that is simply developing the
5 propositions in our case, which I know the court has
6 seen.
7 Core proposition one is to be found at paragraph 20
8 of our case. There are going to be -- there is
9 a dispensation of laws in the Government of Wales Act,
10 and we set out, first of all, the historical support in
11 the books for the dispensing principle. I don't think
12 I even need to say that because it is uncontroversial,
13 but your Lordships will find that and your Ladyship will
14 find that, between paragraphs 23 to 29 of our case.
15 I did want to highlight, simply because of certain
16 things that were said yesterday, the Bill of Rights,
17 which absolutely enshrines into our constitution, the
18 prohibition against dispensing with laws, so it is
19 very -- if one can be very fundamental, it is
20 fundamental to our constitution, this principle; and
21 another point that perhaps needs to be highlighted, Lord
22 Sumption has mentioned this in the course of questions
23 to Mr Eadie, but I am not sure it has been focused on
24 particularly, the hearing before the divisional court
25 was rights, rights and rights, and we accept that rights

1 of course are very very important.

2 But the dispensing principle goes beyond rights, and
3 not only does it go beyond rights, it actually goes
4 beyond things like new constitutional orders. You don't
5 have to have a constitutional order or a human right for
6 the dispensing principle to remain the axiom of our
7 constitution.

8 So we say that the Government has accepted the
9 fundamental nature of the dispensing principle but it
10 simply misunderstands it and misapplies it. Indeed,
11 what Mr Eadie said, I think at some stage, it will be in
12 the transcript, is there was a genuine dispute in this
13 case, and in characteristic fairness he said there is
14 a constitutional issue here, no doubt the dispensing
15 principle exists but we have just misapplied it; and he
16 then says, he then prays in aid for that submission the
17 De Keyser line of cases and for the reasons I have
18 suggested, they are wrong.

19 As to dispensing, paragraph 31 of our case makes it
20 clear which statutory provisions we are suggesting have
21 been dispensed with in the Government of Wales Act and
22 I don't think it is necessary to go through the details,
23 save to say that 108 and 109 are of major importance,
24 and we cite both 108, I think, and 109, so 108 is at
25 paragraph 32 of our case.

1 THE PRESIDENT: Yes.

2 MR GORDON: 109, I think is at paragraph 36 of our case.

3 THE PRESIDENT: Yes.

4 MR GORDON: What will be of some interest no doubt to this
5 court when one looks at the prohibition at 108(6)(c):

6 "A provision which falls within subsection (4) is
7 outside the Assembly's legislative competence if it is
8 incompatible with the convention rights or with EU law."

9 Those are important -- that is an important
10 provision because it is to be contrasted with other
11 international provisions, as we shall see in a moment,
12 which are not embedded in the statute in the same way,
13 and which the Secretary of State has power to intervene
14 with, but they are not written into the fabric of the
15 devolution statutory regime.

16 My Lords and my Lady, the detail or the grit, if you
17 like, of section 108 is dealing also with other aspects
18 of legislative competence. So the structure is this: in
19 Wales there is not this reserved powers model, it is
20 a conferred powers model; so the Assembly gets the
21 powers it has from what goes into, what comes out of,
22 what is transferred across, within schedule 7, and
23 section 108(c), however, is a red line constraint. So
24 we move then from that to --

25 THE PRESIDENT: The definition of EU law is lifted really

1 from section 2(1) of the 1972 Act, isn't it.
2 MR GORDON: It is.
3 THE PRESIDENT: So in a sense this argument, you can say,
4 for better or for worse, is linked very closely to the
5 main argument, if I can call it that, based on the
6 1972 Act?
7 MR GORDON: It is, and I say two things to that. First of
8 all, the fact that it is linked closely takes us back to
9 the point I made earlier, which was described as a bold
10 submission, but it is of a piece. Why would Parliament
11 in the Government of Wales Act put in a permanent
12 feature of the Assembly's competence when it was
13 unnecessary to do so, unless it thought that what was
14 put into the 1972 Act was permanent membership of the
15 EU, save unless removed by statute.
16 THE PRESIDENT: The other view would be that if Mr Eadie is
17 right on the 1972 Act, then that carries into, because
18 they have used the same definition, the Government of
19 Wales Act, and if you rely on it to help you -- if it
20 unfortunately doesn't help you because we are with
21 Mr Eadie, then that has the same consequence on the
22 Government of Wales Act; namely the argument does not
23 help you here either.
24 MR GORDON: I fully understand the point against me, but can
25 we then move to what we say in paragraph 33 of our case,

1 so section 108(6)(c) places a clear and unqualified
2 restriction on the competence of the Welsh Assembly, but
3 it may not legislate contrary to EU or convention
4 rights, we would say. We place emphasis on the fact
5 that there is no equivalent restriction on legislative
6 competence for types of international obligations, other
7 than those found in section 108(6)(a). Other types of
8 international obligation are separately addressed, but
9 only as set out in section 114(1)(d).
10 That provision does give, as I foreshadowed earlier,
11 the Secretary of State the power to veto an Assembly act
12 which is incompatible with any international obligation.
13 So if all we are talking about in the 1972 Act are
14 international obligations, why are they being treated
15 differently as far as EU law is concerned and convention
16 rights are concerned? As I say, your Lordship points
17 correctly to the definition of EU law, I fully accept
18 that, but what we do say is that when you get to 109, we
19 do find ourselves in an interesting quandary, if one is
20 trying to say: doesn't it all mean the narrow conduit
21 pipe in section 2, because if you look, and it is in our
22 case at 36 and I don't need to take you to the
23 section --
24 THE PRESIDENT: Yes, it is, thank you.
25 MR GORDON: -- but there it is, you can make an order in

1 council amending schedule 7, and if you do, one can see
2 that in subsection (4) of section 109, one makes no
3 recommendation to Her Majesty in council unless a draft
4 of the statutory instrument containing the order in
5 council has been laid before and approved by
6 a resolution of each House of Parliament and, subject to
7 an immaterial exception, where it has been laid before
8 and approved by a resolution of the Assembly.
9 So as I said earlier, this is a very detailed
10 machinery for the amendment of legislative competence
11 and then we have the Sewel convention which your
12 Lordship was -- referred to as possibly reinforcing this
13 argument but the important point is this. If as
14 a matter of statutory interpretation the Government are
15 right, as I said earlier, your Lordships have the point,
16 the most important changes of all to legislative
17 competence can be done by a simple signing of a piece of
18 paper by a Government minister, under some supposed
19 prerogative or asserted prerogative. And we say that
20 simply misses the point.
21 We also point to the -- lest it be said against us,
22 all you are having surely is removal of a constraint, we
23 refer to the explanatory note, I don't know if the court
24 has the explanatory note to section 109.
25 THE PRESIDENT: Is that the relevant part summarised in --

1 MR GORDON: You have a yellow tag on your desk and we have
2 cited it.
3 THE PRESIDENT: You have. Are there any other relevant
4 parts apart from the one you quote?
5 MR GORDON: No, it is -- "enhanced" is the word that matters
6 there, my Lord.
7 THE PRESIDENT: Thank you. Thank you for supplying it.
8 MR GORDON: We make similar points about the Welsh ministers
9 and your Lordships will have those and your Ladyship
10 will have that point. We make other points about the
11 huge lost swathes of EU law, and Lady Hale put
12 a question about that the other day. We mentioned the
13 interpretation point in section 154, but I fully accept
14 the connection that your Lordships draw between
15 section 2 and GOWA.
16 What we say is it is not unnecessary in
17 a (Inaudible) connection for the reasons I have given,
18 but also say that GOWA may throw some light on
19 section 2. But apart from that and it should not be
20 forgotten, my Lord, Lord Pannick, has put forward
21 compelling arguments in our respectful submission,
22 Ms Mountfield will do the same no doubt, as to why
23 section 2 does not mean what the Government says it
24 means. Certainly we say you should not construe
25 section 2 alone; you should not forget the Sewel

1 convention, you should not forget devolution when you
2 are approaching that question -- what other background
3 is important, in my submission.
4 So then I just wanted, having gone through that and
5 pointed out the dispensing provisions that we say --
6 sorry, the provisions of the Government of Wales Act
7 that we say are dispensed with, I wanted to come back to
8 the Government's objections and, essentially, the
9 objection in the devolution submission is twofold, and
10 the key point I think I wanted to draw, do your
11 Lordships have the devolution submissions of the
12 Government?
13 They are -- I don't know if your Lordships have
14 them. If you have -- you do? What I wanted to point
15 to, my Lord, was paragraph 4(3) and 5, where there is
16 a reference at paragraph 4(3) to the Government of Wales
17 Act. What is said, I think, and it is the point made
18 against the Scottish devolution arguments as well --
19 LORD CARNWATH: Which paragraph, sorry, I beg your pardon.
20 MR GORDON: My note says 4(3) and 5. The reference at 4(3)
21 is to the exclusion of foreign affairs from the powers
22 conferred on the Welsh Assembly. So that is the first
23 argument put against us. That is the first argument put
24 against us, because I think it is said: well, you have
25 not got anything relating to devolved matters that

1 affects your competence, or something of that sort.
2 The simple point here is, and it is the same
3 argument I imagine that the learned Lord Advocate would
4 put, the fact that you have something reserved outside
5 the specific devolved competences is simply a reference
6 to the method to achieve an outcome. What actually
7 matters is the outcome, and the outcome where you
8 exercise a foreign affairs jurisdiction may well be to
9 affect areas of competence of the Welsh Assembly. So
10 that is why the words, "regarding devolved matters", can
11 only sensibly mean, quite apart from the practices of
12 the Sewel convention, one thing: they mean, does
13 an action taken affect the legislative competence of the
14 Welsh Assembly.
15 But then the devolution submissions go on to say,
16 and I think this is at 5, what is fatal to our case,
17 they say, is that the legislation, far from occupying
18 the field, declines to enter the field occupied by
19 Parliament at all, and demonstrates that nothing in the
20 devolution legislation abrogates the prerogative.
21 Well, this is the confusion that I mentioned
22 earlier, and we are not talking about an abrogation of
23 the prerogative. So this is reliance which confuses two
24 quite separate principles. The first principle is that
25 Parliament may abolish parts of the prerogative, and

1 that is known as abeyance. The second principle,
2 however, is that if you have got an existing head of
3 prerogative, you cannot -- if you have not got
4 an existing head of prerogative, it follows that there
5 is nothing to abrogate. So the confusion of principle
6 that runs through Mr Eadie's arguments, run through the
7 devolution submission responses as well.
8 If you look just very briefly, one sees evidence of
9 this confusion if your Lordships and your Ladyship look
10 at paragraph 57, striking example in the Government's
11 case, the Government's case now, not the devolution
12 submissions, and I will read from it, if I may.
13 THE PRESIDENT: 57?
14 MR GORDON: Paragraph 57.
15 THE PRESIDENT: Of what.
16 MR GORDON: Of the original case.
17 THE PRESIDENT: The original case, thank you.
18 MR GORDON: Sorry if I didn't make that clear. The original
19 case.
20 THE PRESIDENT: You have now. Yes.
21 MR GORDON: "The principle properly stated is that
22 prerogative powers can be used to change domestic laws
23 and to deprive individuals of rights in the UK if the
24 powers are part of the prerogative and if the change is
25 not inconsistent with the requirements of an act of

1 Parliament which occupies the field in question."
2 That has to be wrong. It is a major part of the
3 Government's case. So you can deprive individuals of
4 rights, you have a power to do it, and that is issue 12
5 in the statement of facts and issues; you can do it
6 without any authority from Parliament, provided that it
7 is not inconsistent with the requirements of an act
8 which occupies the field in question.
9 LORD MANCE: That is surely -- why is that incorrect?
10 MR GORDON: Because it goes right back to the De Keyser line
11 of cases.
12 LORD MANCE: So really it is correct if you take the double
13 taxation treaties, isn't it?
14 MR GORDON: With double taxation treaties --
15 LORD MANCE: You can have a piece of legislation which
16 allows the use of the prerogative, or contemplates it,
17 perhaps, in a way which will switch on or off domestic
18 rights or vary them.
19 MR GORDON: I think --
20 LORD MANCE: It is all a matter of construction.
21 MR GORDON: I think this distinction has been referred to.
22 If one has an Act of Parliament which contains within it
23 the possibility of expansion or contraction, undoubtedly
24 the prerogative may have effects. So it may have
25 effects on law, but what it cannot do in my respectful

1 submission is dispense with the law itself.
2 LORD MANCE: It may be you are taking issue with the words
3 "change domestic law". In that situation the
4 prerogative is not -- it is in accordance with domestic
5 law.
6 MR GORDON: All I am saying, my Lord, is that if -- we are
7 looking at a case in front of the Supreme Court. To put
8 a proposition like that when we have the dispensing
9 principle is plainly in my submission not correct. But
10 it gets worse than that, because pages 35 to 43 of the
11 Government's case are entirely taken up -- if there is
12 any doubt that Mr Eadie's raft is the De Keyser
13 principle, it fades away when one sees the heading, "The
14 application of De Keyser's principles", pages 35 to 43.
15 This case, at least our case on the dispensing
16 principle has nothing to do with the De Keyser line of
17 cases. And we can see then that all the cases the
18 Government puts against us, paragraphs 40, 45 and 55(b)
19 of its case, 56 of its case, have nothing to do with the
20 dispensing principle.
21 So one goes, for example, to paragraph 40 of the
22 Government's case; it says the exercise of the
23 prerogative can undoubtedly have effects on "the content
24 of domestic law and the extent of individual rights and
25 obligations which have effect in domestic law".

1 Whether that is right or wrong, none of the cases in
2 paragraph 40(a) to (d) are examples of the prerogative
3 being used to dispense with or even amend a statute.
4 THE PRESIDENT: We are now really trespassing on points that
5 have already been made, aren't we?
6 MR GORDON: My Lord, I will not do that. Can I give you
7 paragraphs that we object to and we say have nothing to
8 do with the dispensing principle: paragraph 40,
9 paragraph 45, paragraph 55(b) and paragraph 56. The
10 point being that we ask ourselves, if my learned friend
11 is in error in relying on these cases, what other cases
12 is he putting before you in relation to the dispensing
13 principle?
14 The only other point I think I want to make before
15 I come to Sewel is the point I made or foreshadowed
16 earlier, which is, we respectfully submit, that it is
17 not a correct approach to say: well, all we need to do
18 is look at section 2, and if that falls away, so does
19 everything else. I made that point but I just want to,
20 as it were, emphasise it.
21 THE PRESIDENT: Thank you.
22 MR GORDON: Can I now turn to Sewel and as far as the Sewel
23 convention is concerned, I think that I have already
24 foreshadowed that the importance of the Sewel convention
25 is not, in our submission, its legal enforceability, but

1 that it represents a dialogue between Parliament and the
2 devolved legislatures.
3 Now, that dialogue is important for at least two
4 reasons. The first reason is that it is a dialogue
5 between legislatures, and I don't need to emphasise, but
6 I think I ought to, to this court, that the degree of
7 autonomy or sovereignty of a devolved legislature is
8 a sensitive area and it is a growing area for some of
9 the devolved legislatures. There has been case law in
10 the Supreme Court, and perhaps notably, the Axa case.
11 There is undoubtedly an emerging sovereignty. It is
12 not the same, we know, as Westminster sovereignty, but
13 it is a growing sovereignty of the devolved
14 legislatures, and it is an important area.
15 The second point is that the Sewel convention in its
16 structure envisages -- it doesn't matter what the word
17 ordinarily or normally means at the moment for this
18 purpose -- a legislative dialogue between two
19 legislatures of different competences, but nonetheless
20 of legislative competence. It, therefore, third point,
21 requires the Westminster Parliament to consider whether
22 it is going to legislate without the consent of the
23 devolved legislature in question.
24 Now, the fourth point therefore is this. The
25 evaluative decision as to whether to legislate or not is

1 Westminster. But it is not the prerogative. So if the
2 prerogative can be used to short-circuit this dialogue,
3 it is in our submission to ignore the development, the
4 devolution development, the modern dynamic devolution
5 development on which our constitution is materially
6 predicated now that we have devolution in very strong
7 form.
8 This, of course, is not an argument on legislative
9 interpretation, nor is it an argument on the legal
10 enforceability of the Sewel convention. It is
11 an argument on the common law approach to the
12 prerogative.
13 Nor, indeed, as I think I said earlier, does Sewel
14 necessarily stand in isolation when one is building up
15 a common law anatomisation of the Sewel convention. For
16 example, Ms Mountfield, I know, has a historical
17 analysis, and it is going to be directed to the fact
18 that in context, the use of the prerogative has never
19 been used in this kind of way. That is a separate
20 argument, and not one that I intrude on.
21 But when you look at all the sources of information,
22 the common law attaches to itself to analyse the legal
23 scope of a prerogative power, Sewel is very important in
24 that approach, as is history, as to some extent are the
25 commentators.

1 If I can take your Lordships very briefly, if I can
2 find it in my own authorities, it is the Agricultural
3 Sector (Wales) Bill case, 2014, it is in the authorities
4 at volume 20. And I wanted to -- it is tab 246,
5 electronic page 6837.
6 THE PRESIDENT: Thank you.
7 MR GORDON: I wanted to take the court particularly to
8 paragraph 42. What one sees there is a statement by the
9 Supreme Court, an outline of the history of devolution
10 in Wales, and the three phases, but what I wanted to
11 focus on, or invite your Lordships and your Ladyship to
12 focus on, was paragraph 42.
13 THE PRESIDENT: Yes.
14 MR GORDON: "In our view, each of the successive phases of
15 Welsh devolution", so this is the third phase:
16 "... significantly increased the legislative
17 competence of the Assembly. The distinction is most
18 marked between the second and third phases."
19 So when I earlier spoke of the trajectory of
20 devolution, this is the kind of thing, this is the kind
21 of incremental process I had in mind. So that means, in
22 our submission, that the constitutional context engaged
23 by devolution is extremely important, an extremely
24 important component element in determining the legal
25 limits of the prerogative. The importance of

1 constitutional statutes in this context has been
2 stressed, and in our respectful submission, the
3 devolution machinery reflects the passing of
4 constitutional statutes on any view.
5 So when it is said by the Advocate General as it
6 appears to be, see paragraph 24 of the devolution
7 submissions, that we concede that the Sewel convention
8 is, and I quote from his case, "legally irrelevant",
9 that is a complete misrepresentation of what we do say.
10 We have never said that. It is legally highly relevant.
11 Of course, the importance of the convention is not
12 in terms of what does it mean in its precision, can it
13 be enforced in any particular case? What it does mean,
14 however, is that it reflects a practice, and it reflects
15 a growing practice.
16 The practice we set out in our case, so at
17 paragraph 78, the court will have seen our reference to
18 the standing order 29, there has to be a legislative
19 consent memorandum in relation to any relevant bill.
20 Then at paragraph 79 we have the memorandum of
21 understanding.
22 Then of course, as I have, I think, mentioned
23 earlier, we get in the future to a Government of Wales
24 bill, if it becomes an act, will have the same provision
25 as is currently in section 28(8) of the Scotland Act.

1 So we then get to what actually happens, what the
2 Government actually says the practice is. This is all
3 we rely on, this is the point. If one goes to
4 paragraph 86 of our case, DGN, devolution guidance note
5 17 -- I said 86, it should be 85. If I just read these
6 words, again, it is in our case --
7 THE PRESIDENT: Yes.
8 MR GORDON: "The UK Government and the Welsh Government have
9 agreed ..."
10 So the UK Government and the Welsh Government have
11 agreed.
12 THE PRESIDENT: Yes, yes.
13 MR GORDON: "... that the Welsh minister should seek the
14 consent of the Assembly ... such provisions and in
15 context it clearly means modifying the Assembly's
16 legislative competence are included in bills."
17 Then we can see the standing order which implements
18 the next stage. It is true that the Government -- it
19 just repeats the practice that your Lordships have
20 heard. The Government will not normally ask Parliament
21 to legislate the matters -- without the consent of the
22 Assembly. Then we get the practice, and we give
23 an example in the footnote in our case, dealing with the
24 what actually happens in practice.
25 What does happen is that the clerk to the Assembly

1 sends the LCM laid by the Welsh Government to the clerk
2 of the House of Commons, communicating the result of the
3 vote.
4 The point from all this is not the detail of the
5 practice, but the fact that there is a practice, and the
6 fact that the practice in question is one between
7 legislatures and one which involves communication
8 between the devolved legislature and the Westminster
9 Parliament.
10 At the end of the day, we are not asking your
11 Lordships and your Ladyship to construe a statute, what
12 we are asking in this argument is for this court, no
13 doubt in combination with other techniques of
14 development of the common law, to evaluate in a case
15 such as the present, of enormous constitutional
16 importance, the weight to be given to the Sewel
17 convention, no doubt other aspects of the common law, in
18 deciding whether the prerogative in this case, whatever
19 the scope of the dispensing principle, can be used to
20 drive through constitutional change of a seismic nature
21 which the prerogative, as far as I am aware, has never
22 carried through before, certainly since 1688.
23 So I hope I don't need to go to the Jonathan Cape
24 case, your Lordships know what we say about it, and your
25 Ladyship; I am not going to go through it. The point is

1 the point I have made. But the critical thing, as
2 I said earlier, is that the conventions are, with
3 an uncodified constitution -- we are one of only three
4 countries in the world, I think, to have an uncodified
5 constitution.
6 LADY HALE: To that we must add the Crown dependencies.
7 MR GORDON: We must, I agree.
8 LADY HALE: They don't have written constitutions either but
9 they are independent countries.
10 MR GORDON: We drafted constitutions for the world after
11 about 1787, and it is only in the 19th century when you
12 get to the Hansard debates that you start debating the
13 virtues of an uncodified constitution.
14 So where do we go to from all this?
15 Well, concluding the submissions I make, and I may
16 just finish early with luck, there may be a temptation
17 with the mountains of legal authorities with which this
18 court has been confronted, to think that the issues
19 involved in these appeals are complicated. We suggest
20 they are not.
21 The dispensing principle is one of the most
22 fundamental constitutional principles that we have. Its
23 existence is not in dispute. The case law on it is
24 clear. The Government's confusion about the effect of
25 that case law does not in any way obscure the clarity of

1 the principle.

2 As to the Sewel convention, its effect is equally
3 clear, once it is accepted as we submit it should be
4 that the common law as to the scope of prerogative power
5 has to be applied to our modern and evolving
6 constitutional arrangements. Devolution is at the very
7 core of those evolving constitutional arrangements, and
8 also at the core is the developing notion that
9 an unwritten constitution does not mean the lack of
10 a constitution.

11 The development of the idea of constitutional
12 statute applies full force to the various statutes
13 giving effect to the devolution settlement in
14 Great Britain since 1997. With that idea comes with the
15 common law corollary that one cannot have implied repeal
16 of a constitutional statute.

17 Yet in essence, the Government's case as it applies
18 to Wales is that the framework of devolution in Wales
19 may be, by the prerogative, stripped back and radically
20 altered without any statute at all, in disregard of
21 processes designed to ensure the stability of
22 devolution, simply in order to give effect to the
23 popular will expressed in an advisory referendum. That
24 is, we say, not the reflection of a modern constitution;
25 it is a reversal to a wider exercise of prerogative

1 power and has existed for several hundred years.
2 My Lords and my Lady, I am going to finish 10
3 minutes early, and in doing so, unless the court has
4 further questions, I have been asked, a request that
5 I only too happily assent to, to devolve my extra time
6 to Ms Mountfield.
7 THE PRESIDENT: I am not sure it is yours to give.
8 MR GORDON: Yes, I don't think I have the competence,
9 my Lord. Can I ask for a schedule 7 addition.
10 My Lord, those are my submissions.
11 THE PRESIDENT: Thank you very much, Mr Gordon.
12 Ms Mountfield, I think the fair course might be to let
13 you have five of Mr Gordon's minutes and for Mr Gill to
14 have five minutes also.
15 MS MOUNTFIELD: Yes, that does seem fair.
16 THE PRESIDENT: I don't think I need Mr Gordon's consent for
17 that, but if I do I am sure he will give it.
18 Submissions by MS MOUNTFIELD
19 MS MOUNTFIELD: My Lords and my Lady, my clients are a group
20 of ordinary British citizens and one Gibraltarian
21 citizen who are all people who will be affected in a
22 very significant way, in very significant aspects of
23 their lives, by a decision to leave the EU and the
24 profound changes this decision will make to the law of
25 the United Kingdom and to their rights as European

1 citizens. They have been crowd-funded by many thousands
2 of relatively small donations from private individuals.
3 The issues in this case concern a long-standing
4 constitutional principle, or long-standing
5 constitutional principles. To some the legal arguments
6 in the case may sound dry and antiquarian, and it is
7 true that some of the principles that I rely upon have
8 a long history, but that is not to diminish their
9 importance. As Mr Eadie said, and I agree with him, the
10 fact that a principle is well established does not make
11 it an irrelevant anachronism today. Such principles can
12 have a real and continuing value in contributing to the
13 effective allocation of powers between the limbs of the
14 state and in ensuring that they do not illegitimately
15 intrude on to one another's territory.
16 On that subject, may I say one word on the role of
17 the judges which has been the subject of intense
18 interest in this case. The applications for judicial
19 review before this court are not, of course, an attempt
20 to persuade judges to usurp the power of any other arm
21 of the state in an illegitimate way. They are certainly
22 not, as Mr Eadie suggested in his closing observations
23 on Tuesday morning, an attempt to persuade this court to
24 undertake an act of judicial legislation.
25 The court is not being asked to decide whether in

1 the light of the result of the referendum, the
2 United Kingdom should leave or should not leave the
3 European Union. Nor is it being asked to compel either
4 the Government or Parliament to do anything. All the
5 court is being asked to do is to consider whether as
6 a matter of law, an intended act by the appellant to
7 notify the European Union of a decision to leave on
8 behalf of the United Kingdom would be a lawful act in
9 the absence of express statutory authority. The relief
10 which the respondents seek is for the court to uphold
11 the declaration that the divisional court gave that he
12 does not have such power and so it would be unlawful.
13 This is an entirely orthodox application for
14 judicial review in that respect, even if it is not and
15 I can't submit that it is, an entirely ordinary one.
16 So if I could outline our approach. Mr Eadie
17 invites this court to find that the court can trigger
18 Article 50 in exercise of the royal prerogative, even
19 though this will alter domestic law, because it has what
20 he described on Monday, and it is in the transcript at
21 page 75, as an "untrammelled" prerogative power to do
22 it.
23 We disagree with that. We reject the false
24 assumption that the foreign relations prerogative
25 extends to permitting the Government to dispense with

1 domestic law and in his written case, paragraph 64, that
2 is MS 12356, the appellant invites you to start your
3 analysis at what we say is the wrong point by asking you
4 simply to assume that there is a prerogative power to
5 change the law, and then, basing yourselves on that
6 assumption, to ask whether this presumed prerogative has
7 been abrogated.
8 This is an artificial starting point. It is the
9 wrong starting point, and the reason it is the wrong
10 starting point is because it is almost halfway down the
11 analytical track. But it is perhaps a convenient
12 starting point for the appellant, because it bypasses
13 what we say is the biggest hurdle which he faces in this
14 appeal.
15 As Lord Sumption put it in questions to Mr Eadie on
16 Monday and as Mr Gordon has submitted and as we put in
17 paragraph 7 of our printed case, MS 12482, before you
18 ever get to any question of abrogation, you have to ask
19 a prior question. What are the limits, if any, of the
20 prerogative power to make and unmake treaties? Does the
21 treaty prerogative extend to changing the law on the
22 national plane? Because if it doesn't, then no question
23 of abrogation ever arises. We invite the court to
24 approach this case from what we say is the true starting
25 point by considering two questions.

1 The first question to address is as to the extent of
2 the treaty prerogative and whether it extends to
3 allowing the Government to effectively dispense with
4 domestic law at all. We say it doesn't and that is my
5 first proposition.
6 We say it is a fundamental constitutional maxim, not
7 a mere generality, that the King, or, in this case, the
8 appellant exercising the Crown's powers, may not, using
9 the language of The Case of Proclamations, by his
10 proclamation or any other way change the law or remove
11 rights.
12 We say that the Bill of Rights and indeed the Claim
13 of Right in Scotland and the Acts of Union put it beyond
14 doubt that only the United Kingdom Parliament can change
15 the law.
16 The second question to consider is whether
17 triggering Article 50 would in fact change domestic law
18 and remove European Union law rights which are
19 recognised by it, contrary to the prohibition on
20 dispensing with law, and we say that it would. That is
21 my second proposition.
22 We say that European Union law is domestic law, and
23 that rights conferred under it are domestic law rights,
24 and that they are not contingent on an exercise of
25 prerogative power. I will submit that Professor Finnis

1 upon whose views the Government relies so heavily is
2 wrong to say that section 2(1) of the
3 European Communities Act is no more than a vessel, so
4 that the existence of any domestic law rights is
5 contingent on the exercise of a Government minister's
6 entirely untrammelled general power to remove the very
7 source of them.
8 That will be my second strand of submissions.
9 Finally, I will address you briefly on two short
10 matters that have arisen during the course of oral
11 argument.
12 Turning then to my first proposition, can
13 I establish at once that we do not, of course, deny that
14 subject now to the provisions of CRAG, the appellant has
15 a power to enter, and -- not subject to the provisions
16 of CRAG, to withdraw from international obligations on
17 behalf of the United Kingdom. The court is not faced
18 with a dispute about the existence of a treaty-making
19 prerogative, nor indeed a dispute as to its exercise.
20 This is not a misuse case. The only dispute as far as
21 we see it is as to the extent of the prerogative which
22 exists. The appellant puts the extent of the foreign
23 affairs prerogative in issue, and Mr Eadie said on
24 Monday that the prerogative power in the field of making
25 treaties, ratification of treaties and withdrawal from

1 treaties is and always has been, he said, always has
2 been, a general power untrammelled by any implication
3 that it cannot be used to change domestic law.
4 We say there is no prerogative power to change or
5 dispense with the law as it stands outside the
6 prerogative, whether that pre-existing law is contained
7 in the common law or in acts of Parliament. So in that
8 sense it goes beyond the issue of parliamentary
9 sovereignty which Mr Chambers raised. My authority for
10 that, I don't ask you to turn it up, is Lord Hoffmann in
11 Bancoult (No 2), which is core authorities volume 4,
12 tab 54, MS 2225, paragraph 44.
13 So faced with that dispute between the appellant and
14 the respondents, the correct approach for the court to
15 take, we say, is the one which was identified by
16 Lord Bingham in Bancoult (No 2), and may I ask you to
17 turn that up please --
18 LORD CLARKE: You have set it out in your case at
19 paragraph 8, haven't you.
20 MS MOUNTFIELD: Yes. The passage I was planning to take you
21 to is only slightly longer; it starts at 2230 in the
22 electronic manuscript. Paragraph 69, six lines down:
23 "It is for the courts to enquire into whether
24 a particular prerogative power exists or not, and if it
25 does exist, into its extent. Over the centuries the

1 scope of the royal prerogative has been steadily eroded
2 ... as an exercise of legislative power by the executive
3 without the authority of Parliament, the royal
4 prerogative to legislate by order in council is indeed
5 an anachronistic survival. When the existence or effect
6 of the royal prerogative is in question, the courts must
7 conduct a historical enquiry to ascertain whether there
8 is any precedent ... the exercise of the power in the
9 given circumstances. If it is law it will be found in
10 our books."
11 Then after the citation from Entick v Carrington,
12 Lord Bingham refers to De Keyser and to Burmah Oil and
13 he cites there the passage in Lord Reid's speech which
14 Mr Eadie took you to. He explained why Lord Reid was
15 talking about the prerogative as a relic of a past age:
16 "I would think the proper approach is a historical
17 one ... how was it used in former times and how has it
18 been used in modern times."
19 So Mr Eadie and I agree that the correct approach is
20 a historical approach, but I submit that it is striking
21 that despite positively commending that approach to you,
22 Mr Eadie did not undertake any such enquiry, but put his
23 claim for a wide untrammelled prerogative to change the
24 law at the basis of general assertion.
25 In paragraphs 13 to 23 of our written case which is

1 in the core volume at tab 12, MS 12484 and following, we
2 have undertaken precisely that enquiry. You will have
3 read it, of course, I will not go through it word for
4 word, but in a moment I will seek to draw your attention
5 to some particularly significant parts of it, but before
6 I do that, may I make an overarching observation.
7 The case before you shows that the appellant
8 confuses two different concepts, which we say should be
9 kept distinct, and it is that confusion which leads to
10 the error in his case. One of the concepts that the
11 appellant submits or advances is uncontroversial, but
12 the second is controversial and we say it is wrong.
13 The first proposition is that the concept of
14 a prerogative power to affect rights exists. The fact
15 of such prerogative power is not controversial; it is
16 a matter of common law. The appellant submits, and we
17 accept, that there are some residual prerogative powers
18 and that the lawful exercise of some of those powers
19 within their proper boundaries may affect the way in
20 which people enjoy rights.
21 So, for example, the prerogative to set conditions
22 for Crown servants in the GCHQ case affects what
23 conditions of work those servants have. The prerogative
24 to requisition property where it is necessary to wage
25 a war means that your property rights are attenuated in

1 time of war. That is what cases like De Keysers were
2 examining. Given the scope, and in De Keysers it was
3 an assumed scope of the war prerogative -- any
4 particular prerogative, in that case, the war
5 prerogative -- has that prerogative been abrogated by
6 statute? That is uncontroversial.
7 The second concept, which we say that the appellant
8 confuses with the first, is the idea of a prerogative
9 power so wide that it changes the law, or suspends or
10 dispenses with the operation of the law, or alters the
11 sources of it. The confusion in the appellant's case,
12 we say, is to equate the existence of a prerogative
13 power which can have an effect on rights when operated
14 within its scope to the existence of a prerogative power
15 to change or dispense with law outside its scope. The
16 confusion results in a submission which we submit is
17 contrary to the most basic principles of our
18 constitution.
19 Of course there can be actions in use of the
20 prerogative on the international plane which vary the
21 facts to which the law applies.
22 Post Office v Estuary Radio is one example; the
23 prerogative is used to change the territorial waters,
24 the scope of the statute or the effect of the statute
25 changes. The Joyce case is another, you declare war,

1 somebody making a radio broadcast becomes the Queen's
2 enemy and comes within the ambit of the Treason Act.
3 But we say that is materially different to changing
4 the law which applies to particular facts, let alone the
5 sources of law. For example if the war prerogative
6 includes a power to requisition, as was assumed in
7 De Keyser, that is not the same as empowering the
8 Government in time of war(?) to abolish or alter common
9 law or statutory property rights altogether.
10 So we dispute the appellant's submission that the
11 prerogative can be used to dispense law, on the basis of
12 the historical enquiry which we have undertaken and set
13 out in our written case. I will take this by reference
14 to the written case, and please could you have it open
15 for this part of my submissions; the relevant passage is
16 on MS 12484 in the second core volume.
17 THE PRESIDENT: Thank you.
18 MS MOUNTFIELD: From paragraph 13 we have looked at the
19 general constitutional position concerning the use of
20 the historical prerogative to dispense with law, and
21 separately from paragraph 17, whether it can be said
22 that the treaty prerogative is in some way different or
23 wider.
24 So the first part of the historical case from
25 paragraph 13 sets out the authorities which show that

1 the prerogative, any prerogative, cannot be used to
2 dispense with or suspend the law. May I please ask you
3 to cross out the words "the foreign relations" above
4 paragraph 13 in that heading, which is
5 an overenthusiastic autocorrect function, I am afraid.
6 LORD CARNWATH: Sorry, which words?
7 MS MOUNTFIELD: Subheading B above paragraph 13, "the
8 foreign relations" should be crossed out. These are the
9 cases which are not about the foreign relations
10 prerogative, and the next heading is about the ones that
11 are about the foreign relations prerogative.
12 THE PRESIDENT: Thank you.
13 MS MOUNTFIELD: I will not, can I reassure you at once, take
14 you to all of these, but may I start by showing you the
15 first one, which is The Case of Proclamations, which is
16 in the core authorities volume 2, tab 9, MS 225. This
17 of course is a case that precedes the Bill of Rights and
18 concerned the extent of a King's power by proclamation
19 to prohibit new buildings around London. On page 226,
20 about halfway down the page, you see the holding, which
21 is 226 in the electronic manuscript:
22 "The King, by his proclamation or other ways, cannot
23 change any part of the common law or statute law or the
24 customs of the realm."
25 Then at the bottom of the page, they look at some

1 cases. Four lines from the bottom, Lord Coke observes
2 that:
3 "We do find diverse precedents of proclamations
4 which are utterly against law and reason, and for that
5 void, and which therefore should not be brought into
6 precedent."
7 The first example is an interesting one in this
8 context. An act was made by which foreigners were
9 licensed to merchandise within London, but Henry IV by
10 proclamation prohibited the execution of it and said it
11 should be suspended until the next Parliament, which was
12 against the law.
13 That is the principle of the thing. If by statute
14 it is said people can trade in this country, the royal
15 power cannot be used to suspend that without further
16 parliamentary authority.
17 That was then put in statutory form in a sense in
18 the Bill of Rights which you have seen, and the Claim of
19 Right, which established that the Crown has no power to
20 dispense with or suspend laws.
21 So the next step in my historical enquiry is Article
22 18 of the Acts of Union. I don't think we need to turn
23 it up, it is volume 12, 107. Article 18 is at MS 4161,
24 it is very familiar. But that really puts the point
25 positively, so in the previous authorities it has been

1 said, the Crown cannot dispense; what the Acts of Union
2 say is that only body with power to change the law, at
3 least as far as Scotland is concerned, is the UK
4 Parliament. And in relation to private law we have the
5 question of evident utility, but even in relation to
6 public law, the only body that can change that law for
7 Scotland is the United Kingdom Parliament.
8 So then we come forward in time to the 20th century,
9 and you'll see in our written case, I will not take you
10 to it, the case of London County Council v The King,
11 where London County Council intended to give a licence
12 which indicated that the Sunday Observance Act was not
13 going to be enforced. That was quashed because Lord
14 Justice Scrutton held in fairly trenchant terms that the
15 London County Council was in no better position than
16 James II in that respect, and we submit nor plainly is
17 the appellant.
18 It is not in our written case, I have mentioned it,
19 that Lord Hoffmann in Bancoult (No 2), paragraph 44, MS
20 2225, said that since the 17th century, the prerogative
21 had not empowered the Crown to change English common law
22 or statute law.
23 Coming forward again in time to Nicklinson, again,
24 I will not turn it up because I know you will be very
25 familiar with it, it is volume 8, 73, 2965, that was the

1 case where it was proposed that in order to give effect
2 to European convention rights, a criminal law, the
3 Suicide Act, would be kept on the statute book but ought
4 to be disapplied by an executive act, a policy setting
5 out the circumstances in which it would not be applied.
6 That proposition was rejected by my Lord, Lord
7 Sumption on the basis that it would be contrary to the
8 Bill of Rights. He also drew attention to Priti(?),
9 which was a case where an individual dispensation from
10 the law was sought from someone whose husband wanted
11 an assurance that he would be immune from prosecution if
12 he assisted her in suicide. That was said it couldn't
13 be done, because it would be a dispensation with the law
14 on a proleptic basis. That is what we submit
15 a notification under Article 50 would be.
16 We have also set out some New Zealand and Australian
17 authorities. Fitzgerald was the case we cited to the
18 divisional court. That was the case where it was
19 announced that a statutory scheme would no longer be
20 applied, ending the intended passage of legislation to
21 confirm the policy, and that was held to be an unlawful
22 suspension of the law.
23 THE PRESIDENT: Fairly similar to the Fire Brigades Union.
24 MS MOUNTFIELD: It is, that is what I was going to say,
25 my Lord. What is said in that case, that it doesn't

1 matter that we think Parliament intends to change this
2 law later, that is constitutionally irrelevant. What
3 Lord Browne-Wilkinson said in the Fire Brigades Union
4 case, at MS 483, is that it is not for the executive to
5 say that provisions of law, inconsistent with the
6 prerogative(?) act would be repealed when a suitable
7 legislative opportunity arises. It is for Parliament
8 and not the executive to repeal or not repeal
9 legislation. It is their choice.
10 Then we cite the Hayden case, the last line of that
11 citation, whatever the vestige of the dispensing power
12 which remained at the time of the Bill of Rights, it is
13 no more.
14 The second part of our historical enquiry from
15 paragraph 17 on MS 12486 addresses any distinction that
16 the appellant may seek to draw between the ordinary
17 position in relation to prerogative powers and the
18 foreign relations prerogative, because it may be argued
19 as with the royal prerogative, the royal prerogative can
20 alter the enjoyment of property or may be able to alter
21 the enjoyment of property in certain circumstances; can
22 the foreign relations prerogative do that as an aspect
23 of its content?
24 But again, we say that the Secretary of State's
25 submission that his power, prerogative power to enter or

1 to withdraw from international legal obligations is
2 entirely untrammelled, simply cannot withstand the
3 historical enquiry which Mr Eadie and I agree is the
4 correct approach to this.
5 There is a strong line of authority to support the
6 orthodox view that the executive may not, by exercise of
7 its foreign policy powers, vary domestic law or to
8 remove rights.
9 Again I take that from my written case, it has not
10 been challenged, I will not take you to the underlying
11 cases one by one unless you want me to --
12 THE PRESIDENT: You have taken us to the case in -- the
13 Henry IV case cited in Coke's report of proclamations.
14 MS MOUNTFIELD: Yes, I have taken you to The Case of
15 Proclamations. I am not going to take you to them
16 unless you want me to, I can take you to the
17 underpinning --
18 THE PRESIDENT: Basically you say these cases, as it were,
19 speak for themselves. Any particular one you want to
20 take us to?
21 MS MOUNTFIELD: Yes, I will just draw your attention to the
22 case about the end of the Seven Years' War, and
23 Chalmers' "Opinions of Eminent Lawyers". I will not
24 take you to the point case, but the case arose as
25 a result of the treaty of Paris at the end of the Seven

1 Years' War and although -- before the Seven Years' War,
2 Newfoundland had been a British territory but French
3 fishermen had had historic fishing rights there, from
4 the treaty of Utrecht. Those were preserved at the end
5 of the Seven Years' War by the treaty of Paris. But
6 almost immediately after that, the Crown wanted to amend
7 the treaty of Paris.
8 So it asked the law officers if they had -- if it
9 had power to do that, whether the Crown could legally
10 enter into and had any power to endorse such regulation.
11 The law officers said that the Crown could not do that.
12 The reason why not was because it was considered that
13 the articles of the project were not consistent with the
14 10th and 11th acts of William III, which are not in the
15 bundle but you can have them if you want them. That was
16 the policy of that Act and it was inconsistent with the
17 purposes of the legislation.
18 The reason I draw your legislation to that one is
19 because it was not about only the rights of British
20 subjects, or indeed necessarily on soil that was
21 protected by Britain. It was about using a treaty power
22 to amend that which was seen to be the purpose of
23 a statute, and it was said that that couldn't be done.
24 Then we have George III adopting an act of
25 Parliament to enable him to enter treaties to end the

1 wars with the American colonies, because he was not
2 sure, or because I invite you to find that it was
3 assumed that he would not have power to do that, cutting
4 across domestic law rights in the absence of an act of
5 Parliament.
6 Then we have the Phillimore principle that my Lord,
7 Lord Pannick took you in the Parlement Belge case. It
8 is worth observing that that -- Sir Robert Phillimore's
9 judgment's in case was in fact overturned on appeal, but
10 the reason it was overturned on appeal was because the
11 Court of Appeal considered that the prerogative did
12 extend to deciding that a ship was a property designated
13 for public purposes, and that was a conclusive fact.
14 Once that was decided using the prerogative, that was
15 a fact that altered the application of the prerogative,
16 but it was not to take away from the general principle
17 that Sir Robert Phillimore had set forward.
18 THE PRESIDENT: Thank you.
19 MS MOUNTFIELD: Then the case of Littrell v United States of
20 America. I need to just correct one point in my written
21 case there, at the top of page 12489, the Court of
22 Appeal did not in fact allow an appeal against the first
23 instance judgment. What happened was that a judge at
24 first instance dismissed an application or struck it
25 out, on the basis that the Status of Forces agreement

1 did not give the appellant the rights -- on analysis did
2 not give the appellant the rights that he sought.
3 That was upheld by a High Court judge but the Court
4 of Appeal said that was wrong; they shouldn't have
5 looked at the Status of Forces agreement at all, it was
6 not part of domestic law, and they upheld the result,
7 they upheld the strike-out because of state immunity.
8 THE PRESIDENT: They disapproved the reasoning.
9 MS MOUNTFIELD: Yes, but the relevant passages for your
10 Lordships' note are Lord Justice Rose at MS 10932 and
11 Lord Justice Hoffmann -- I have the internal reference
12 here which is 93 B to 94 F, upholding Lord
13 Justice Phillimore but there are two reasons why I don't
14 draw the whole of that case to your attention. One is
15 time and the other is because the first instance judge
16 who was told he was wrong was a deputy High Court judge,
17 Sir Robert Carnwath sitting as a deputy High Court
18 judge.
19 But there is an interesting passage in Lord
20 Justice Hoffmann's speech again in there, where he talks
21 about how if the Status of Forces agreement had been
22 a question of domestic law, of course a court could look
23 at it to look at the facts, and to look at -- somebody
24 was a member of the force that had the benefit of that
25 agreement. It was not saying you could never look at

1 a treaty for that factual purpose; you cannot construe
2 it or consider that it confers rights.
3 What I say is that all those cases are entirely
4 consistent with the passage in the speech of Lord
5 Oliver's in the Tin Council case, which I think has been
6 drawn to your attention by almost every counsel, but
7 what we say is that that is authority for the causal
8 link, between the inability of the Crown to alter
9 domestic law by making or unmaking a treaty, and the
10 prerogative power and the respect that the court will
11 give to that for the power of the Crown to make foreign
12 own affairs, or the executive to make foreign affairs.
13 They will do it because it confers no rights in
14 domestic law. There is nothing for the domestic court
15 to look at; simply irrelevant as a source of rights.
16 THE PRESIDENT: Yes, I see.
17 MS MOUNTFIELD: The cases which the appellant relies on
18 simply do not bear the meaning he ascribes to them.
19 That is in our written case at paragraphs 20 to 23 and
20 we also adopt Lord Pannick's submissions on this point.
21 May I draw your attention, without turning it up in
22 view of the time, to the McWhirter case, which is in
23 core volume 3, tab 46, and starts at 1847. The
24 appellant relies on this in their written case to
25 suggest that the continued exercise of an untrammelled

1 foreign relations power is specifically recognised in
2 the Bill of Rights. That is right, it does say that,
3 but it doesn't support the appellant's submission that
4 the foreign affairs prerogative is untrammelled, and
5 extends to changing domestic law. Indeed, we say it
6 goes against that.
7 McWhirter was an application for judicial review,
8 brought by somebody who opposed our entry to the
9 European Union, and he opposed the Crown's decision to
10 sign the treaty of accession, because the Crown was
11 divesting itself of the entire and perfect and full
12 exercise of regal power and government; and that was
13 rejected. But the reason it was rejected was that the
14 signing of the treaty had no effect on domestic law, and
15 because it was the passing by Parliament of the
16 European Communities Act and the subsequent ratification
17 if the bill was adopted, and not the executive act of
18 signing the treaty which would be the basis for the
19 domestic law which would then be applied by the domestic
20 courts.
21 You see that from the passages that Mr Eadie invited
22 your attention to in the speech of Lord Denning at
23 paragraph 8, and Lord Justice Phillimore at paragraph 8.
24 Finally, I should mention the Hales case that was
25 raised by Mr Larkin, and on that we say that is

1 a pre-Bill of Rights case, and indeed arguably one of
2 the causes of the passage of the Bill of Rights. It was
3 overtaken by it, and we have put in a short clip of new
4 materials. At tab 3 of that there is an interesting
5 lecture by Professor Bradley about that case where he
6 draws attention to the history, and suggests that the
7 court which gave judgment in that case had been put
8 under considerable external pressure, and the judges had
9 been handpicked by one of the parties to the litigation,
10 the latter of which at least cannot be said about this
11 court.
12 LORD MANCE: What does this look like?
13 MS MOUNTFIELD: It is tab 3.
14 LORD MANCE: That.
15 MS MOUNTFIELD: Yes, I don't invite you to look at it now,
16 but it is a lecture that explains the history of the
17 Hales case, and it is quite interesting, the sort of
18 pressure that the King put the judges under.
19 So we accept that those authorities are not
20 conclusive. Some of them relate to varying common law
21 rights, and we are talking about varying statutory
22 rights; some of them are only indicative, and none of
23 the older authorities are judicial in nature. But we
24 say that they do provide at least a clear indication
25 that there is an orthodox position on this question.

1 The later cases we refer to, or authorities we refer
2 to, are judicial. Can I also add to my list Higgs,
3 which was cited by Lord Pannick; that is V21, tab 260,
4 MS 7231, the speech of Lord Hoffmann. We also invite
5 your attention to the view of Sir William Holdsworth,
6 the Vinerian professor of English law, in an article in
7 the 1942 Law Quarterly Review, volume 33, tab 456, MS
8 11316.
9 He starts by observing that Blackstone's statement
10 to the effect that there were no limitations on the
11 treaty-making power of the Crown was not an accurate
12 statement of law in the 18th century:
13 "Two very definite limitations upon it were then and
14 are now recognised. Though the Crown and the Crown
15 alone can make a treaty, if the terms of the treaty
16 involve the imposition of any charge on the subject or
17 an alteration in the rules of English law, they cannot
18 take effect without the sanction of Parliament. These
19 two limitations are the result of the constitutional
20 settlement effected by the great rebellion and the
21 revolution."
22 We say the appellant has simply failed to engage
23 with this material or to provide any authority that,
24 properly read, rebuts it.
25 Having undertaken this historical enquiry, we ask:

1 can the appellant's case on the existence of
2 a prerogative to change the law be sustained? As Lord
3 Camden said in Entick v Carrington: if it be law,
4 authority for it will be found in our books; but there
5 is not any, and the silence of the books disproves the
6 appellant's case on this point, which is the point that
7 he invites you simply to assume in his favour.
8 It follows, we submit, that the foreign relations
9 prerogative cannot be used to change the law or to vary
10 the sources of law which apply in the domestic sphere.
11 We submit that once the European Communities Act has
12 become law and the European Union treaties have effect
13 as sources of UK law, prior parliamentary authorisation
14 is required to enter into or to resile from an EU
15 treaty, and the provisions of the
16 European Communities Act cannot be dispensed with in any
17 other way.
18 We say that is an absolutely basic constitutional
19 principle, what one of the constellation of professors
20 on the UK Constitutional Law Association blog described
21 as "constitutional law 101". So it is perhaps
22 unsurprising that when modern judges have even
23 fleetingly considered the issue of the United Kingdom
24 leaving the European Union, they have not considered it
25 as some point to be determined or left over for argument

1 in some later case, but simply assumed that any decision
2 on withdrawing from the European Union would be one for
3 Parliament.
4 I am not going to go through the references, they
5 are on our written case at paragraph 27: four cases, the
6 dicta of three eminent constitutional judges. We have
7 set out there what Lord Dyson said in the Shindler case.
8 Mr Eadie suggested that it didn't -- Lord Dyson was not
9 suggesting it would be for Parliament to decide whether
10 the UK would leave the EU, that is not our reading of
11 paragraph 19; but I do accept, of course, that none of
12 these was a case where the judge was being called on to
13 decide the point, but I do say it is significant that
14 what these judges assumed was consistent with what I say
15 was the orthodox position; I do say it is significant
16 that are no dicta to the contrary.
17 That is the end of my first point. There is no
18 prerogative power to change the law, there is nothing to
19 abrogate. Mr Eadie's submissions on the De Keyser
20 principle are, as Mr Gordon suggested, in effect to say
21 that the Government can change the constitution in
22 a radical way, because Parliament has never said that it
23 can't.
24 Or, to put it at a perhaps more facetious level --
25 we are on the last day of the case -- Mr Eadie's

1 submissions are the equivalent of arguing that because
2 none of the attempts to catch the Loch Ness monster
3 succeeded, the Loch Ness monster still roams free.
4 So I turn to my second proposition which is that --
5 sorry, before that, I should say that if I were wrong on
6 that, and I did need to rely on the principle of
7 abrogation, then we would say that the
8 European Communities Act did abrogate or clamp any
9 prerogative power which may have existed; and if I did
10 need it, and I say I don't, there are alternative
11 submissions on that in our submissions for the first
12 instance hearing, at paragraphs 29 through to 50. They
13 start in the first core volume at 12152, and we would
14 rely on those if we needed them.
15 The second point then is to say, well, if there is
16 no power to dispense with or change the law, would the
17 appellant, if he triggered Article 50, in fact dispense
18 with law and remove EU law rights? We say yes. We say
19 this firstly because EU law is part of domestic law, so
20 far as this court is concerned. The reason it is part
21 of domestic law, and the only reason it is part of
22 domestic law is because the core Parliament has so
23 willed.
24 That is the consequence of our dualist legal system
25 and the rule of recognition; it is supported by the

1 observations of Lord Mance in Pham, which are in
2 paragraph 27 of our written case, and also by Lord Reed
3 in HS2, paragraphs 78 to 79, which are at MS 535. We
4 assume that that is common ground, but Lord Pannick took
5 you to section 18 of the European Union Act 2011, and it
6 is worth pointing out, if I dare make one more citation
7 from Hansard, which has not always gone down well; but
8 the Halsbury's Statutes edition at section 18, on page
9 153, does note Lord Howell introducing the bill, and
10 saying that: the common law is already clear on this,
11 Parliament is sovereign, EU law has an effect in the UK
12 because, and solely because Parliament wills that it
13 should be; the purpose of this section is to put that
14 beyond speculation.
15 My Lord, Lord Kerr said: what is article 18 doing;
16 it is putting what is already the common law beyond
17 speculation, so it has a declaratory effect.
18 So any suggestion, we submit, that EU law, the law
19 of the treaties and the rights arising from time to time
20 under the treaties is in some way not domestic law is
21 contrary to the express statutory provisions which
22 confirm the pre-existing common law.
23 But despite this common ground on the rule of
24 recognition, the appellant's case is that EU law rights
25 are nonetheless not domestic rights, because, he says,

1 they are contingent on an exercise of executive
2 prerogative to have any life at all. The executive
3 chooses not to exercise the prerogative to bring those
4 rights into play or to take away the ball, they are not
5 rights anymore.
6 So again, I use the language of a vessel, he says
7 that when Parliament passed the European Communities Act
8 in 1972, it just created an empty vessel which the
9 minister could at any time fill or empty at will by
10 using his foreign relations prerogative. If that was
11 the case, I submit it is the broadest Henry VIII clause
12 in history. But on his case, the Secretary of State
13 says that except so far as he was constrained by post
14 European Communities Act statutes, then at any time he
15 could have increased the flow of EU law or decreased it
16 or turned it off altogether, without any need for
17 further statutory authority, through what he described
18 as the conduit, section 2(1) of the Act.
19 So if the appellant decides to leave the EU, he
20 suggests, as I understand it, that that is not
21 dispensing with the law, because the European
22 Communities Act can stay on the statute book, and so can
23 any EU law rights which exist under the treaties. It is
24 just that the treaties have become a nil class(?)
25 because they no longer apply to the United Kingdom.

1 That is his argument, as I understand it, but it is
2 not right, and it is not right on the language of the
3 Act, and it is not right when you look at statutory
4 intention. On the statutory language, we accept that
5 this is an ambulatory statute, but it is not ambulatory
6 in the way that the appellant says it is. We deal with
7 this in our written case at paragraphs 55 to 58, MS
8 12500, but what we say is that section 1(2) of the Act
9 sets out a list of what the treaties are, for the
10 purposes of the European Communities Act, and the
11 treaties, capital T, are treaties specified by
12 Parliament in primary legislation. That is the source
13 of the law in the domestic sphere, and that is a matter
14 which is in control of Parliament. If it's not a
15 capital T, treaty, as defined by Parliament, it is not
16 a treaty.
17 In section 2 of the Act, section 2(1) provides for
18 what the effect of those treaties will be in domestic
19 law. Although it is very familiar, and we have gone
20 through it a lot of times, can I just ask you to turn it
21 up while I talk about it. It is in MS 18 in the first
22 core volume, and it says that:
23 "All such rights, powers, liabilities, obligations
24 ... from time to time created or arising by or under the
25 treaties" --

1 THE PRESIDENT: We have read this.
2 MS MOUNTFIELD: Yes.
3 "... as in accordance with the treaties ... without
4 further enactment to be given legal effect ... shall be
5 recognised and available in law."
6 And so on.
7 That is what a Community law right is, because that
8 is what Parliament says in section 2(1). It is
9 significant, I say, that the words "from time to time"
10 come under the rights et cetera which flow from the
11 treaties and not the treaties; it is the rights from
12 time to time, not the treaties from time to time. The
13 scope of the treaties having been established by section
14 1(2), the conduit, in section 2(1), is for the rights
15 from time to time under the treaties but not the
16 treaties themselves.
17 Those have been fixed by Parliament. Given that
18 they have been fixed by Parliament, what follows is that
19 the directly affected rights which are created by the
20 treaties themselves are immutable, rights of free
21 movement and non-discrimination and so on, because they
22 are rights under the treaties; and the treaties are the
23 treaties that Parliament says are the treaties.
24 So it is true that the content of rights created or
25 arising under the treaties by EU legislative acts like

1 regulations, or directly effective provisions of
2 directives might change from time to time, but insofar
3 as those changes become part of domestic law, that is
4 a result of Parliament's decision in section 2(1) to
5 give automatic effect to EU legislative acts and
6 decisions of EU legislative bodies. It is not the
7 direct consequence of the actions of the UK Government
8 exercising its prerogative power in the field of
9 international affairs.
10 That is the point in the Youssef case which you
11 discussed with some of my learned friends yesterday, the
12 Security Council resolution given effect through an EU
13 regulation. Paragraph 34, which is supplementary MS
14 679, we consider to be an authority in our favour.
15 The appellant's reading also ignores the statutory
16 purpose. Lord Mance asked if the
17 European Communities Act was neutral as to whether
18 United Kingdom was a member of the EU. We say clearly
19 not, and on that point we rely on the submissions of
20 Lord Pannick and Mr Chambers.
21 THE PRESIDENT: Yes.
22 MS MOUNTFIELD: The consequences of the case advanced by the
23 appellant -- the argument is not only wrong, it does
24 have very serious consequences, under this Act, but also
25 for the whole relationship between the executive and

1 Parliament. As to this Act, if the appellant is right,
2 then by the sweep of the executive pen, the appellant
3 can dispense with a whole swathe of domestic law rights,
4 many of which are fundamental in character and which
5 could not be restored by a future Parliament or indeed
6 by any other UK constitutional actor acting
7 unilaterally.
8 We have set out some of those fundamental rights in
9 the annex to our written case, MS 12507. I have been
10 asked to say particularly that my clients, and those
11 that support them, consider that their EU citizenship is
12 a fundamental part of their identity. So that if they
13 are to be deprived of it, it is their elected
14 representatives in Parliament who should in law be
15 responsible for that.
16 I said there might be other wider consequences and
17 can I give you one example of that, very briefly. If
18 the Government is right, then it is certainly arguable,
19 perhaps probable, that the executive could effectively
20 dispense with the Human Rights Act and the convention
21 rights which it incorporates into domestic law without
22 the prior consent of Parliament.
23 I don't have time to deal with that point in any
24 detail, but we have put the relevant provisions in the
25 additional bundle and the short point is that section 1

1 defines what the convention rights are, but section 21
2 says that those rights are the rights in force from time
3 to time -- as they applied to the UK from time to time.
4 So if under Article 50(8) of the convention, the
5 executive in the exercise of the prerogative denounces
6 the convention, those rights as they apply in the UK are
7 no rights, they can stay on the statute book, they can
8 stay in schedule 1 but they are not of any effect. The
9 Human Rights Act would technically be in force but it
10 would be a dead letter.
11 LORD CARNWATH: Can I ask you one point on that, it may not
12 matter, but before the Human Rights Act, there was
13 a right of petition, individual petition to the Court of
14 Human Rights, which was granted by executive power
15 without any statutory underpinning, I think --
16 (Inaudible). I take it that before the
17 Human Rights Act, it would have been possible for the
18 Government, by executive prerogative action, to withdraw
19 from the -- and effectively take away your individual
20 right of petition, but the difference is that now it is
21 guaranteed by statute.
22 MS MOUNTFIELD: Yes, because they were not domestically
23 enforceable rights. They had a persuasive effect --
24 LORD SUMPTION: But they were individual rights --
25 MS MOUNTFIELD: They were individual rights in international

1 law which as a matter of policy --
2 LORD CARNWATH: Is that not comparable to your rights -- or
3 individual rights as an EU citizen, which is a European
4 right?
5 MS MOUNTFIELD: No, because they are only rights in domestic
6 law and recognised by these courts because Parliament
7 says so, so they are domestic rights.
8 LORD CARNWATH: It is the Act which makes the difference,
9 yes.
10 MS MOUNTFIELD: Yes. That is another example of the
11 significant wider constitutional consequences.
12 Can I, in my very short remaining time, which I am
13 very grateful I have, pick up on two points which arose
14 in argument over the last couple of days.
15 First, on the 2015 Referendum Act --
16 LORD REED: If I can just interrupt, just thinking aloud,
17 I suppose if rights were created under the prerogative,
18 then they could equally be taken away under the
19 prerogative, and I am thinking of the criminal injuries
20 compensation scheme which originally was created under
21 the prerogative.
22 MS MOUNTFIELD: Yes, they are not statutory rights, so they
23 can be taken away. If the prerogative -- yes, if the
24 Crown in the GCHQ case can take away your right to
25 strike, it can also give you back your right to strike,

1 or decide you are going to get very good pay and
2 conditions, take it away again, it is not a contractual
3 right, it is a prerogative power.
4 LORD REED: Yes, and there, the Crown is not acting in
5 a particular capacity as an employer vis-a-vis its
6 employees, for example, but it is creating a scheme of
7 rights for the entire population which it can then take
8 away again at its own hand.
9 MS MOUNTFIELD: Yes, but it is a very unusual situation,
10 that, and that is a prerogative which has now
11 disappeared, as prerogatives tend to do, when Parliament
12 gets involved.
13 THE PRESIDENT: You were going to turn to the 2015 Act.
14 MS MOUNTFIELD: The 2015 Act. Can I just address the
15 suggestion that was put by my Lord, Lord Neuberger, in
16 particular to Lord Pannick, that the 2015 Act could in
17 some way revive or legitimise the use of the prerogative
18 power if it existed -- put into abeyance by the 1972 Act
19 and subsequent legislation, and of course this would
20 only arise if we were wrong on the extent of the
21 prerogative.
22 THE PRESIDENT: Yes.
23 MS MOUNTFIELD: But even in those circumstances, it would be
24 necessary to appreciate that assuming it was the
25 European Communities Act which had put the prerogative

1 into abeyance, it was also the European Communities Act
2 which created European Union law rights which are
3 described as fundamental rights, and also created rights
4 which -- or a scheme of law which was being described as
5 constitutional by our courts.
6 So it would be necessary to accept, as this court
7 has recognised, that the European Communities Act and
8 the devolution acts are constitutional statutes. That
9 means that if some later statute were to operate, so as
10 to undo the effect of the European Communities Act and
11 to bring back the prerogative which had been previously
12 held in abeyance, it would require clear and express
13 statutory language to do that.
14 That language would be required under the principle
15 of legality, the Simms principle, and also because of
16 the principle set out in relation to constitutional
17 statutes by Lord Justice Laws in Thoburn. There is no
18 such express language, and to hold that the 2015 Act by
19 implication had such an effect, that would be an act of
20 judicial legislation.
21 If Parliament had intended a particular result of
22 the 2015 referendum to have a particular constitutional
23 consequence, it would have stipulated that, as it had
24 with other referenda, and you have been told about the
25 alternative vote referendum, but may I also draw your

1 attention, without turning it up, perhaps, to the
2 provisions of section 1(2) of the Northern Ireland --
3 THE PRESIDENT: We saw that, we commented on that yesterday.
4 MS MOUNTFIELD: Yes. The final point, my Lord, is about
5 Lord Carnwath's question on Wednesday in the transcript
6 at page 46, about Article 50(3). He pointed out that in
7 seeking to constrain the manner in which the
8 United Kingdom's vote could be exercised, Parliament
9 made specific reference in the schedule of the 2011 Act
10 to Article 50(3).
11 Can I explain very briefly why this says nothing
12 either way about the United Kingdom's own invocation of
13 Article 50. It is quite a complicated point but I think
14 I have crystallised it.
15 You will recall that under the main provisions of in
16 European Union Act 2011, a complicated system of
17 controls was imposed on the ability of ministers to
18 transfer powers. Essentially it had to have either
19 a referendum and an act of Parliament or an act of
20 Parliament. I am not going to deal with that
21 complicated system of controls, it is most clearly in
22 section 4(1)(k). But the provisions to which they
23 applied are in schedule 1, which is at volume 1 of the
24 core volume, tab 6, MS 141. It is a final reference but
25 can I ask you to turn it up, please.

1 You will see there -- 155, I am so sorry, 155 on the
2 memory stick. You will see at the bottom of that list
3 of provisions, Article 50(3), the decision of the
4 European Council extending time during which treaties
5 apply to state withdrawing from the EU. What matters in
6 my submission is the heading:
7 "The treaty provisions where amendment removing need
8 for a unanimity, consensus or common accord would
9 attract a referendum."
10 That is one of the ones in that list. What that
11 means for the purposes of this case is that when it
12 included that provision in this schedule, Parliament was
13 not contemplating the regulation of the conditions under
14 which the UK itself could invoke Article 50, or indeed
15 the circumstances in which UK could give or withhold
16 approval or extension of time if another member state
17 was intending to leave the EU.
18 What it was is it was just part of a list of
19 provisions in respect of which the United Kingdom
20 Parliament provided by statute that the Government could
21 not agree to give up an existing veto power under the
22 treaties without a referendum.
23 As Lord Pannick said and we agree, it is
24 unsurprising that the 2008 and 2011 acts were silent on
25 the constitutional arrangements which would permit the

1 United Kingdom to trigger Article 50, because it is so
2 long established and so fundamental a constitutional
3 principle, that the Government cannot dispense with law
4 without parliamentary authority; and it is, or at least
5 it was until the appellant put it in issue in this case,
6 elementary.
7 So the People's Challenge --
8 LORD CARNWATH: But just picking up that point, I know that
9 is what Lord Pannick said, but there is nothing in the
10 contemporary papers to suggest that that was in anyone's
11 mind, and as far as one can see from the discussion
12 there was in the select committee and so on, this
13 withdrawal in 2008 was simply seen as something which
14 confirmed parliamentary sovereignty and therefore did
15 not (Inaudible) specific provision. But I don't think
16 there is any suggestion at that stage that anyone was
17 discussing the sort of issues we have been discussing
18 here.
19 MS MOUNTFIELD: I say they were not discussing them because
20 it was so obvious --
21 LORD CARNWATH: You say it was so obvious, but that is your
22 interpretation.
23 MS MOUNTFIELD: I say it flows inexorably from that entire
24 history, from the civil war --
25 LORD CARNWATH: I understand the way you put it, but the

1 point I am asking is there is nothing in the
2 contemporary papers to suggest that was actually given
3 any --
4 MS MOUNTFIELD: There is nothing to suggest that it occurred
5 to anyone that withdrawal from the EU could be
6 undertaken without a statute, when it had taken
7 a statute to take us in.
8 Yes, and I am reminded that the CRAG green paper --
9 I don't have the reference, you were given it yesterday,
10 I think by Mr Chambers, the CRAG green paper
11 specifically referred to that point.
12 I have run out of time. The People's Challenge
13 respondents seek to uphold the divisional court's
14 judgment in this case, not only for its relevance and
15 importance to the issues before this court, but because
16 of its importance in a democratic society which is based
17 on the separation of powers and the rule of law, of the
18 constitutional orthodoxy which the divisional court's
19 judgment upholds, and we respectfully invite you to
20 dismiss this appeal.
21 THE PRESIDENT: Thank you very much, Ms Mountfield.
22 Mr Gill. We will sit a little bit late to give you
23 your 20 minutes.
24
25

1 Submissions by MR GILL

2 MR GILL: That is very kind. I hope to be finished in time.

3 A great deal has been said and I do not propose to

4 repeat it. Except to say I wish I had said all those

5 wonderful things that you have heard from Lord Pannick,

6 Mr Chambers and those who have gone before me this

7 morning.

8 But I adopt them of course, gratefully.

9 A reasonable amount of what I had intended to say and

10 which is in a speaking note which I hope has found its

11 way to the bench --

12 THE PRESIDENT: Thank you very much, we have it, yes.

13 MR GILL: -- has been covered by Mr Gordon QC this morning,

14 so that will perhaps helpfully shorten things even

15 further.

16 My Lords, my Lady, the first thing to say at the

17 outset, I think is this. I will make a few introductory

18 comments and then deal with three points. But the first

19 thing I think one has to keep hold of is that hard cases

20 make bad law. This case is not hard. Some people are

21 trying to make it very, very hard. The reason why they

22 are trying to make it very hard and putting their

23 counsel in the position of contortions, where they are

24 saying one thing one minute and another thing the next,

25 is because nobody ever thought that the 2015 Act was

1 ever intended to confer any prerogative power at all.
2 The reason for that is, or one reason for that may
3 be, when I say nobody, I mean the Government, two
4 important actors, the Government and the legislature,
5 and the one reason for that may be this: it is
6 a political point made by those who voted leave. It is
7 that nobody ever thought there was going to be a leave
8 vote. That is why -- the idea even that there was going
9 to be any need to even consider the prerogative. That
10 is why the statute is simply drafted as it is in the
11 limited way. But this will be something that I may
12 touch on briefly in due course.
13 At the outset, a few opening points which are
14 reflective of what Mr Gordon said, but I just wish to
15 highlight them in this way. Firstly, if the rule of law
16 is to mean anything, even sovereigns must be constrained
17 by it. The prerogative is no more than a creature of
18 the common law. It is not that you cannot use the
19 prerogative to dispense with laws; there is simply no
20 prerogative to dispense with laws; it is not a question
21 of its use or abuse, it just doesn't exist.
22 That was the position before the 1972 Act. The 1972
23 Act did not change that position. I am not going to go
24 into the 1972 Act or the legislation. Others have dealt
25 with that. No question of a clamp arises.

1 The non-dispensing principle that Mr Gordon talks
2 about remains and no question of a clamp at all arises.
3 Those are the opening comments. The three areas
4 that I do want to deal with are the areas which
5 affect -- two of them which affect those clients who
6 I particularly represent and then the third point will
7 be to say something about the flexible interpretation
8 point, which gets back to the 2015 Act point.
9 So starting with the two areas that affect my
10 particular clients and it is in the opening note, in the
11 speaking note, my Lords, my Lady, the submissions that
12 have been made, which amount to basically what Mr Gordon
13 has reiterated this morning, are said basically to force
14 a technical position, that you are just asking for
15 an act of Parliament when really something else will do,
16 some other form of parliamentary involvement will do.
17 We say our position is anything but abstract or
18 technical. It is very, very real. Not only does the
19 use of the prerogative, claimed use of the prerogative,
20 now affect whole swathes of laws; they affect the most
21 fundamental rights which affect vulnerable classes of
22 persons that are set out in our printed case, facts as
23 to precisely how my clients will be affected. I am not
24 going to have time to go over that, but it is set out in
25 the case. Very real examples of what the law changes

1 will mean for them.

2 Now, that being the position, we say that the

3 parties who we represent, the AB parties, they are

4 representative of two classes of persons -- this is

5 paragraph 6 of the speaking note -- EU nationals living

6 in this country and those who derive rights of residence

7 from them, principally their family members; and

8 secondly, children, whose continued presence in this

9 country depends on the exercise of them or their carers

10 and family members, of rights derived from EU law.

11 And I have in mind British children who as EU

12 citizens need carers who are non-British or non-EU even,

13 who therefore, as a result of EU law, need their carers

14 with them, who are then given what are called Zambrano

15 rights, derivative rights of residence.

16 These classes of persons, and the first class, EEA

17 and their family members, is of course a very large

18 class, are very, very significantly affected by the

19 position.

20 Now, for the reasons that are set out in our written

21 case, we say that the effect of what the Government now

22 wants to do, is now forced to do, not having thought

23 about it beforehand, is to say that they will use the

24 prerogative to give the Article 50(2) notice; having

25 themselves made an Article 50(1) decision; they don't

1 say the 2015 referendum decision was the decision, they
2 say they themselves, the Government, will make and have
3 made, the decision; and that they will give the
4 Article 50(2) notice under the royal prerogative. And
5 they say that they will give it without there being any
6 prior safeguarding of the rights that would otherwise
7 fall on the day of withdrawal.
8 We say that is simply a complete breach of the
9 non-dispensing principle, whatever label one wants --
10 Mr Gordon referred to this morning.
11 So what does that mean for the class of people that
12 I represent, the EEA nationals, when you don't put in
13 place a protective scheme for them as to what their
14 position will be on the day of withdrawal. What it
15 means is, and I put it like this, paragraph 11: be ready
16 to pack your bags and go on that day. It is that stark,
17 because we are not going to give you any guarantees, in
18 fact we are going to use you as a bargaining chip.
19 Not only are we not going to put any rights in place
20 in the domestic legislation which protect you in some
21 sense, we would like you to stay but we are giving you
22 no guarantees whatsoever; that is the current position.
23 We say that on the current law, and I am only dealing
24 with law, not -- the current law, not as to what may
25 happen, that is simply not possible, or lawful.

1 Of course things may change in the future,
2 paragraph 12, of course protections may be given. This
3 was Mr Eadie's response in the court below, and he has
4 not dealt with it in his written case, and I assume that
5 this will remain his response in his reply. His
6 response was that: Mr Gill is putting it in
7 too exaggerated a way, of course we will find ways of
8 protecting people in due course.
9 Due course is not good enough for me or for the
10 children that I represent. They need to know what is
11 their position now. Children in particular are entitled
12 to know because of the duties to which we have signed up
13 to under the UN convention, rights of the child, which
14 therefore impose upon us obligations under Article 4 of
15 that convention for progressive implementation of the
16 convention in national law. Children are entitled to
17 know what is going to be their position. Their parents
18 are entitled to know what long-term arrangements are we
19 going to make for them.
20 Bear in mind, this may not be two years on the law,
21 bear in mind, this is a point made in the speaking note,
22 on the Secretary of State's case, if this is all about
23 prerogative power, what they could do is they could
24 negotiate with the other member states now, behind the
25 scenes, I have no problem with that; they can do that on

1 an international level anyway. They could have some
2 sort of agreement, withdrawal agreement lined up in
3 principle, draft agreement.
4 They could then, on 1 January, give a notice, having
5 made a decision for 50(1) purposes, and under 50(2),
6 give the decision on 1 January; on 2 January they could
7 sign their withdrawal agreement.
8 On the law as it stands, and on their case, that
9 could be the effect. Where does that leave the rights
10 of the EEA nationals or their families, people who have
11 been here and the children in particular? It drives
12 a coach and horses through all those rights.
13 It may take two years, it may take longer than two
14 years. That in a sense is even more cruel because it
15 actually prolongs the uncertainty.
16 Not only this, paragraph 15, we say it is not just
17 about taking away rights; it is about exposing the class
18 whom I represent to criminal liability and summary
19 removal. Again, there was no dispute about this in the
20 court below. I have been saying this, we have been
21 saying this, from a very early point and the other side
22 have never disputed this. Their position is: we will
23 find some way of sorting this out. I am not going to
24 have time to take you through the legislation on this.
25 It is set out in our printed case at paragraphs 42 to

1 55.

2 THE PRESIDENT: Thank you.

3 MR GILL: The relevant section is section 7 of the

4 Immigration Act 1988 which in effect says that, if

5 I just read it out very fast, on MS 12533:

6 "A person shall not under ... Immigration Act ...

7 require leave to enter or remain in the United Kingdom

8 in any case in which he is entitled to do so by virtue

9 of an enforceable right or any provision made under

10 section 2(2) of the European Communities Act ..."

11 The immigration -- EEA regulations 2006 are that

12 instrument, and therefore the rights flow, not from the

13 Immigration Act 1971; they flow from section 7 of the

14 ECA 1972, section 7 of the Immigration Act 1988, and the

15 EEA Regulations 2006, outside of the remit of

16 prerogative power.

17 THE PRESIDENT: Mr Gill, I should just point out that you

18 are well over halfway through your submissions and you

19 said you had three points and this is the first.

20 MR GILL: My Lord, I think the other two, I hope will be

21 a bit shorter.

22 THE PRESIDENT: That is fine.

23 MR GILL: The second one certainly will be.

24 THE PRESIDENT: Thank you.

25 MR GILL: The position then is that for the reasons that are

1 set out on 12533 and 12534, it is, what will happen is
2 that on the day of withdrawal, and you will just have to
3 go through the legislation, I am afraid, but believe me,
4 I am right, that on the day of withdrawal, my clients
5 are here without leave, they are committing a criminal
6 offence, unless Mr Eadie stands up and says: no, I am
7 telling you they are not going to be committing
8 a criminal offence. And he has never said that so far.
9 I would be very happy to hear him say that but he has
10 not said that.
11 If that is the position, then Case of Proclamations,
12 tab 9, middle of page 266, the quote which is at the
13 bottom in our footnote 40:
14 "... King cannot change any part of the common law
15 nor create any offence ... proclamation which was not
16 an offence before without Parliament ..."
17 And the Jones case, my Lords, the references to
18 this --
19 THE PRESIDENT: They are helpfully in paragraph 17 of your
20 speaking note, thank you.
21 MR GILL: Yes, and it is MS 2852, and it talks about
22 creeping situation which brings about a criminal
23 offence, can't do it, it says without Parliament, it is
24 that clear.
25 Now, that, therefore, for those reasons, we say

1 means that this is about -- even if Lord Pannick were to
2 fail on a broader argument, this argument on its own
3 would stand.
4 THE PRESIDENT: Understand.
5 MR GILL: As to then the children's point.
6 THE PRESIDENT: This is your second point.
7 MR GILL: This is the second point. I am going to come back
8 to the flexible interpretation point.
9 My Lords, the children point is really set out at
10 paragraphs 20, 21 and 22 of the speaking note and --
11 THE PRESIDENT: This is really a sort of extreme, as it
12 were, category of the first, is it really?
13 MR GILL: It is, it is, absolutely it is.
14 THE PRESIDENT: Thank you.
15 MR GILL: But there are a great many family lawyers
16 extremely concerned about what this is going to mean in
17 relations to Brussels 2(a) and all sorts of other
18 regulations to do with the enforcement of orders across
19 Europe, and what protections are going to be put in
20 place.
21 Of course Mr Eadie did submit in the court below, we
22 will find some other way, there will be other mechanisms
23 of human rights provisions of one sort or another,
24 possibly Hague convention in relation to this. But they
25 are not the same, and this is what the divisional court

1 said, those measures are not the same, and there are
2 many ways in which I can explain why they are not --
3 THE PRESIDENT: It is a bit like the Fire Brigades point,
4 the fact that the Government says it is going to
5 introduce legislation, you say is nothing to the point.
6 MR GILL: That is right.
7 THE PRESIDENT: I see.
8 MR GILL: But this really explains it very graphically. As
9 to the flexible construction point, if I can just have
10 three or four minutes in relation to that.
11 THE PRESIDENT: You have it, of course, yes.
12 MR GILL: My Lords, this, we say, is a red herring in this
13 case. This case is not about flexible constitution at
14 all. It has nothing to do with it. This is about
15 a very clear constitutional point which is the bedrock
16 of our constitution. We do not need to struggle to make
17 the constitution flexible in order to give effect and
18 meaning to that fundamental principle that Mr Gordon and
19 Ms Mountfield and others have talked about.
20 The flexible constitution point, and the only
21 authority cited in support of this is the Robinson
22 point, was being used by Lord Bingham in a certain way
23 only and we have set this out, if I just skip a bit, on
24 page 11 of the speaking note, at letter J:
25 "The appellant's submission is built on the idea of

1 a flexible constitution, which is derived from Lord
2 Bingham's very limited use of that concept in Robinson.
3 However, Lord Bingham was only able to refer to the need
4 to adopt flexibility because of the flexibility which he
5 derived from other statutory sections. Robinson is
6 therefore a traditional exercise in construction of
7 a statute, guided by the need to make the statute work
8 in a flexible constitution."
9 But the appellant seems to be asking the court to go
10 way beyond this, and to drag out of the 2015 Act, when
11 he accepts the language simply is not there at all, but
12 to drag out of the 2015 Act, in combination with some
13 other things which are ministerial statements, some
14 indication that Parliament must have intended to cede
15 its control over this. This is set out in paragraph 25.
16 25 and 26. But -- okay.
17 At 25 it says for the purposes -- the appellant's
18 submission really is this. For the purposes of
19 interpreting legislation in order to decide whether the
20 executive has been given a prerogative power, such that
21 this exercise will nullify a large body of laws given by
22 Parliament of our fundamental human rights and freedoms,
23 including exposing people to criminal liability, he says
24 the court is entitled to have regard to (1) what the
25 2015 Act does not say, as opposed to normal principles

1 of construction of language; (2) to couple that with the
2 appellant's asserted interpretation of a background
3 context, and in particular with statements made by
4 ministers that it would be their intention to act in
5 accordance with the outcome of the referendum, despite
6 other statements to the contrary. (c) to infer
7 therefrom by using this notion of a flexible
8 constitution, and that is all it is, that the Parliament
9 must have intended to confer upon the executive the
10 power to give the Article 50(2) notification, simply on
11 the strength of a vote if it was to leave the EU.
12 This is a novel and far-reaching proposition,
13 indeed, it is outlandish and seeks to avoid the
14 principle of legality; avoid the words of the 2015 Act;
15 seeks to read in extra words which are simply not there;
16 completely defeats the Hoffmann principle in Simms; and
17 would require, if Mr Eadie is right, actually, and this
18 is bottom of page 9, actually look at a lot of other
19 things like evidence; what did people mean when they
20 said what they did in such and such statement and so on?
21 What did Parliament actually mean? It is just
22 a complete nonsense when one gets into how you are
23 actually about to deal with it.
24 As to Parliament standing up for -- this is what
25 I will finish on -- as to Parliament standing up for

1 itself, why should Parliament have to say anything? Why
2 should it have to react to what could be politically
3 mischievous conduct -- usurping the executive? Why
4 should Parliament and the judiciary not assume that the
5 executive and the people of this country know the law?
6 Why should it be assumed against Parliament, and against
7 almost half of those who voted in the referendum, and
8 perhaps all of those who did not, that Parliament
9 understood and agreed to the proposition that by
10 enacting 2015 Act in the terms that it did, it was in
11 fact ceding the legal question, the legal decision? Why
12 should that be assumed?
13 My Lords, my Lady, the other points are simply there
14 set out in the rest of that paragraph and we say in
15 paragraph 27, whilst I accept Lord Reed's point that the
16 notion of a flexible constitution can be useful, this
17 case is about something far, far more fundamental than
18 that. The court may be facing a certain amount of
19 pressure, it is a 11-bench court; this is no time to
20 turn a flexible constitution into a slippery one and let
21 go of its bedrock fundamentals.
22 My Lord, those are my submissions.
23 THE PRESIDENT: Thank you very much indeed, Mr Gill.
24 Well, we have reached just after 1.00. We will
25 resume again at 2.00 and we will be hearing from

1 Mr Green then, I think. Thank you very much. Court is
2 now adjourned.
3 (1.05 pm)
4 (The Luncheon Adjournment)
5 (2.00 pm)
6 THE PRESIDENT: Final shake of the kaleidoscope of the front
7 bench. Mr Green.
8 Submissions by MR GREEN
9 MR GREEN: I am most grateful, my Lord. My Lady, my Lords.
10 I appear as an intervener, on behalf of the Expat
11 Interveners who are distinctly affected by the removal
12 or the prospect of removal of the rights that will be
13 lost as a result of the triggering of Article 50, rights
14 which Parliament is not able to replicate for them
15 beyond these shores.
16 In the time I have available, I shall not trespass
17 upon the submissions already made and gratefully adopt
18 those of my learned friends Lord Pannick, Mr Chambers
19 and Ms Mountfield and Mr Gill, and I am rather hoping,
20 my Lords, my Lady, that those submissions that I do not
21 manage to develop fully may develop rather better in the
22 minds of the court than perhaps if I develop them
23 myself.
24 Briefly the key issue on which I wish to focus is
25 the anterior question identified by Lord Kerr and

1 mentioned indeed by Lord Sumption on the first day, as
2 to whether there was ever any relevant prerogative; and
3 to answer that question by relying, of course, on the
4 principles advanced by Mr Chambers and Lord Pannick and
5 my learned friends, but also specifically by reference
6 to a facet of the 1972 Act upon which attention has not
7 yet fully focused, and that is the conferral of
8 legislative power on the EU institutions. Because of
9 course it is right that the 1972 Act invested rights or
10 conferred rights on individuals and obligations and so
11 forth domestically; but it is also true, and, we
12 respectfully submit, vitally important to a proper
13 understanding of whether there was a prerogative at all;
14 and a proper understanding of the legislation that
15 follows which I will come to, to identify structurally
16 and constitutionally what was happening in 1972 when the
17 legislative competence was conferred on the EU
18 institutions.
19 In summary our submissions are these.
20 First of all, Parliament gave its consent to EU
21 institutions with the participation of representatives
22 of member states in accordance with the provisions of
23 the treaties listed in the 1972 Act. It gave its
24 consent to the making of law which would have direct
25 effect, not in the technical term but in the real term,

1 within the United Kingdom.

2 It gave statutory authorisation to the Government of
3 the day to participate in that process. Indeed it went
4 further; it gave statutory authorisation to
5 representatives of governments of other countries
6 potentially to outvote the United Kingdom and legislate.

7 It is through the prism of that analysis that we
8 respectfully make one short but, we say, important
9 submission, and that is that the upward-facing facet, if
10 I can call it that, of conferring legislative competence
11 on the EU institutions, reflected a fundamental
12 constitutional change.

13 It can be summarised thus: the legislative power
14 which Parliament was conferring on the EU institutions
15 was, prior to the Act, only Parliament's to confer,
16 because it was only Parliament's to exercise. We
17 respectfully say that, because it was only Parliament's
18 to exercise and only Parliament's to confer upon those
19 institutions, it is only Parliament's to take back. We
20 respectfully say that that analysis is dispositive of
21 the appeal and we respectfully invite the court so to
22 find.

23 That analysis is also important when one comes to
24 consider the subsequent legislation which your Lordships
25 and my Lady have already heard submissions on, namely

1 the 2008 and 2011 acts, because those acts, properly
2 understood through the prism of conferral of legislative
3 competence and the voluntary limitation of sovereignty
4 of the United Kingdom in that respect, those acts are in
5 fact, to my Lord, Lord Carnwath's points, in pari
6 materia in the sense that, together with this aspect of
7 the 1972 Act, the conferral of legislative competence,
8 those acts regulate the legislative competence so
9 conferred.
10 My Lords, it is quite important to distinguish
11 between different aspects of that legislative competence
12 and we respectfully say that the appellant starts in the
13 wrong position. Because the acts, because the 1972 Act,
14 specifically lists the treaties to which effect is given
15 in section 1(2), and because primary legislation
16 therefore needs to be amended to add a new treaty to
17 that list, from the very beginning, Parliament had
18 control over whether any additional treaties could be
19 included in the scheme which it created through the
20 1972 Act.
21 What is salient about the 2008 and 2011 acts is that
22 Parliament then seeks to control not the addition of
23 treaties but the way in which the legislative mechanisms
24 which it has itself authorised, operate internally
25 within the European Union institutions; and through that

1 prism a picture immediately emerges which we say, with
2 respect to the appellant, is not just inconsistent but
3 irreconcilable with the appellant's overarching case.
4 The reason for that is this: that we see a picture
5 in the 2008 Act and the 2011 Act, of increasing control
6 where the legislative facility internal to the EU
7 institutions is increased. Therefore Parliament is
8 seeking to control that which might only otherwise have
9 happened by the addition of a new treaty by primary
10 legislation in section 1.
11 That analysis is quite important because if I can
12 use possibly slightly evocative phrases, the section 1
13 listing of the treaties, and I respectfully adopt my
14 learned friend Ms Mountfield's submission on this, the
15 words "time to time" that we find in section 2, refers
16 to time to time, the rights derive from the treaties
17 which Parliament has listed in the 1972 act. Section 1
18 operates as, if I may say so, the castle walls, so that
19 no new treaty may be admitted other than with the assent
20 of Parliament.
21 Then what the 2008 and 2011 acts are seeking to
22 control is the operation of, without any disrespect to
23 the EU institutions, what some people might view as the
24 Trojan horse provisions, which are quite different in
25 nature. They are provisions where internally treaty

1 changes and competences may be taken by the Community
2 effectively for itself. The procedures are varied, but
3 that is the essence of what those two acts were directed
4 to achieve.
5 My Lords, it is significant that the ordinary
6 revision procedure which is one of the procedures to
7 which those acts relate, specifically contemplates the
8 increase or reduction of competences which your
9 Lordships will find at page MS 222, core authorities at
10 the very front.
11 I think those provisions are actually in there
12 because of Article 50 being rather important in this
13 case, but we helpfully have Article 48 beginning at 221
14 and at the top of 222 --
15 LORD SUMPTION: Which statute are you referring to?
16 MR GREEN: I am so sorry, my Lord, this the treaty of the
17 European Union. It is the very first tab in core
18 authorities volume 1; at the very top it has the number
19 8 on it.
20 LORD SUMPTION: I see.
21 MR GREEN: At the top of page 222, the court will see there
22 the provision made by Article 48 for the ordinary
23 revision procedure, a procedure which is not just
24 increasing but also reducing the competences conferred
25 on the union in the treaties.

1 LORD SUMPTION: The ordinary revision procedure was not new
2 with Lisbon.
3 MR GREEN: My Lord, no.
4 LORD SUMPTION: That was the old tradition of
5 inter-governmental conferences and the new treaty. It
6 is the simplified revision procedure that is new.
7 MR GREEN: My Lord, yes and the point I am seeking to make
8 is not the novelty of the ordinary procedure, but the
9 increasing parliamentary control over participation in
10 the legislative processes of the Union in relation to
11 the use of these various procedures.
12 So that the underlying submission is simply this,
13 that not only do we respectfully say that the
14 constitutional architecture of the conferral of
15 legislative power that belongs to Parliament upon the EU
16 institutions, not only do we say that that conferral is
17 a very important facet to add to my Lord, Lord Kerr's
18 observation about the point being advanced by Lord
19 Pannick, that investing rights on individuals might be
20 an anterior point by which there could be said to be no
21 relevant prerogative; we say the conferral point puts
22 that almost even more strongly because it was only ever
23 Parliament's power to exercise, only ever Parliament's
24 power to confer and only ever Parliament's power to take
25 back.

1 But we then go further and say that the direction of
2 travel of the 2008 and 2011 acts, which insofar as they
3 regulate the legislative power of -- the exercise of the
4 legislative power conferred, those acts themselves are
5 swimming in a different direction to that contended for
6 by the appellant.
7 My Lords, my Lady, we also respectfully say, and
8 I adopt my learned friend Ms Mountfield's submission,
9 that there was a consistent understanding, insofar as
10 one can be discerned, from the courts that it would be
11 Parliament that would decide whether to leave the
12 European Union, as it has now become. In that respect
13 we rely on Blackburn which predates the 1972 Act,
14 because it is in 1971, all the way through to Shindler
15 which postdates the 2015 Referendum Act.
16 The court will already have identified the materials
17 to which my learned friends Lord Pannick and Mr Chambers
18 have already referred in terms of the green paper and
19 the command paper.
20 So there was a consistent understanding in the
21 background that it would be Parliament that would leave
22 the European Union. So as to my Lord, Lord Mance's
23 questions as to whether the 1972 Act was neutral or
24 perhaps agnostic as to the United Kingdom joining the
25 European Union, as it has now become -- the European

1 Community as it was then -- the answer, when viewed
2 through the prism of the conferral of legislative power
3 of Parliament, can only be: no, it was not neutral, at
4 all.
5 The conferral of the sovereign legislative power of
6 Parliament on the EU institutions speaks only to the Act
7 being consistent and only consistent with the
8 United Kingdom joining the European Community.
9 My Lords, as to the 2015 Act and its significance,
10 my Lady, Lady Hale has already identified, of course,
11 that the Referendum Act did have legal consequences in
12 that a referendum was held and the political
13 significance of that has already been identified. But
14 we would respectfully say that at the moment that
15 Parliament exercises the legislative choices which we
16 say properly belong to Parliament as to the consequence
17 of the referendum, Parliament might do that a number of
18 different ways. Parliament might mandate the Government
19 to trigger Article 50, or it might grant a power to the
20 Government to trigger Article 50.
21 If it were to grant a power, and I think this maybe
22 speaks to the analysis that my Lords, Lord Reed and Lord
23 Carnwath were canvassing, if it were to grant the
24 Government a power, there is no doubt whatsoever that
25 the referendum undertaken under the 2015 Act would be of

1 very considerable significance in the exercise of the
2 Government's power and the lawfulness of the exercise of
3 that power in deciding, if it did, to notify under
4 Article 50.
5 But that is a very different matter to the question
6 which is before this court, which is whether or not
7 there is a prerogative power for the Government to
8 notify under Article 50, and that is not the question
9 asked by the 2015 referendum, and it is not the question
10 upon which the people have spoken.
11 The question before this court is a legal question,
12 and we respectfully say that because of the nature of
13 the 1972 Act in doing everything that has already been
14 described in the field of rights, which are extremely
15 important, but also conferring legislative power on the
16 European Union institutions as it did, for those
17 reasons, the only answer to the question of whether
18 there was any relevant prerogative in 1972 can be that
19 there was none.
20 This point was squarely before the divisional court,
21 and the sheet of references refers to the relevant part
22 in core volume tab 8 where that point was taken.
23 We respectfully invite this court to understand the
24 divisional court's treatment of its general appraisal of
25 the normal rules that apply when the Government acts on

1 the international treaty plane, in the exercise of the
2 prerogative powers, as setting the background from which
3 it then clearly distinguished this case, for the reasons
4 that my learned friend and I have hopefully
5 satisfactorily identified as completely distinct.
6 My Lords --
7 LORD CLARKE: What was the role of the 2008 Act in all this?
8 MR GREEN: My Lord, the 2008 Act brought in, your Lordships
9 will see it in core volume 1 at tab 4, and your
10 Lordship, this goes to the Trojan horse point, if I can
11 put it in those terms, at page 119, at section 5,
12 "Amendment of founding treaties":
13 "A treaty which satisfies the following conditions
14 may not be ratified unless approved by act of
15 Parliament. Condition one is that the treaty amends ...
16 [it lists the treaties its] condition two is that the
17 treaty results from the application of article 48(2) to
18 (5) of the treaty on European Union."
19 LORD SUMPTION: The Trojan horse provision is section 6, not
20 section 5. Section 5 describes what had always happened
21 when a treaty was amended and replaced by a new one.
22 MR GREEN: My Lord, I was just coming to section 6. Your
23 Lordship is quite right, that the act or control of
24 participation in the process is found in section 6,
25 which refers specifically to the simplified revision

1 procedure at paragraph A and paragraph B, article 48(7)
2 of the treaty where the voting basis for the procedures
3 can be changed.
4 LORD MANCE: Why was section 5 necessary?
5 MR GREEN: Well, my Lords, I think the answer to that is to
6 put beyond doubt any situation in which a -- to be
7 simply consistent with the provisions in the 1972 Act
8 whereby the Parliament required any new treaty to be
9 approved by an Act of Parliament, and on that same
10 footing, carrying that through into the 2008 act, it
11 would equally require treaties where they amended those
12 treaties to be approved by an Act of Parliament, so
13 my Lord, Lord Sumption is right.
14 LORD SUMPTION: That would have been the effect, wouldn't
15 it, of the 1972 Act anyway, because unless the 1972 Act
16 was amended by legislation, the new treaty wouldn't be
17 one of the treaties for the purposes of the 1972 Act.
18 MR GREEN: My Lord, indeed that is right. So we
19 respectfully say that the -- it is effectively codifying
20 going forward in a picture of increasing control.
21 LORD CLARKE: But it sort of clarifies section 2.
22 MR GREEN: It effectively clarifies it for the amendment
23 purpose rather than the mere listing.
24 LORD SUMPTION: I assume what they were concerned about is
25 that if they only regulated the Trojan horse provisions

1 in section 6, somebody might submit that by implication
2 they had decided that treaties, new treaties didn't need
3 it.
4 MR GREEN: My Lord I think it appears to be an attempt to
5 codify both together for that reason.
6 LORD MANCE: Section 5 is dealing with the ordinary revision
7 procedure, because it refers in section 5(3) to article
8 48, subparagraphs (2) to (5); that was the ordinary
9 revision procedure.
10 MR GREEN: Indeed.
11 LORD MANCE: Was the ordinary revision procedure in the
12 previous treaties?
13 MR GREEN: My Lord, effectively it inherited -- it was
14 originally, I think, either the cooperation procedure or
15 the -- I think it was originally called the cooperation
16 procedure and that developed and became the ordinary
17 procedure.
18 LORD MANCE: I mean, the ordinary revision procedure may
19 have been seen as a further type of Trojan horse,
20 especially, I don't know if one compared the provisions
21 of the previous procedure with this; this might be of
22 a different nature or it may be that -- anyway, it would
23 be interesting to chase that back a little, just to see
24 why, but you can't do it now, probably.
25 MR GREEN: My Lord, no. If it would be helpful for us to do

1 a quick diagrammatic note --
2 LORD MANCE: It would be interesting to see why they
3 suddenly focused on this procedure if it simply
4 replicated the previous one.
5 MR GREEN: I think the answer may be the codification point
6 that Lord Sumption identified, which is if you purport
7 to start fine-tuning controls in one respect, you do not
8 want it to be said that you have implicitly permitted
9 other variations which are not so Trojan, rather more
10 fundamental.
11 LORD CARNWATH: Indeed, exactly what is being said in
12 relation to Article 50, you are codifying these things
13 but then (Inaudible) Article 50, therefore you don't
14 want to control that?
15 MR GREEN: Sorry, my Lord?
16 LORD CARNWATH: The argument you are putting is indeed the
17 argument that has been put in relation to Article 50,
18 because it is said, rightly or wrongly, that this Act
19 clearly indicated the things that they wanted to control
20 but they didn't indicate an intention to control
21 Article 50. Arguably it is much more fundamental.
22 MR GREEN: My Lord, yes, but if one starts from the position
23 that there has always been a prerogative to get rid of
24 domestic rights and to take back legislative competence
25 that Parliament has conferred on another institution, if

1 you start from that premise, which we respectfully say
2 is utterly unrealistic, then you do get to that point,
3 but we respectfully start from a different premise, that
4 there has never been such a prerogative power.
5 LORD CARNWATH: That has been what we have been talking
6 about for the last three days.
7 MR GREEN: My Lord, that is in a sense why I respectfully
8 focus on the 1972 Act and its significance, in terms of
9 constitutional structural change, what that Act
10 effected.
11 THE PRESIDENT: Yes.
12 MR GREEN: My Lords, there were many other things to say.
13 I simply mention in passing the final point on the 2011
14 Act which is section 18, which insofar as it assists,
15 suggests at least that the basis for the rights to
16 remain effective in domestic law was the 1972 Act
17 itself; and we respectfully say it is striking it
18 doesn't say: so long as the treaties shall remain in
19 force on the international plane; or wording to the
20 contrary.
21 So we respectfully say that there is an utterly
22 consistent picture from Blackburn through the
23 parliamentary materials that my learned friends have
24 identified, all the way through to Shindler, and with
25 section 18 appearing in 2011, that the premise of the

1 statutory scheme is that only Parliament may authorise
2 notification under Article 50.
3 My Lords, my Lady, unless I can help the court
4 further, those are our submissions.
5 THE PRESIDENT: Thank you very much, Mr Green. Thank you.
6 I get the impression, Advocate General, that you go
7 first, is that right?
8 Submissions in reply by THE ADVOCATE GENERAL FOR SCOTLAND
9 THE ADVOCATE GENERAL FOR SCOTLAND: Indeed, my Lady and
10 my Lords.
11 If I am short, it is not because I wish to appear in
12 any way dismissive of the submissions by my learned
13 friend the Lord Advocate, by my learned friend
14 Mr Gordon, and by my learned friends for the
15 Northern Ireland Bar, Mr Scoffield and Mr Lavery; it is
16 because I stand between you and my learned friend,
17 Mr Eadie.
18 My Lords, could I shortly address one or two issues
19 that have been raised with regard to the devolved
20 legislation. First of all, with regard to Northern
21 Ireland, the Government is fully and obviously firmly
22 committed to the Belfast agreement and the institutions
23 that are thereby established. We have sought to explain
24 in detail in our printed case why the trigger of
25 Article 50 and the United Kingdom's exit from the EU

1 will not undermine any of that. We have already
2 responded to the applicant's written arguments in that
3 regard.
4 My learned friend Mr Scoffield made quite a lot, as
5 anticipated, of the North South Ministerial Council and
6 implementation bodies, and in particular the special EU
7 programmes body. In order to respond to that, my
8 learned friends, Dr McGleenan and Paul McLaughlin of the
9 Northern Ireland Bar have prepared a short note as
10 I anticipated when I originally addressed the court, and
11 I wonder if your Lordships have a copy of that. I don't
12 propose at this stage to take your Lordships through it
13 in detail.
14 THE PRESIDENT: Right.
15 THE ADVOCATE GENERAL FOR SCOTLAND: It is perhaps sufficient
16 for me to say that clearly these bodies and in
17 particular the special EU programmes body do not rely
18 directly upon the terms of the Northern Ireland Act 1998
19 and indeed that particular body continued in existence
20 after 2006 because of the coming into existence of
21 an international agreement of 25 July 2016 between the
22 British and Irish governments.
23 THE PRESIDENT: Yes.
24 THE ADVOCATE GENERAL FOR SCOTLAND: So I commend the note to
25 your Lordships but as I say, I would not propose to go

1 through it in any detail.
2 THE PRESIDENT: We will read it, as we will all the written
3 material that has been handed up to us. Thank you.
4 THE ADVOCATE GENERAL FOR SCOTLAND: One further point to
5 observe in this context is that, and this applies to all
6 of the devolved legislation, it assumes but does not
7 require membership of the European Union.
8 Can I turn briefly to some of the points made by my
9 learned friend Mr Gordon on behalf of the Counsel
10 General for Wales and I would make two short points. If
11 we are correct about the 1972 Act, then it doesn't
12 appear in my submission necessary for us to go to the
13 devolved legislation; if we are wrong about the
14 1972 Act, then it doesn't appear to me to be necessary
15 for us to go to the devolved legislation.
16 On one further point, my Lords, my learned friend --
17 LORD CLARKE: That would be because you have either lost or
18 won, all down the line.
19 THE ADVOCATE GENERAL FOR SCOTLAND: Indeed so, and it is
20 reflected in the terms in which the devolved legislation
21 addresses the matter of EU competences.
22 LORD HODGE: In short you say there is one trench, and if
23 that trench is stormed, there is not a second trench.
24 THE PRESIDENT: On either side.
25 THE ADVOCATE GENERAL FOR SCOTLAND: Absolutely.

1 LORD REED: There is a point that would then arise that the
2 Lord Advocate raised, in relation to the Sewel
3 convention.
4 THE ADVOCATE GENERAL FOR SCOTLAND: That is what I am going
5 to come on to, my Lord.
6 LORD REED: And indeed his opposite numbers in Wales and
7 Northern Ireland.
8 THE ADVOCATE GENERAL FOR SCOTLAND: That is where I am
9 going. There is one point I was going to make before
10 I come to on the Sewel convention, because that is what
11 I believe I should address at this stage, and that is my
12 learned friend Mr Gordon's suggestion that somehow it
13 was improper for the prerogative to be employed in
14 circumstances where it would elide the application of
15 the Sewel convention with regard to legislation that
16 impacted upon the devolved institutions and the devolved
17 areas of the United Kingdom.
18 My Lords, in my respectful submission, that
19 proposition doesn't stand up to very much in the way of
20 scrutiny. Whenever we agree to the making of a further
21 regulation with direct effect, under European law, we do
22 so in exercise of the prerogative and that regulation
23 takes direct effect in all of the devolved areas of the
24 United Kingdom, as well as in England.
25 Furthermore, I would just notice that, for example,

1 in regard to the Scotland Act, section 57 expressly
2 provides that in the matter of making regulations under
3 section 2(2) of the European Communities Act 1972, that
4 function is to be available to the ministers of the
5 Crown in relation to any matter, and shall continue to
6 be exercisable by them as regards Scotland for those
7 purposes.
8 So there are a number of instances in which either
9 by exercise of the prerogative or the exercise of the
10 power under section 2(2) of the 1972 Act, that changes
11 can be made in the competence of the devolved
12 legislatures, and changes can be made in the law, the
13 rights and the obligations arising in those devolved
14 areas.
15 Can I turn then to the Sewel convention and the
16 first point that I would seek to make --
17 LORD SUMPTION: Which sections of the Scotland Act were you
18 referring to?
19 THE ADVOCATE GENERAL FOR SCOTLAND: Section 57, my Lord.
20 LORD SUMPTION: Thank you.
21 LORD MANCE: So any matters including devolved matters?
22 THE ADVOCATE GENERAL FOR SCOTLAND: Exactly.
23 LORD SUMPTION: Presumably there is no other basis on which
24 you could do it, since regardless of the outcome of any
25 consultation or co-legislative procedure, you would

1 still have to give effect to EU law? But does that
2 apply if you are withdrawing in the same way?
3 THE ADVOCATE GENERAL FOR SCOTLAND: In my respectful
4 submission, it would apply in the same way, but that
5 goes back to an analysis of the 1972 Act which we have
6 already heard about. I don't want to intrude on the
7 territory of my learned friend Mr Eadie. I am quite
8 happy to do so but ...
9 LORD MANCE: This is dealt with in practice by consultation,
10 isn't it; the devolved administrations are asked to make
11 representations on the subject --
12 THE ADVOCATE GENERAL FOR SCOTLAND: It is interesting that
13 my Lord should put it in that way, because obviously --
14 my learned friend Mr Gordon mentioned it, there is
15 dialogue between the various administrations, not
16 a convention. This is where I come to an important
17 point about the way in which my learned friend the Lord
18 Advocate seeks to present his case, because he tries to
19 draw together not just issues that might touch upon
20 a convention, but to incorporate within that simple
21 matters of dialogue or practice that have gone on for
22 a number of years with regard to relations between
23 Westminster and the devolved administrations.
24 It comes up because of the way in which matters are
25 expressed, in particular in the Lord Advocate's written

1 case. In our printed case, and in the printed case for
2 the Attorney General for Northern Ireland and in the
3 printed case of the Counsel General for Wales, reference
4 is made to the Sewel convention. We can understand what
5 the content of the Sewel convention is. It finds its
6 origins in the statement by Lord Sewel during the
7 passage of the Scotland Act 1998; the same wording
8 appears in the Smith Commission report and the same
9 wording is then to appear and does appear in section
10 28(8) of the Scotland Act as amended by section 2 of the
11 Scotland Act 2016.
12 However, my learned friend the Lord Advocate refers
13 to what he terms the legislative consent convention, and
14 in my respectful submission, there is no such thing.
15 Now, this is not a point of pedantry. What my learned
16 friend the Lord Advocate seeks to do is to subsume
17 within his legislative consent convention those matters
18 that are dealt with, for example, by the memorandum of
19 understanding between the governments, and those matters
20 that are dealt with in the devolved guidance notes,
21 prepared by officials for the relationship and control
22 of the relationship between Westminster and the devolved
23 administrations. So in respect of Scotland it is DGN
24 10, in respect of Wales it is DGN 17, in respect of
25 Northern Ireland it is DGN 8.

1 Now, I would just notice, and this is in the papers,
2 that during the passage of the Scotland Bill 2016,
3 various attempts were made to amend clause 2 in order to
4 incorporate within what was then the Sewel convention as
5 properly understood, references in addition to the
6 contents of DGN 10, DGN 8, DGN 17 in order to expand the
7 convention that was then going to be expressed in
8 statutory forms.
9 None of those amendments proceeded, and one of the
10 points made in response to these attempts at amendment
11 was that the practice that was followed between
12 officials of the respective administrations was
13 something that could change from time to time and should
14 not be set in any form of statute. Whereas the
15 convention itself could be and was to be.
16 There was a further aspect to that, which was that
17 so far as these considerations were concerned, the
18 standing orders which dealt with what are termed
19 legislative consent memoranda and legislative consent
20 motions were the standing orders of the devolved
21 administrations. They had nothing to do with Parliament
22 at Westminster.
23 These were mechanisms that the devolved
24 administrations had developed in order to deal with the
25 application and operation of relationships between the

1 devolved administrations and Westminster.

2 And yet, and I invite you to go back to the Lord
3 Advocate's case, because at one point he suggests that
4 his legislative consent convention is the Sewel
5 convention, but I invite you to go back to his written
6 case, where it becomes increasingly apparent that he has
7 brought into that new convention, if I can call it that,
8 a great deal of procedural detail and practice that is
9 actually contained within the DGN, the devolved guidance
10 notes.

11 Indeed, in response to a question yesterday from
12 my Lord, Lord Reed, when asked about the language of
13 section 28(8) of the Scotland Act 2016, my learned
14 friend the Lord Advocate answered, and I quote:

15 "... it points back to language which appears in the
16 memorandum of understanding and which has been
17 articulated in practice."

18 With respect, it does not. It refers directly back
19 to the statement made by Lord Sewel which was repeated
20 in the Smith Commission report and incorporated in
21 section 28(8) of the Scotland Act.

22 Once we understand that, we can put in context what
23 is actually meant by the convention and its operation.
24 With regard to the position of Wales and Northern
25 Ireland, of course there is no statutory expression of

1 the Sewel convention, although I notice that my learned
2 friend the Lord Advocate said this morning that even
3 without section 28(8), his position would remain the
4 same.
5 I would observe, and reference was made to this in
6 our written case, that if one wants guidance, as regards
7 such a convention, one can look perhaps no further than
8 the Privy Council case of Madzimbamuto that I referred
9 to in my opening submissions to the court, and in
10 particular the observations of Lord Reed with regard to
11 the relevance and application of such a convention.
12 Now, I accept that in one sense section 28(8) of the
13 Scotland Act does alter the position of Scotland but
14 not, I would suggest, very much. My learned friend the
15 Lord Advocate says there must be some legal content to
16 the convention, although it is not clear how this could
17 play a legal role. I would respectfully observe that,
18 when my Lord, Lord Hodge raised the point about section
19 28(8) and its incorporation into statute, he observed
20 that it may have been there to preserve what had been
21 a convention, so that if it was to be intruded upon, it
22 would have to be intruded upon by primary legislation.
23 In other words it was to be seen as fixed.
24 That is why it was restricted to the very particular
25 terms of the Sewel convention itself and not extended to

1 embrace practice, practice notes, or dialogue between
2 the respective administrations. Indeed, there are
3 precedents for that. The Ponsonby convention, for
4 example, was finally, after many, many years,
5 incorporated in statutory form, I would infer in order
6 that it could be seen to be fixed and only intruded upon
7 by primary legislation on the part of Parliament.
8 Just because it is incorporated in statutory terms
9 and in order to be preserved in present features does
10 not mean the convention is justiciable, and I would
11 emphasise a number of points which underline this.
12 First of all, the language of section 28(8) itself,
13 the Sewel convention, is the language of political
14 judgment. I don't seek to expand upon that at this
15 time, and I did make submissions on this point before.
16 Section 28(7) --
17 LORD KERR: It is not so much political judgment as
18 political undertaking, is it not?
19 THE ADVOCATE GENERAL FOR SCOTLAND: Judgment, my Lord, in my
20 respectful submission; remember, this is a matter for
21 Parliament and Parliament's judgment, in my submission.
22 LORD KERR: Does it not convey an undertaking?
23 THE ADVOCATE GENERAL FOR SCOTLAND: Not on the face of it,
24 my Lord. It is, as I expressed it before,
25 a self-denying ordinance expressed by a sovereign

1 Parliament, albeit in qualified terms.
2 LORD KERR: That is interesting. So it is not giving any
3 undertaking at all as to how Parliament will address the
4 question of whether it should legislate?
5 THE ADVOCATE GENERAL FOR SCOTLAND: I would simply express
6 it as a self-denying ordinance expressed in qualified
7 terms, my Lord.
8 LORD KERR: Could I ask you also, you say it doesn't reflect
9 the memorandum of understanding; if that is right, what
10 is the significance of it not reflecting the memorandum
11 of understanding?
12 THE ADVOCATE GENERAL FOR SCOTLAND: Merely this, my Lord.
13 The memorandum of understanding, like the DGNs 8, 10 and
14 17, fix the practice that is going to be followed by the
15 respect governments in order to maintain dialogue, in
16 order to maintain communication, and in order to
17 maintain coherence in circumstances where there are two
18 sources of legislation for particular parts of the
19 United Kingdom. But more particularly, and more
20 narrowly, the Sewel convention is an expression of what
21 Parliament will do. It is an expression of its
22 self-denying ordinance.
23 One has to bear in mind it follows section 28(7),
24 which reiterates the absolute sovereignty of the
25 Westminster Parliament. It is then followed by the

1 words "but it is recognised", and I simply pose
2 rhetorically the question, recognised by whom? It is
3 recognised by the sovereign Parliament.
4 That is not consistent with a justiciable matter.
5 But perhaps there is a more significant point to
6 make, and it was one brought out by my Lord, Lord Mance,
7 which is there is on the face of it no possible remedy
8 if the sovereign Parliament does not adhere to the Sewel
9 convention, and it might appear to be an unduly narrow
10 and civilian approach to matters, but if there a right
11 there is a remedy. If there is no remedy, is there
12 a right?
13 In my respectful submission, even as you begin to
14 pursue the idea of a remedy, you come up against Article
15 9 of the Bill of Rights and against the Claim of Right,
16 and one cannot go past that, it is perfectly clear. So
17 in light of this, while Article 50 may refer to
18 constitutional requirements, it is quite impossible to
19 see how the Sewel convention can constitute one of those
20 constitutional requirements.
21 At one point my learned friend the Lord Advocate
22 said: well, I will take any proposed bill in its
23 narrowest terms, and I will then test matters by
24 reference to that.
25 Well, let us suppose that there is a bill to

1 authorise the giving of notice under Article 50 to the
2 EU. That is not on any view a bill with regard to
3 devolved matters. So applying the Lord Advocate's own
4 test, it is really quite impossible to see how the Sewel
5 convention can be elevated into a constitutional
6 requirement for the purposes of Article 50.
7 LORD HODGE: Can I clarify one matter, please,
8 Advocate General. In section 28(8), after the
9 introductory words, "it is recognised that", everything
10 that is then said is almost verbatim the words used by
11 Lord Sewel. Is it the Government's position, the UK
12 Government's position, that all of those words,
13 including the words "with regard to devolved matters"
14 are non-justiciable; is that your position?
15 THE ADVOCATE GENERAL FOR SCOTLAND: Yes.
16 LORD HODGE: It is, thank you.
17 LORD CARNWATH: The assumption presumably in a case where
18 Westminster does legislate for a devolved matter is that
19 it is legislating for a matter which would be within the
20 competence of the devolved legislature. On no view, it
21 seemed to me, at the moment, could withdrawal from the
22 EU, however many effects it has on other devolved
23 matters, itself constitute a devolved matter in respect
24 of which there is a parallel right to legislate in both
25 legislatures.

1 THE ADVOCATE GENERAL FOR SCOTLAND: Indeed so, my Lord.
2 Indeed.
3 Relations with the EU are, of course, expressly
4 reserved from the Scottish Parliament.
5 LORD SUMPTION: That seems to me to be the main difficulty
6 about the notion that because withdrawal has knock-on
7 effects on other matters that are devolved, it must
8 be -- entitled to special treatment.
9 THE ADVOCATE GENERAL FOR SCOTLAND: I concur on that,
10 my Lord, and it applies in respect of Northern Ireland,
11 albeit the structure is in respect of the excepted
12 matters, the result is the same and it also applies, it
13 would apply in respect of the Government of Wales Act as
14 well. So one arrives at the same conclusion, that this
15 is not a matter for the devolved administrations in that
16 context. I am not seeking to equiparate the wording in
17 section 28(8) with the wording of section 29, and the
18 question of what it relates to.
19 In my respectful submission the wording is quite
20 distinct because of the origins of the Sewel convention
21 dictating the terms of section 28(8) of the
22 Scotland Act.
23 It underlines that what was introduced was a matter
24 of political judgment and no more than that.
25 LORD MANCE: You have really got to read (8) with (7),

1 haven't you.

2 THE ADVOCATE GENERAL FOR SCOTLAND: Absolutely, my Lord.

3 LORD MANCE: When you look at (7), any argument that (8) is

4 legally enforceable amounts to saying that (7) doesn't

5 mean what it says.

6 THE ADVOCATE GENERAL FOR SCOTLAND: There is then a question

7 as to whether your Lordships are even required to

8 answer --

9 THE PRESIDENT: It could be that (8) is carved out of (7),

10 couldn't it? One reading.

11 LADY HALE: But could read "excepted".

12 THE PRESIDENT: But except -- exactly.

13 THE ADVOCATE GENERAL FOR SCOTLAND: My Lord, if one reads

14 them together, with respect, it is quite apparent, as

15 I indicated before, we are dealing with the absolute

16 sovereignty of the Westminster Parliament --

17 THE PRESIDENT: -- also Article 9 of the Bill of Rights and

18 the equivalent.

19 THE ADVOCATE GENERAL FOR SCOTLAND: And the expression of

20 a self-denying ordinance that keeps us well away from

21 Article 9 of the Bill of Rights.

22 THE PRESIDENT: It is somewhat uncomfortable to find it in

23 a statute at all if you are right.

24 THE ADVOCATE GENERAL FOR SCOTLAND: There are occasions

25 where one finds expressed in a statute something that is

1 not justiciable but is declaratory essentially.
2 THE PRESIDENT: Yes, slightly odd use of a statute.
3 THE ADVOCATE GENERAL FOR SCOTLAND: It is, my Lord, but then
4 it is worthwhile just pausing to notice the origins of
5 section 28(8). The Smith Commission was a political
6 commission between all the political parties in
7 Scotland. Lord Smith produced a report and the
8 Government undertook to implement the recommendations in
9 the report in the Scotland Bill 2016, and it did so
10 virtually line by line. So it was the expression of
11 a political agreement within statutory form, and that is
12 why I would respectfully suggest it is rather unusual in
13 that context.
14 Your Lordships actually have various extracts from
15 Hansard concerning the debates on clause 2. I am not
16 going to go to them, I still have memories of them, but
17 it was perfectly apparent why clause 2 was going to be
18 incorporated.
19 THE PRESIDENT: We have the point.
20 LORD MANCE: Is the key one the one which is actually set
21 out in the footnote in Halsbury, Lord Dunlop,
22 parliamentary under-secretary of state, saying that it
23 is not justiciable and so on, yes.
24 THE ADVOCATE GENERAL FOR SCOTLAND: It was said on a number
25 of occasions, my Lord.

1 LORD REED: If I remember correctly, the Government in fact
2 undertook to implement the recommendations before the
3 recommendations had been made, with the consequence that
4 it was committed to implementing even a purely political
5 recommendation if such a recommendation were made.
6 THE ADVOCATE GENERAL FOR SCOTLAND: Absolutely, and one of
7 the points made during the course of the Scotland Bill
8 2016 was that we were attempting to put into statutory
9 form material that had not been prepared by lawyers, but
10 politicians. That posed a challenge, not only in
11 respect of clause 2, but in respect of certain other
12 aspects of the 2016 bill.
13 My Lords --
14 THE PRESIDENT: I think we should move on, it is my fault,
15 I started it.
16 THE ADVOCATE GENERAL FOR SCOTLAND: Indeed and I am
17 conscious of time, so I am just going to sum up in this
18 way, my Lords, that it is not necessary in my submission
19 for the courts to answer the second devolution issue
20 that has been brought from Northern Ireland. In my
21 respectful submission the court may be entitled to hold
22 that what the Lord Advocate describes as the legislative
23 consent convention is not a constitutional requirement
24 in terms of Article 50.
25 Unless I can assist the court further, I would rest

1 my submissions there. I am obliged, my Lords.
2 THE PRESIDENT: Thank you, Advocate General, thank you.
3 Mr Eadie.
4 Submissions in reply by MR EADIE
5 MR EADIE: My Lords, my Lady, really the final lap this
6 time. You have had what I am sure we all hope are
7 useful submissions from all the parties in these
8 appeals, including, it might be thought, particularly
9 useful submissions from Mr Gordon this morning on child
10 rearing, distinguished, it might be thought, by their
11 overstatement of parental power, but I will be short as
12 I possibly can.
13 Can I start with the basic case, and it is as well,
14 we submit, to be clear about the nature of the issue and
15 what it is that our case does and does not assert or
16 entail.
17 We do not assert, and our case does not entail,
18 a power to repeal or amend or in any other way to alter
19 the Dangerous Dogs Act. By the Dangerous Dogs Act,
20 I mean any act equivalent to the Dangerous Dogs Act. We
21 do not assert a general power to alter the law of the
22 land or to alter common law rights by exercise of the
23 prerogative.
24 We do assert a specific power to notify under
25 Article 50(2), and so to start the process of

1 withdrawal, notwithstanding that that will result in
2 changes to domestic law, which was introduced to
3 implement those treaties.
4 It is plain, we submit, that Parliament can
5 intervene -- I use the word "intervene" deliberately
6 because that was the word used in the JH Rayner case by
7 Lord Oliver -- in a particular context to set up
8 domestic law, and to cater for its alteration as it sees
9 fit, and no one denies its authority, its sovereignty,
10 if you will, to do that.
11 It can do that by express provision, of course. Its
12 legislation and the techniques it uses, are, it is
13 trite, to be considered in their proper constitutional
14 context, including, we submit, a clear understanding
15 that under our constitution, there are other sources of
16 power. Other organs of the state that share the
17 responsibility of Government. That is why it is often
18 highly significant to consider what powers Parliament in
19 its legislation has left in place under that regime,
20 under that constitution.
21 What that introductory section leads to and what it
22 indicates, we submit, is that the true question in this
23 case is as to the nature of the parliamentary
24 intervention that there has in fact been in this case.
25 By this case, I mean our own very particular and very

1 special legislative context.

2 What does that parliamentary scheme, properly viewed

3 and considered, tell the court about the single issue at

4 the heart of this appeal? Namely, has Parliament

5 decided that prerogative power cannot be used to give

6 Article 50 notice, or has Parliament decided that it can

7 be used to give Article 50 notice?

8 LORD SUMPTION: Or has Parliament decided neither of those

9 things, but left it to the ordinary law governing the

10 exercise of the royal prerogative.

11 MR EADIE: My Lord, that is why I started precisely where

12 I did, because in my submission, once you recognise that

13 there are different sources of power and that Parliament

14 can intervene in that way, and we are not making the

15 submission that has been attributed to us, that is

16 precisely why I set up the question in the manner that

17 I did, making it in effect a question about what

18 Parliament has decided to do.

19 Now, if Parliament has decided, and I am going to

20 take you back to some of the legislation, to set up

21 an intricate regime in a variety of different ways, it

22 might be thought to be tolerably surprising if the

23 answer to this appeal is the one that my Lord poses,

24 which is in effect the a priori point that has been

25 taken against me again this morning, in the light of the

1 interventions that my Lord has made in the course of
2 this appeal.
3 LORD KERR: But my Lord's point to you surely is that
4 underpinning your argument is that Parliament must have
5 decided one way or the other.
6 MR EADIE: My Lord, Parliament does not have to decide. The
7 question for the court is whether it has in fact done
8 so, having regard to the nature of the legislative
9 regime which is in place in the particular context.
10 LORD KERR: What if it has not decided? What then?
11 MR EADIE: My Lord, if it has not decided, then you are
12 thrown back on to the nature of the prerogative power,
13 of course.
14 LORD SUMPTION: Do you accept that if Parliament has not
15 decided one way or the other what the answer to that
16 question is, then having regard to the way you
17 introduced your submissions, you lose?
18 MR EADIE: My Lord, if Parliament has not intervened in any
19 way --
20 LORD SUMPTION: If Parliament has not decided implicitly or
21 expressly whether an Article 50 notice can be given by
22 ministerial authority, one way or the other, do you
23 accept that that means you lose?
24 MR EADIE: If you ignore all the EU legislation, if you
25 ignore CRAG, if you ignore all the rest of the

1 legislative regime, we do not assert a power to amend
2 the Dangerous Dogs Act.
3 LORD SUMPTION: By the Dangerous Dogs Act, I take it you
4 mean the European Communities Act.
5 MR EADIE: No -- because that drags back in the very
6 legislation that your question sought to exclude.
7 THE PRESIDENT: I think what is being put to you, which you
8 may say is a non-question, is if, when we look at the
9 Act, we come to the conclusion that Parliament has not
10 decided to exclude the royal prerogative or has decided
11 to let it continue or apply, we cannot decide which, or
12 Parliament has not gone either way, then what? Or do
13 you say we have to interpret the Act one way or the
14 other?
15 MR EADIE: My Lord, I do.
16 THE PRESIDENT: You say it is a non-question.
17 MR EADIE: Yes, that is the legislation that governs.
18 LORD MANCE: We are looking for hypothetical intention
19 effectively, aren't we.
20 MR EADIE: You are.
21 LORD MANCE: I just want to ask one point, because I came
22 across actually a textbook on European law written by
23 the current President of the court and I notice actually
24 in relation to the treaties before the treaty of Lisbon
25 that he asserts, bluntly, that under European law there

1 was no right of withdrawal before Article 50 was
2 introduced.
3 Now, of course, from our parliamentary, in our
4 parliamentary system, we would say that you can always
5 repeal the 1972 Act, but it just puts a slightly
6 different complexion, if that was the attitude, on the
7 position, the background to the 1972 Act, if it was
8 recognised at that stage that -- I don't know whether it
9 was, or whether --
10 MR EADIE: I think my answer to that is that that would open
11 up an area which was controversial before the divisional
12 court, which I don't much want to get back into --
13 LORD MANCE: On what basis is it common ground here that
14 there could be withdrawal?
15 MR EADIE: The divisional court put it ultimately -- we put
16 in a note on the Vienna convention on the law of
17 treaties and how that might work and whether we could
18 leave unilaterally. I think the way they left it was
19 rather compromised by saying -- I put it wrongly. The
20 way they left it in their judgment, I think, was
21 a compromise solution, as it were, which was to
22 acknowledge that we could have left at the very least by
23 consent, and then have moved on, and therefore
24 withdrawal was in the minds of those --
25 LORD MANCE: It is a bit difficult to say withdrawal was in

1 the minds -- if it could only be done by consent at that
2 stage, I would have thought it was the last thing that
3 was in your mind when you were getting married.
4 THE PRESIDENT: Speak for yourself.
5 MR EADIE: I am not going anywhere near that one.
6 I sincerely hope Mrs Eadie is not watching.
7 My Lord, I think that is the way the divisional
8 court left it. It is a controversial issue, no doubt,
9 as to whether or not withdrawal could have happened in
10 another way.
11 LORD MANCE: In fact, Professor Lenaerts, or President
12 Lenaerts, does consider the Vienna convention and he
13 discounts it. He says it wouldn't -- but anyway I've
14 got your position, you say at least by consent.
15 MR EADIE: At least by consent. If there needed to be a
16 submission, our submission on the Vienna convention was
17 that we could have done it unilaterally, and indeed
18 Parliament was certainly contemplating it, it might be
19 thought. That they were is illustrated by the fact that
20 three years later, they were worrying about a referendum
21 to come out.
22 LORD MANCE: That is presumably under a different change of
23 government.
24 MR EADIE: It may be under a different change of
25 government --

1 THE PRESIDENT: Anyway, it proceeded before the divisional
2 court, and nobody is challenging it here, that the
3 United Kingdom could have got out, albeit by agreement
4 with the then other members of the Community.
5 MR EADIE: That was the way the divisional court left it,
6 and the controversial issue is could we have done it
7 another way.
8 THE PRESIDENT: Then you come back, in answer to Lord
9 Sumption's point, you have to take the Act as you find
10 it and come to a conclusion one way or the other.
11 MR EADIE: Exactly so, and you take the scheme of
12 legislation. It is going to be very important how you
13 approach the scheme of legislation, and I am going to
14 come to that, but for the moment, and just on the basic
15 approach, our submission is that Parliament can control
16 Government's prerogative powers, it can decide what
17 domestic legal effects should be attached to the
18 exercise of those powers. Those two things are
19 different and distinct.
20 In relation to the latter, in other words what legal
21 effects should be attached to the exercise of the
22 powers, and that that is for Parliament, it is evident,
23 we submit, and no one has really quibbled with this,
24 that parliamentary intervention, Lord Oliver's word
25 again, can create the situation in which serious

1 domestic legal impacts, to put it neutrally, flow from
2 Government acts on the international plane; and that
3 those serious impacts, flowing back into domestic law as
4 a result of Government action on the
5 international plane, do not need, they never have,
6 parliamentary intervention again, prior to them doing
7 that.
8 So one can take examples which you are well familiar
9 with now, you can take the Post Office v Estuary Radio
10 case, the territorial waters was left by Parliament if
11 you want to analyse it that way, in the hands of the
12 Government. When those are extended, without prior
13 parliamentary intervention, the nature and the scope of
14 the criminal offence to which that Act gave rise, so
15 a pretty extreme example, expanded.
16 You can take the Lord Haw-Haw example that
17 Lord Millett gave in his article, and Lord Wilson put to
18 me when I was opening the appeal, that isn't that
19 different because the prosecution in that case was under
20 the Treason Act.
21 True, of course, that is exactly the way the
22 prosecution would have happened, but if Lord Haw-Haw had
23 been broadcasting in 1938 a series of broadcasts that
24 were adulatory of Adolf Hitler, he would have committed
25 no treason and no criminal offence.

1 The reason his offence was committed was because in
2 1939 Her Majesty's Government had declared war on
3 Germany, a state of war. You may say that that is
4 an international fact, that was the point that was put
5 to me by Lord Sumption, but we respectfully submit that
6 that is a difference and not a distinction, so far as
7 this is concerned, this aspect of the matter is
8 concerned. In the Haw-Haw case, in the Post Office v
9 Estuary Radio case, of course it created a different
10 state of legal facts on the international plane, if you
11 will, but those different international legal facts only
12 were created and only arose because of the exercise of
13 Government prerogative power on the international plane.
14 LORD WILSON: I think what is said is that the prerogative
15 can certainly bring individuals into or out of laws that
16 have been made, and that is said to be quite different
17 from this proposed situation.
18 MR EADIE: My respectful submission is it is not so very
19 different.
20 LORD REED: I wonder, I mean the real point being made,
21 I think, is this, that it is very simple. There is
22 a common law rule that the Crown cannot, under the
23 prerogative, alter the law of the land. EU law is the
24 law of the land; therefore the prerogative cannot be
25 used to alter the effect of EU law in the

1 United Kingdom. That is the synergism.

2 As I understand it, your analogy with the

3 Dangerous Dogs Act is designed to illustrate that EU law

4 is not the law of the land in the same sense as the

5 Dangerous Dogs Act is. You cannot under the prerogative

6 alter the Dangerous Dogs Act; you can, you say, alter EU

7 law precisely because it is not part of the law of the

8 land in that sense.

9 MR EADIE: Precisely because it is not the law of the land

10 in that sense; that is in truth coming close to the

11 Finniss/Millett analysis, if I can put it that way

12 without disrespect in adding titles, but also to

13 illustrate a basic truth, which is that Parliament has

14 intervened. And so you have the mechanism set up in the

15 1972 Act, you have the various forms of legislative

16 control, so it goes to both of those things.

17 The reason that I introduced the Dangerous Dogs Act

18 and my learned friend Lord Pannick introduced the

19 Dangerous Dogs Act into the debate was to draw the

20 distinction between parliamentary intervention, as it

21 were, which creates a situation under which

22 international acts by Government in the exercise of

23 prerogative powers flow back into domestic law, and the

24 Dangerous Dogs Act which has nothing of that form of

25 parliamentary intervention about it.

1 LORD REED: But if, for example, there were an EU regulation
2 called the dangerous dogs regulation, you would say that
3 could be deprived of effect in the UK by exercising the
4 prerogative, because it is not part of UK law, it is --
5 what is part of UK law, as I understand your argument,
6 is the 1972 Act, and that gives effect to the EU law
7 within the UK.
8 MR EADIE: My Lord, exactly so, exactly so. That is the
9 nature of the argument, for good or ill. That is the
10 nature of it.
11 LORD SUMPTION: Whereas the position would be different if
12 it was the dangerous dogs directive.
13 MR EADIE: It would. It would. It would be different if it
14 was a purely domestic Dangerous Dogs Act, so I should
15 have clarified that by Act, I meant domestic legislation
16 rather than Act on the EU level; if it is dangerous dogs
17 regulation it flows back in through 2(1) and it becomes
18 directly effective. My Lord, Lord Sumption is of course
19 right, if it is the dangerous dogs directive, it
20 requires free-standing secondary legislation no doubt
21 enacted using section 2(2) of the 1972 Act.
22 But those are fundamental constitutional
23 distinctions, and what they illustrate is that there is
24 a different species and form of parliamentary
25 intervention in each of those situations. What that

1 also illustrates, we respectfully submit, is the basic
2 proposition that all depends on the nature of the
3 parliamentary intervention that there has been. If one
4 wants to break that down a little more in our foreign
5 affairs context, in the sphere of foreign affairs, that
6 requires consideration of two separate things, to do
7 with the nature of parliamentary intervention.
8 (a), has Parliament intervened to control the
9 exercise of the prerogative power itself, on the
10 international plane, and (b) what is the nature of the
11 parliamentary intervention in relation to the effects
12 that the exercise of prerogative power on the
13 international plane might have, in domestic law.
14 LORD MANCE: Can I just go back, behind regulations and
15 directives, because that is the result of the European
16 law, but the basic point which was surely decided by the
17 1972 Act was that Parliament was prepared to entrust
18 legislation to a different order of institution, and
19 that required a parliamentary choice, didn't it? It is
20 slightly odd, isn't it, to think that that could be
21 undone by an executive decision; Parliament has
22 introduced a new source of law-making.
23 MR EADIE: My Lord, that is, as it were, a question that can
24 only be answered by properly looking at both of the
25 aspects that I have just identified and tracing it

1 through the legislative scheme as a whole. I mean, you
2 know my basic submission on the 1972 act not to jump too
3 far ahead, but you know the basic submission that I make
4 about that, which was it was all to do with
5 transposition. It didn't give us, as it were,
6 permission to ratify, it didn't seek to control the
7 exercise --
8 LORD MANCE: It was a radical thing for Parliament to do to
9 effectively -- you can use the word delegate or assign
10 or confer -- legislative authority on different bodies,
11 it was a submission we heard earlier today and it is --
12 it required a parliamentary choice, it required
13 a parliamentary decision; and it is a point I am
14 putting, that it is a bit odd to think that that could
15 be undone by an executive decision?
16 MR EADIE: My respectful submission in answer to that, and
17 I will come to the scheme of the 1972 Act in due course,
18 but my respectful submission in answer to that is that
19 that depends on what the 1972 Act was doing --
20 LORD MANCE: You say it is all embraced within your
21 submissions about the 1972 Act being a simple conduit
22 which can be cut off.
23 MR EADIE: A simple conduit and not controlling the exercise
24 of prerogative power on the international plane, and so
25 not surprising in that way that it left that other side

1 of things to Government. But to come directly to the
2 point my learned friend Mr Green was making, which
3 I think was the one my Lord was putting to me, which you
4 heard today about it conferring legislative authority on
5 other international institutions, with the greatest of
6 respect, that is not on any view what the 1972 Act could
7 possibly have been doing. Parliament has never
8 purported to legislate, to confer legislative competence
9 in that sense on other sovereign states or other
10 institutions.
11 What it does is to set up a scheme in the 1972 Act
12 under which actions by the United Kingdom Government and
13 other sovereign states on the international plane may
14 create effects flowing back into domestic law. It is
15 not purporting to authorise in a legislative sense
16 another sovereign state to act in any way, shape or
17 form, still less an international institution such as
18 the EU. It is dealing with the consequences of the
19 exercise of power by the UK Government, and that is the
20 limit of its competence legislatively, by the UK
21 Government on the international plane.
22 Now the fact that that involves them liaising with,
23 dealing with, negotiating with, making agreements with,
24 cooperating in a legislative process within the EU, is
25 neither here nor there. It doesn't alter the basic

1 characterisation.
2 LORD REED: Are you saying then that the relevant source of
3 law remains statute? Namely the 1972 Act.
4 MR EADIE: In relation to the effects in domestic law, yes.
5 LORD REED: And that is confirmed by section 18 of the 2011
6 Act?
7 MR EADIE: Exactly so.
8 LORD CARNWATH: That is why I thought -- no one else seems
9 to be interested in Youssef, but that case is a very
10 good example, the proceedings of the UN committee,
11 which -- there is no question of us authorising the UN
12 committee to do anything, it is just that once it has
13 effect, it then comes into UK law via --
14 MR EADIE: Via EU law and the regulation.
15 LORD CARNWATH: -- and the Act, so it is a really good
16 example of that process going on.
17 MR EADIE: Exactly so, my Lord, and lest it be thought we
18 were not interested in Youssef, we are for that very
19 reason.
20 LORD CARNWATH: Thank you very much.
21 MR EADIE: I am grateful.
22 What this analysis also illustrates is the
23 staggeringly obvious constitutional truism which is that
24 context is everything, so it is no good turning up with
25 The Parlement Belge or Walker v Baird and burning down

1 lobster factories in Canada; what you actually have to
2 do is to look at the legislative scheme that is before
3 you and work out what the nature of parliamentary
4 intervention in the particular sphere, in the particular
5 context, has been.
6 What you cannot do is to derive a big, broad
7 proposition which is uncontroversial, that says, as
8 a general proposition, the Government can by prerogative
9 alter the law or create a new source of law, I will come
10 back to that, but -- and then say: and that solves the
11 problem in this case; it plainly doesn't. The question
12 is what has Parliament done, what has the parliamentary
13 intervention created.
14 Of course the reason that I am passionately
15 concerned about the suggestion that there is an a priori
16 answer to this case of that kind is because the
17 consequences for Government and for the pursuit of
18 foreign affairs by Government, of the discovery by the
19 courts of a principle that effectively says that the
20 prerogative power to conduct our foreign affairs cannot
21 be exercised if it would, might, potential, has the
22 potential to affect domestic law; what is the difference
23 between affect domestic law and alter the law of the
24 land; if that is the principle, uncertain in its scope
25 as that description I hope has indicated, then that does

1 have very, very serious consequences.
2 LORD KERR: But the argument is that if it arises where
3 rights are given by act of Parliament, you have left
4 that qualification out of your formulation.
5 MR EADIE: There are two -- I don't want to keep going back
6 and repeating the point, but I respectfully submit there
7 are two separate things: have they controlled the
8 exercise of power on the prerogative plane, can you do
9 that; and the second thing is what has the parliamentary
10 intervention told you about the nature and consequences
11 and effects of any such exercise. Of course I accept
12 I've got to confront that; that is why I started where
13 I did with the Dangerous Dogs Act and the exploration of
14 the issues surrounding it.
15 LORD KERR: The argument is really put rather simply.
16 Parliament has given the citizens of the United Kingdom
17 these rights; they cannot be taken away, other than by
18 act of Parliament. Now, do you accept the first of
19 those propositions and if not, why not?
20 MR EADIE: My Lord, no. My submission, as you know, and
21 I am not going to go back over the all the points I made
22 in opening but my submission, as you know, is that this
23 is a particularly special type of right; it is
24 contingent, it is inherently limited and it depends on
25 my two-legged stool. It depends, of course, on

1 parliamentary intervention to create the conduit, but as
2 section 2(1) itself positively and expressly asserts and
3 says, these are rights that are created on the
4 international plane. How are they created on the
5 international plane? By the United Kingdom Government
6 exercising its prerogative powers within the EU
7 institutions.
8 LORD KERR: Even though they come through the medium of the
9 1972 legislation, you say that it is possible to argue
10 that they are not given to the citizens of the
11 United Kingdom by Parliament?
12 MR EADIE: Well, again, one can put it any which way. They
13 are in the sense that Parliament has intervened to
14 create the conduit. That is a necessary but not
15 sufficient condition for the continued existence of the
16 right.
17 LORD KERR: You can call it a conduit or whatever you like,
18 but the ultimate question has to be confronted. Were
19 they or were they not given by Parliament?
20 MR EADIE: My Lord, Parliament plainly enacted the 1972 Act
21 and it created the conduit that it did so as to allow --
22 sorry, my Lord.
23 LORD REED: Not at all, carry on.
24 MR EADIE: I have made the point.
25 LORD REED: I thought your answer was: yes, they are rights

1 given by Parliament, but they are rights which were
2 given on a conditional basis, the condition being the
3 continued membership of the EU.
4 MR EADIE: So that is the consequence of section 2.
5 LORD REED: Precisely. That is what it says, such rights as
6 in accordance with the treaties are ...
7 MR EADIE: From time to time exist.
8 LORD REED: Are to be implemented in the UK.
9 MR EADIE: So again, I will come back to the point, but the
10 direct answer to my Lord, Lord Kerr is contingent,
11 inherently limited. Contingent upon two things: one,
12 our participation in the EU processes to create the
13 rights and obligations from time to time, shrinking as
14 that corpus of rights does, or expanding as it does and
15 has done over the years; and secondly and more
16 fundamentally, contingent upon our continued membership
17 of the EEC or what it became, the European Union.
18 LORD KERR: That is building quite an edifice on the phrase
19 "from time to time", because "from time to time" in
20 a different connotation could equally mean as the rights
21 are adapted by the treaties.
22 MR EADIE: My Lord, it is not only building it on that. It
23 is building it on the nature and the structure of the
24 Act, it is building it on what it was doing by way of
25 transposition and what it was leaving to the royal

1 prerogative to deal with. It goes to all the
2 fundamental points I made about the 1972 act when
3 opening. I don't want to go back over --
4 LORD KERR: Sorry, we have probably taken it as far as we
5 can.
6 MR EADIE: It is helpful to have the questions.
7 LORD SUMPTION: Would it help you if you are right about
8 this, because obviously what comes through your conduit
9 pipe is the question of EU law, but whether the conduit
10 pipe exists is a question of English constitutional law;
11 and you have to show, surely, that a ministerial
12 decision can, to use Lord Mance's words, effectively
13 alter the sources of EU law, in other words alter -- of
14 English law, British law, it has to alter the
15 constitutional question: what are the sources of our
16 law; and not just the question: what rights happen to
17 exist?
18 MR EADIE: I respectfully submit, I have to show that the
19 nature of the parliamentary intervention that there has
20 been in this context, from 1972 onwards, allows the
21 Government to continue to exercise its prerogative
22 powers on the international plane, and I have to show
23 that the nature of that parliamentary involvement can
24 and does, as it were, with Parliament's permission,
25 create effects into domestic law.

1 I say that is not a question of analysing it as
2 though there were some freestanding constitutional
3 principle which provided the answer. I say that the
4 correct approach to answering that question is not to
5 ignore the entire legislative scheme and come at it on
6 the basis that there is an a priori constitutional
7 principle in play.
8 The reason that the constitutional principle is
9 advanced in the way it is by my learned friend Lord
10 Pannick and others is because, when they get to the
11 statutory scheme, the argument becomes extremely
12 difficult for them. For reasons I will develop, they
13 have a great deal of difficulty explaining away what
14 on earth Parliament thought it was doing if they are
15 right in the 2008, the 2011 and now the 2015 Act.
16 So what they do is to say: you don't need to go
17 anywhere near that, you don't go near De Keyser, you
18 don't go near the legislative scheme that Parliament has
19 seen fit to enact; and the solution to this case
20 involves standing back, sweeping all that away and just
21 saying: there is the constitutional principle.
22 So we fundamentally do not accept that way of
23 approaching the case. We say that the right way of
24 approaching it is to look at the legislative scheme in
25 its entirety and to ask what that scheme tells you about

1 Parliament's intention on the base question that
2 I identified at the outset.
3 THE PRESIDENT: What you say ultimately, I think, is that
4 the statute creates the conduit pipe, but Parliament
5 effectively, by the way it has designed the Act, is to
6 say: we have control of the conduit pipe, but the
7 Government has control of what goes through the conduit
8 pipe.
9 MR EADIE: Yes.
10 THE PRESIDENT: So if the Government pulls out of the
11 treaty, the conduit pipe stays there, the statute stays
12 there, but nothing comes through.
13 MR EADIE: It is the empty vessel argument.
14 THE PRESIDENT: That is how we read it.
15 MR EADIE: That is how you do it, on the 1972 Act?
16 THE PRESIDENT: Yes.
17 MR EADIE: The reason I have started here, I have to go
18 a bit, but the reason I have started here is because
19 I am aware, I am well aware that the point has been made
20 on a number of occasions by Lord Sumption, with the
21 usual conviction and convincing nature of it, but with
22 the reason I started there is because there is quite
23 a fundamental question about basic approach, and about
24 precisely how the court should go about analysing the
25 basic question that I identified at the outset. We do

1 respectfully submit that that is right way of doing it.
2 Look at the statutory scheme as a whole, don't sweep
3 it away, it is not answered by identifying
4 an uncontroversial, basic constitutional question. The
5 true question is what does Parliament intend looking at
6 that scheme, and can I move to the nature of the
7 approach.
8 If that is, if you are at that place, and
9 I appreciate that some of you may not be, but if you
10 are, what is the correct way of looking at the
11 legislative scheme, and before you -- if you get to that
12 place, that does not seem to be an unduly controversial
13 issue. We submit that the correct approach to that
14 question is to consider the statutory scheme as a whole
15 (a), and (b) as it exists today.
16 That means considering as a scheme CRAG and all the
17 relevant EU legislation as it has developed today, and
18 then you ask: having regard to that scheme, would it be
19 unlawful for Her Majesty's Government to give Article 50
20 notice? The reason that my learned friends don't much
21 like that is because they would much rather stop the
22 clock in 1972, but the fact of the matter is that they
23 haven't really sought to challenge in any significant
24 way that as the correct approach to the question of: how
25 do you go about considering this legislative scheme?

1 I advanced a whole succession of arguments, none of
2 which have been quibbled with by my learned friends or
3 any of them, as to why that was the correct approach in
4 principle in this appeal. Because the question is about
5 the present state of the division of responsibility
6 between our pillars of state, legislative, executive,
7 and indeed judicial, and that demands a current answer
8 and not a historic one. Because it is a constitutional
9 question that is raised by this appeal, and so it is to
10 be answered per Robinson and Lord Bingham in the light
11 of the current state of the constitutional arrangements.
12 That is no doubt why the devolved administrations
13 were interested in supporting this approach, because if
14 you freeze the clock in 1972, they don't have their
15 devolved legislation, but we respectfully submit it is
16 correct. It is a constitutional question to be answered
17 in the light of current constitutional circumstances,
18 because it will, we submitted, as you will recall, be
19 wholly artificial to address the question of triggering
20 Article 50 to implement the referendum, without any
21 reference to the very legislation which established the
22 referendum.
23 Because it is common ground between us that the
24 valid exercise of prerogative powers is a matter to be
25 considered itself from time to time, and according to

1 the legislation then in force; and in any event, and
2 this is quite a long way down the sequence of arguments,
3 because the 2008 Act, to take but one example, amends
4 the 1972 Act.
5 So even if you were on ordinary principles of
6 legislative interpretation, that would be the right
7 answer, and because, although I don't want to spend too
8 long on this, the in pari materia principle applies.
9 Again, I am not going to go back to the cases that my
10 Lord, Lord Mance identified in relation to that. It
11 might be thought that the true principle to be derived
12 from those cases is, it all depends what you mean by
13 materiae(?). But my Lord will have his own views on
14 that, I am sure, not assisted we respectfully submit, by
15 another case which I lost in this court, called
16 JB (Jamaica), which some of you may recall well.
17 LADY HALE: I think it has a name now.
18 MR EADIE: Has it got a name other than JB (Jamaica)?
19 LADY HALE: Yes, I think it is called Jamar Brown.
20 MR EADIE: That is helpful.
21 But we respectfully submit that paragraph 24 of that
22 doesn't actually advance matters unduly in relation to
23 that.
24 Our submission is as a matter of basic approach, you
25 don't freeze the clock at 1972; you look at the

1 statutory scheme as a whole and then you make your mind
2 up.
3 LORD WILSON: Mr Eadie, there have been brief references
4 over the last few days to our right to vote in European
5 parliamentary elections. Some of us may have thought
6 that in the big scheme of things, perhaps that is rather
7 unimportant, but perhaps it does have an importance,
8 because, correct me if I am wrong, that is securely
9 founded on a conventional domestic statute which you are
10 proposing to repeal or empty of content. If you are
11 saying look at everything, should we briefly look at
12 that too?
13 MR EADIE: My Lord, you can briefly look at it, or you can
14 look at it in detail. Our answer will be the same. Our
15 answer is that is of course a freestanding piece of
16 legislation, and it will continue to stay on the books,
17 as it were, after withdrawal and after the two-year
18 period, even if no agreement is reached. So it sits
19 a bit like regulations that are made to implement
20 directives but in primary legislative form.
21 Our respectful submission in relation to the 2002
22 Act is that its fundamental premise is that we continue
23 to be members of the club, so it is of course different
24 in form, but my answer is essentially the same.
25 Can I turn briefly to the scheme itself and its

1 relevant components. I have a bit still to get through.
2 I have made my submissions in answer to Mr Green, and
3 whether or not in truth what Parliament was purporting
4 to do in 1972, which is where we start.
5 My Lord, I am sorry, I am reminded by Mr Coppel very
6 helpfully that we have dealt with, I think, the
7 question, or certainly that 2002 Act in paragraph 63 of
8 our case. Can I leave that there.
9 I have answered Mr Green in relation to the
10 1972 Act, and of course one can seek to examine and to
11 imply matters into it, both parties are deeply divided
12 and hold deeply divided views about its effects and
13 about the correct implications for the exercise of the
14 prerogative power to withdraw from 1972.
15 Of course my learned friend Lord Pannick becomes
16 a bit ambivalent at this point because when he gets to
17 2015 he insists upon language as a matter of
18 interpretation, but when he goes to 1972, because there
19 is no language dealing with -- jolly good reason -- the
20 exercise of the powers to withdraw or ratify or anything
21 else terms of international plane actions, he is
22 prepared to imply and to look at purpose and effect.
23 But, leaving that on one side, you know our basic
24 case in relation to the 1972 Act. We submit that the
25 ECA is legislation which was fundamentally designed to

1 implement -- it's an implementing statute -- to
2 implement UK treaty obligations. It was not seeking to
3 control, it contained no provision seeking to control,
4 the prerogative -- in other words, the action by
5 Government on the international plane. There is nothing
6 of that kind in it. So that is one part of the dual
7 analysis that is of interest.
8 What about actions on the international plane? The
9 second part of that, the distinct part, is what about
10 domestic rights, how do they all work? My submission on
11 that is it creates rights, certainly, or recognises
12 rights, more accurately, but of a very special kind,
13 contingent, inherently limited, created and taken away
14 on the international plane, as the corpus of rights
15 expands, and contingent at a more fundamental level on
16 the premise, which is our continued membership of the
17 EU, or of the EEC as it then was, and both my learned
18 friend Ms Mountfield and my learned friend Lord Pannick
19 promised, as it were, to answer that feature of the
20 1972 Act. Lord Pannick promised to answer Finniss,
21 I think is the way it was put, in response to a question
22 that Lord Hughes asked and Ms Mountfield promised that
23 she would deal with that answer, and neither did so.
24 Neither has explained why it is that that analysis is
25 wrong, the Finniss/Millett analysis, contingent or

1 inherently limited rights.
2 The third point we make about the Act is that its
3 character is not changed by the thought that it
4 introduces a new source of law into our domestic system.
5 It is not changed because that doesn't fundamentally
6 change the nature of the best. A new source of law
7 involves simply asking the same question in a slightly
8 different form. Can you alter domestic legal rights and
9 obligations and, if so, how. We do respectfully
10 entirely agree with the point that was made, I think, by
11 Lord Reed, which is to put to Ms Mountfield, and she
12 accepted it -- and it is significant that she accepted
13 it -- if rights can be created under the prerogative,
14 was the question, do you accept that they can be taken
15 away by exercise of the prerogative? To which the
16 answer which was given was yes, and we respectfully
17 submit that that was a correct answer given to that
18 question.
19 We do note that it was not, we submit,
20 a constitutional necessity for Parliament to legislate
21 by the ECA as a precondition for ratification, just to
22 focus on that issue which has been addressed and you
23 thought about, I know. True it is that the position was
24 that there were non-binding legislative motions, to put
25 it that way, by the Houses of Parliament that preceded

1 it but it was not a condition of ratification. That is
2 of the essence of the latest Finniss article, which is
3 in our little black bundle, drawing the contrast between
4 the way in which this Act was structured -- it's the
5 long title point -- and the way in which the Bahamas,
6 Barbados and other independence was created. There was
7 nothing in the Act which said you either have a power to
8 or you are required to ratify this treaty. The reason
9 that was done is because it is Governmental practice.
10 So we respectfully agree with the statement that my
11 learned friend Mr Chambers took you to from the CRAG
12 consultation paper, MS 5282, paragraph 119, where it was
13 said the Government's practice is not to ratify a treaty
14 until all the necessary domestic legislation is in place
15 to enable it to comply with the treaty, since to do
16 otherwise could put the UK in breach of its
17 international obligations. That is a perfectly
18 understandable practice but it is not the same as saying
19 that you need prior legislative authority before you can
20 take that step on the international plane and, with
21 respect to Mr Chambers' submissions and Lord Templeman's
22 article, to which he also took you, is entirely
23 consistent with that analysis. So there is no
24 implication here that the Government could not take
25 steps on the international plane to reverse ratification

1 without parliamentary approval.

2 We know, linked to this point -- I am not going to

3 go back to the detail of it because you have it in the

4 note -- but we know that in schedule 3 of this very Act,

5 Parliament repealed a series of bits of legislation,

6 including the EFTA Act of 1960. That is precisely

7 an example of the Government withdrawing from a treaty,

8 the EFTA treaty, and it is a far more telling example

9 than my learned friend Lord Pannick was prepared to

10 contemplate. Of course the EFTA convention did not

11 create directly effective rights in the same way as the

12 ECA, but it is an example of the Government giving

13 notice to withdraw from a treaty without the prior

14 consent of Parliament and doing so notwithstanding that

15 leaving EFTA would inevitably bring to an end rights

16 recognised in domestic law in order to comply with EFTA,

17 and then Parliament acting subsequently, as it were, to

18 sort out the domestic legal effects of that Government

19 action on the international plane. So classic dualism

20 in action.

21 All of that, withdrawal from EFTA, parliamentary

22 intervention thereafter, repealing the 1960 Act and

23 sorting out the domestic legal consequences, and so on,

24 all of that expressly recognised in the very ECA itself,

25 the very Act that we are talking about, so you have

1 an act which is said by Lord Pannick to create
2 implication on withdrawal giving effect by repealing it
3 as the final stage in a sequence of actions which
4 started with Government withdrawing on the
5 international plane from EFTA, and that we do
6 respectfully submit is telling.
7 You have all those submissions on the 1972 Act and
8 I am not going to go back to those. What I wanted to
9 focus on was the later legislation, because we do
10 respectfully submit that that later legislation is
11 absolutely key to the issues that arise here, and
12 I start with the basic point, which is that later
13 legislation, whether it is CRAG or whether it is the EU
14 specific legislation, is constitutional, to use that
15 sense. You cannot characterise the 72 Act as
16 constitutional without including all the other pieces in
17 the stream of legislation governing this issue. If the
18 one is, the others must be too. We respectfully submit
19 that they are.
20 So when you are considering issues as to whether you
21 are more like Thoburn or more like HS2, you are truly
22 dealing with understanding how various bits of
23 legislation, all of which can properly be characterised
24 as constitutional, hang together.
25 I wanted to focus very briefly on two of the pieces

1 of legislation, 2008 and 2011, and ask what do they
2 indicate about the division of constitutional
3 responsibility in relation to the giving of notice under
4 Article 50. That is our issue, and it is on those
5 pieces of legislation that I wanted to focus.
6 On the 2008 Act, if I may, a couple of short points.
7 Firstly, we know that in 2008, by 2008, Parliament is
8 focused directly and explicitly on the controls that are
9 to be imposed on the exercise of prerogative powers of
10 a variety of different kinds. The controls are explicit
11 and the scheme of control is nuanced. That is
12 significant because it indicates precisely what one
13 would expect -- it is not just whether but how
14 Parliament is to be involved in different types of
15 decision that is covered by that legislation.
16 Previously untrammelled.
17 Lord Pannick referred to section 6(1)(a) of the 2008
18 Act and the simplified revision procedure for amending
19 the treaties and sought to dismiss that as indicating
20 merely that Brussels thought that amendment should be
21 easier and Parliament still, in any event, needed to be
22 involved. In fact, for the first time, Parliament had,
23 as it were, power to veto treaty amendments conferred
24 upon itself and of course those amendments are
25 amendments which not only did not involve increases in

1 EU competences, the point that I think Lord Mance put to
2 me on a couple of occasions in opening. It doesn't just
3 go to increasing EU competences. So that is not the
4 sole theme of this legislation. Not only does if not
5 involve increases, but it could not do so. I am not
6 going to take you back to it now, but if you go back to
7 Article 48.6, third paragraph, MS 222, you will see that
8 it positively could not by that process increase EU
9 competence.
10 So the true significance of this part of it is that
11 this is but part of a raft of controls specifying the
12 thing to be controlled and the nature of that control,
13 and you will recall that section 2 stands in contrast to
14 other bits of the Act and just says motion,
15 "parliamentary motion".
16 On my learned friend Lord Pannick's case, section 6
17 has to work, despite the fact that, on his argument, it
18 would reduce parliamentary control. Reduce it down from
19 primary legislation as a requirement to mere
20 parliamentary motion. That is the first significance.
21 LORD MANCE: When you say "can't increase competences", it
22 can increase the way in which competences, or change the
23 way in which competences are exercised, can't it? Isn't
24 that the point of Article 48.6?
25 MR EADIE: 48.6, third paragraph, my note says.

1 LORD MANCE: It certainly says "shan't increase the
2 competences", but that means extend the areas in which
3 you may act, but you may nonetheless act in a particular
4 area by --
5 MR EADIE: They already have competence to increase.
6 LORD MANCE: Yes -- by a different route, for example a
7 different qualified majority or a qualified majority
8 instead of unanimity.
9 MR EADIE: My Lord, I think you are right. So it can in
10 a sense but can't in others, if that makes sense? What
11 you can't do is to expand sideways.
12 LORD MANCE: I just wondered, under section 6(1) of the 2008
13 Act, all these provisions of the Lisbon treaty, are they
14 new?
15 MR EADIE: The short answer to that is I don't know. We can
16 find out and let you know.
17 LORD SUMPTION: Isn't the position that they are new to this
18 extent, that most of them provide for an option to use
19 a different legislative procedure or a different voting
20 system in a way that dilutes the blocking power of
21 individual member states? That is actually the vice
22 with which that part of the Act is concerned with.
23 MR EADIE: Yes. This is the Trojan horse point. I don't
24 think I dispute that basic analysis.
25 LORD MANCE: So your argument that here they were being

1 introduced for the first time, really, is met perhaps by
2 the point that this was the first time they needed to be
3 met by any legislation?
4 MR EADIE: My Lord, what I meant by the first time is that
5 this is the first time there is legislative control,
6 which there didn't have to be, on this sort of exercise
7 and this is the Minister of Crown being precluded from
8 doing stuff on the international plane. That is what
9 I meant by the first time. My Lord may be right, it is
10 the first time Parliament has chosen to intervene in
11 this way. It may have been triggered in a particular
12 way but its significance is that, before this, subject
13 of course to the earlier 78 Act and the 2002 Act that
14 I went through earlier in opening, this is the first
15 time they have imposed that control.
16 So there are really two points about this Act I made
17 in opening, you will recall; (1) they are controlling --
18 it doesn't terribly matter what it is -- but they are
19 controlling particular things that are the exercise of
20 prerogative powers on the international main, and (2)
21 they are doing so in a variety of different and nuanced
22 ways. This one is parliamentary motion, and go back
23 over to the previous page and there you have examples of
24 primary legislation being required. So it is
25 a different thing that is controlled and it is

1 a different mechanism of control. Look at section 5.
2 So you have got the how and the what. That is the first
3 point.
4 The second point is that, as we know, Article 50 is
5 introduced in Lisbon. Parliament noted it as
6 a principle change and it approved Lisbon because it
7 increased -- and Article 50 it focused on -- because it
8 increased the competence of the European Parliament. It
9 then decides what to do about. What are we going to do
10 about Article 50? How are we going to control that, or
11 are we? Answer: despite other controls of various
12 kinds, nothing on Article 50, is the short and bald(?)
13 point, and the only proper inference, we respectfully
14 submit, is that Parliament decided therefore to leave
15 this power to be exercised by Her Majesty's Government
16 along with all the other prerogative powers that are not
17 controlled in that sphere by this piece of legislation,
18 day to day business of the foreign affairs prerogative,
19 giving of notice; they were, that is Government were,
20 the only organ which could if physically and legally do
21 so and no control was imposed over that decision,
22 despite the fact that Parliament was directly focused on
23 it in 2008.
24 We know also in that respect, that Lisbon -- this is
25 perhaps a third point -- including Article 50, was added

1 to the list of treaties in the 1972 Act and approved by
2 Parliament in section 4 of the 2008 Act, and we
3 respectfully submit that that is significant because it
4 is a recognition at the very least thereafter, and pace
5 the debate I had with my Lord, Lord Mance about whether
6 withdrawal was a gleam in the eye of those who signed up
7 to the 72 Act in 72, pace that, it is a recognition of
8 the inherently limited nature of the rights and indeed
9 of the basic structure and purpose of the 72 Act. From
10 now on, the rights in section 2 are inevitably subject
11 to Article 50 and we know that Article 50 is about the
12 fundamental premise, as I described it. It is about
13 withdrawing, the fundamental contingency of withdrawal
14 is now catered for and brought within the statutory
15 scheme.
16 So we do respectfully submit that that is
17 significant and it is entirely consistent with our
18 scheme of analysis, which is that the royal prerogative
19 powers, which the 72 Act had done nothing to take away,
20 remain, subject to the parliamentary controls, specific
21 and nuanced as they are, in the 2008 Act. It is not
22 a statutory power, Article 50, as such but it involves
23 Parliament in legislation recognising its existence and
24 acknowledging its effect and all of that, we submit, is
25 critical to the consideration of the statutory scheme as

1 a whole and what it tells one about Parliament's
2 intention on the division of constitutional
3 responsibility in relation to Article 50. This was the
4 very mechanism by which the very thing which is now
5 challenged was to be done. Parliament decided, as it
6 did, no control. It so decided recognising because it
7 is absolutely obvious that, if Article 50 notice is
8 given, then the process of withdrawal is commenced, the
9 bullet is fired at the target, with all the potential
10 effects that that has on directly effective rights and
11 obligations and on other legislation like the 2002 Act,
12 whose practical impact may remain or would be, as it
13 were, taken away when we leave the club. But the idea
14 that Parliament didn't know or cannot be taken to have
15 known that that was the effect of Article 50 simply
16 could not be sustained, we respectfully submit.
17 If the respondents are correct, Parliament always
18 intended that the Government could not give such notice,
19 from 1972 onwards, without primary legislative
20 authority. They say that was the effect of the ECA and,
21 if that is right, given the controls that are introduced
22 in 2008, it is, we respectfully submit, inexplicable why
23 Parliament was not included. They made provision for
24 the sorts of things that required primary legislative
25 authority. Why would they not have included Article 50

1 within that if that is their view? And it is not
2 an answer to say they were operating on the basis of
3 an assumption that the power could not be used. That,
4 as we know, is a highly controversial and contestable
5 assumption with the debate still raging years afterwards
6 in the Supreme Court with 11 of you listening. It
7 doesn't explain in any event why it is that Parliament
8 would not have set out quite clearly on the face of this
9 piece of legislation that primary legislative authority
10 was required.
11 My Lord, Lord Carnwath, invited my learned friend
12 Lord Pannick back onto the 2008 turf of the 2008 Act and
13 its treatment of Article 50, and he gave three answers
14 in that exchange, if we have understood him. Firstly,
15 he said Article 50 merely expresses the power that
16 United Kingdom has always had to withdraw from treaties.
17 We respectfully agree but it is no answer to the points
18 I have been making and it is important that he accepts
19 that Article 50 reflects the prerogative power to
20 withdraw from treaties because that was the position on
21 that analysis in 1972 just as much as in 78, but
22 Article 50 is now the mechanism, but point is that
23 answer does not, that answer, address the key
24 significance of this legislation, which is that it
25 imposed a series of controls over prerogative powers,

1 some of them and not this one.
2 LORD SUMPTION: Do you say its object was to codify all the
3 circumstances in which parliamentary control would be
4 required?
5 MR EADIE: My Lord, we know that the scheme of the
6 legislation developed and that they turned back to the
7 issue again in 2011, so I don't make the submission that
8 it was intended to codify, but the idea that the
9 selection that Parliament made here is not significant,
10 I respectfully submit, is an improbable one.
11 LORD SUMPTION: Because of the greater significance of
12 Article 50?
13 MR EADIE: Exactly so.
14 LORD SUMPTION: But an alternative view was that both 2008
15 and 2011 were directed at a highly specific problem,
16 which was the use of the internal procedures created by
17 the Lisbon treaty in order to effect changes which would
18 previously have required a treaty change, and therefore
19 would have escaped the requirement that a new treaty had
20 to be added to the 1972 Act by amendment.
21 MR EADIE: My Lord, we respectfully would not accept that
22 thesis. We would not accept the thesis because we
23 respectfully submit that it has a broader purpose than
24 that. It has the purpose of Parliament intervening to
25 make decisions about what it does and does not want to

1 control. You may say it had a particular focus in doing
2 that. There were particular things that particularly
3 concerned it, but fact of the matter is that it
4 addressed both what it wanted to control, how it wanted
5 to control it, and we know that, when we come to 2011,
6 I know my Lord will say "It is an example of the same
7 beast", but it specifically focused on Article 50 and
8 introduced Article 50(3) in schedule 1, as we know.
9 Anyway, my Lord, Lord Carnwath, put those matters to
10 my learned friend Lord Pannick. That was his first
11 answer. The second answer was that it is not directly
12 effective and so effect is not given to Article 50 by
13 section 2(1) and Lord Hodge put to me that Parliament
14 had approved the various legislative procedures at EU
15 level and that indeed is true, even though they are
16 international procedures between states and not directly
17 effective in domestic law either. But the point is that
18 Parliament also approved in the same way the
19 non-directly effective provisions of Article 50. So you
20 have a direct, as it were, parallel between those two.
21 Then my learned friend Lord Pannick finally in
22 answer to Lord Carnwath said Article 50 indicates
23 nothing about the way the Government has to act or
24 Parliament has to act domestically, it simply referred
25 back to constitutional requirements. Our short answer

1 to that is the same one: that is not the point. The
2 point is that the domestic legislation, 2008, 2011, are
3 key parts of those constitutional requirements and they,
4 that is the domestic pieces of legislation and not
5 Article 50 in terms, say a very great deal about the
6 controls Parliament has and has not chosen to impose.
7 We make effectively the same points in relation to
8 2011. The whole topic of what to control, the nature of
9 the control is revisited, it is considered afresh and
10 considered with care, and we know that it deals with
11 Article 50 specifically in schedule 1. We respectfully
12 submit the correct analysis is therefore the one that
13 I have indicated.
14 LORD CLARKE: Yours is really a jury point, isn't it? If
15 you look at the first statute, you accept that there is
16 no evidence that they thought about Article 50 in
17 relation to the first of the two statutes but you say,
18 well, common sense suggests they must have, members of
19 the jury, and in the second one you are slightly better
20 off because there is a reference to Article 50.
21 MR EADIE: My Lord, you will not be surprised to hear me say
22 I do not accept it is a jury point.
23 LORD KERR: Nothing wrong with a jury point if it is a good
24 one, Mr Eadie.
25 MR EADIE: It is a good one either way.

1 LADY HALE: We are at least jury-sized.
2 MR EADIE: You are at least jury-sized. That is true.
3 But you have my submission on the nature of it,
4 these were selections that Parliament was making in the
5 very context and indeed the idea that they didn't think
6 about Article 50 --
7 LORD CARNWATH: Well, you were told, it was in the
8 explanatory notes specifically.
9 MR EADIE: The point that I have just been handed -- it is
10 one of the principle changes, what are we going to do
11 about it?
12 The 2015 Act, the final part of the jigsaw, and it
13 is against that background, 2008, 2011, that you arrive
14 at 2015. Can I start with two preliminary points, and
15 I am just going to give you references, given the time,
16 if I may. Firstly, the point about whether Lord Dyson
17 in paragraph 19 of Shindler was or was not assuming. We
18 dealt with that in our case below, our skeleton below --
19 if you really want it, MS 12227 -- but the short point
20 is the one that they were not deciding or turning their
21 minds to that issue.
22 Secondly, in relation to comparator legislation,
23 because we know the 2015 Act was silent, we respectfully
24 submit that there is a jolly good reason why the AV Act,
25 the Alternative Voting Act, contained the legal

1 consequences within it, and that was because there was
2 no prerogative power to alter the actual voting system,
3 so you needed provisions in legislation to work out what
4 those consequences are. By contrast in our situation at
5 2015, you have the freestanding source of power under
6 the prerogative to give the Article 50 notice. So we
7 respectfully submit that that is the short answer, that
8 is the short answer to that.
9 Then Mr Chambers made comparison with the 1975
10 referendum and how that might have been set up and
11 purported to rely upon a statement by a minister of some
12 ambiguity all those years ago; (a) it was a statement by
13 a minister of some ambiguity all those years ago, is the
14 first answer. The more significant answer perhaps is
15 that that was well before any legislation remotely
16 similar to the 2008/2011 Acts which directly focused on
17 the nature of parliamentary controls over specific
18 prerogative powers and their exercise. So we submit
19 that 2015 sits in the context of 2008 and 2011 and it
20 sits in the context of Article 50 existing. It was the
21 necessary first step in the process of withdrawal, it
22 was the prescribed and the mandated process for
23 withdrawing. If we are going to do withdrawal, that is
24 how we have to do it, and, moreover, the 2015 Act asks
25 the very withdrawal question and sets up the referendum

1 to answer it.

2 We pointed out that, on the respondent's case, the

3 effect of the 2015 Act was to require the self same

4 question to be put back to Parliament. The very

5 question they asked in the referendum. My learned

6 friends Lord Pannick and Mr Chambers, and I think all of

7 the other respondents, perhaps with the exception of

8 Mr Gill, accept that a single line would do. A single

9 line act would sought the legal problem.

10 That created a difficulty which Lord Pannick

11 realised. It created a difficulty because that made no

12 sense in the context of legislation in which Parliament

13 had already decided to put that very question to the

14 people in a referendum and had set up an act for the

15 purpose of doing that, and so the answer which he was

16 driven to in order to explain away that constitutional

17 strangeness, to put it at its lowest, was that that

18 might be or might not be the only question that

19 Parliament was interested in. Parliament might be

20 interested in other questions but that is not an answer.

21 It is not an answer because it bears no relation, the

22 possibility that Parliament might introduce amendments

23 and the Lords want to discuss negotiating strategy, all

24 of that, it has nothing to do with his legal case. His

25 legal case is you need primary legislative authority

1 just to give the notice. It is no good saying you have
2 to go back because they might want to ask other
3 questions, that is the solution, as he accepts, to his
4 legal case and we respectfully submit therefore that the
5 answer he gave is no answer at all, and indeed we submit
6 that the 2015 Act speaks volumes about the intention of
7 Parliament.
8 Is the result of no legal significance? We
9 respectfully submit that would be very surprising and
10 you know what our primary case is, namely that it is
11 consistent with the scheme of legislation. It left the
12 royal prerogative power to give notice in the hands of
13 the Government, it introduced no form of control of the
14 kind we saw in 2008 and 2011, and the reason for that is
15 because the royal prerogative exists and existed to give
16 effect to the outcome of the referendum.
17 We also say, as you know, alternatively that, even
18 if the 72 Act had the effect that it did on the royal
19 prerogative, the 2015 Act is still highly legally
20 important. A flexibility of the constitution is
21 important -- and I am not going to go back on that,
22 Robinson. It is language and not divination, of course,
23 but you have plenty of language in the 2008 and the 2011
24 Acts to work through and we know that in the context of
25 the 2015 Act, Parliament chose to set up the referendum

1 as it did.

2 Can I address one other question just before finally
3 coming to the significance of yesterday's events and
4 that is that no one I think is suggesting that, in our
5 particular context, the foreign affairs prerogative or
6 indeed any ingredient of it has been destroyed. That is
7 not the nature. We are not abeyance. We are a control
8 on exercise. We are not abeyance or abrogation or
9 cutting down or destruction because, even if Parliament
10 had given express authority, that authority would be in
11 nature to exercise the very power, in other words the
12 power on the international plane to withdraw. No one is
13 suggesting that the power to make or unmake treaties, to
14 withdraw from treaties, has gone. So what we are truly
15 dealing with here is not destruction forever, we are --
16 and it was the Lord Reed analysis I think -- but we are
17 dealing with, on any proper view of it, we are dealing
18 with a situation in which it is the exercise of
19 prerogative that is controlled and, if that is the right
20 analysis, then it is perfectly possible and we
21 respectfully submit the most convincing analysis, if we
22 are wrong on the 72 Act, the most convincing analysis at
23 that stage becomes, if it is all about the exercise of
24 the prerogative, the 2015 Act significance is perfectly
25 obvious, because no one asserts -- and Lord Pannick

1 accepted in questioning with Lord Reed that, if there
2 was power, if the power continued to exist and it was
3 a question of exercise, then after the 2015 Act, no one
4 could possibly say that it was improper or even remotely
5 unlawful for the Government to exercise that particular
6 power.
7 LORD MANCE: I don't quite follow that because, if the
8 prerogative could not be exercised except with authority
9 in the form of an Act of Parliament, then it is not the
10 prerogative that is being exercised, it's the
11 parliamentary authority.
12 MR EADIE: But they leave the prerogative in place, is the
13 argument. The point I am really on here is, what
14 happens if you are against me on 72? How does that
15 work? What is the significance then of 2015? The
16 analysis then goes, we submit, if it is all about
17 exercise, then 2015 is not as it were reinventing
18 something which has died -- exhuming the body, as
19 someone I think put it -- it is simply, and again wary
20 of my Lord, Lord Kerr's metaphors point, it is simply
21 indicating that hereafter the exercise of the royal
22 prerogative is entirely proper.
23 My Lords, the motion. May I just briefly tell
24 you --
25 LORD CARNWATH: Sorry, I don't want to delay things but I do

1 need to clarify a point which arose on the first day,
2 a sort of slight difference between myself and
3 Lord Sumption about the relevance of the subsequent
4 legislation, because I think we need to know whether
5 there is a difference between you and the Attorney
6 General for Northern Ireland, and indeed Lawyers for
7 Britain, because the point made by Mr Justice Maguire is
8 that, yes, this will result two years down the line in
9 changes to the law, but that will be governed, or is
10 intended to be governed, by the legislature -- and
11 I think one would add you cannot control that but it is
12 in the control of Parliament.
13 Now, that is a point which I think is taken by the
14 Attorney General for Northern Ireland but it is not
15 a point which you have taken. I understand you don't
16 need it on your hypothesis, but are you distancing
17 yourself -- you do refer, it comes into paragraph 105 of
18 the Mr Justice Maguire's judgment, to which you do refer
19 to, apparently with approval, in your case but I just
20 want to know whether that is something you disassociate
21 yourself from or whether it is part of your case if only
22 as a fallback?
23 (Pause)
24 I know it is a difficult question to answer, but
25 that is really the reason why I stepped in on the first

1 day.

2 MR EADIE: I was thinking gifts and Greeks.

3 LORD CARNWATH: Yes, I thought you might be. Yes. If you

4 don't want to say anything more about it --

5 MR EADIE: Can I say we are tolerably neutral about it. If

6 it helps us, it helps us.

7 LORD CARNWATH: Right.

8 THE PRESIDENT: You want to deal with the motions.

9 MR EADIE: You should have a copy of the motions before you

10 on your desk, and we have given you both, because there

11 have been two. I referred to one in October,

12 12 October, so the one with big writing on it -- it

13 looks like that -- that is the one that happened

14 yesterday.

15 THE PRESIDENT: What do you say about them?

16 MR EADIE: My Lord, you see the resolution, the nature of

17 the resolution, and you see in effect that it indicates

18 the view of the house.

19 THE PRESIDENT: Yes.

20 MR EADIE: You see the majorities.

21 THE PRESIDENT: Yes. Yes.

22 MR EADIE: You see in particular the call from the House of

23 Commons from the Government, final line, to invoke

24 Article 50 by 31 March 2017.

25 THE PRESIDENT: Yes.

1 MR EADIE: The other one, which is the 2016 one, the only
2 bit that you really need -- the rest of it is history
3 and how you got to the place where it ended up -- is the
4 final paragraph, "resolved", because again it was
5 an opposition day motion which the Government amended
6 and was then passed by the house --
7 THE PRESIDENT: Thank you.
8 MR EADIE: -- in that way and we respectfully submit that
9 that is highly significant. It provides the sharpest of
10 focuses. No doubt it is not legally binding but that
11 doesn't mean it is not legally relevant. It provides
12 the sharpest of focuses on the nature of the issues now
13 in play because Parliament has given, or the House of
14 Commons at least has given, specific approval to the
15 Government to give that notice and indeed it has called
16 on them to do so by a particular date. It has done so
17 as it did at the outset all of those years ago, in
18 precisely the same way.
19 So if one is worrying about joint effort and have
20 you got a mirror -- we respectfully submit you already
21 had the mirror because you had primary legislation in
22 the 2015 Act -- but you have an even more perfect mirror
23 now, you have not just got the 2015 Act, you have got
24 this resolution by the House of Commons.
25 It is impossible, we respectfully submit, in those

1 circumstances to pray in aid broad considerations of the
2 kind my learned friend Mr Chambers urged upon you about
3 parliamentary sovereignty. Parliament has indicated its
4 view and has done so clearly, and has done so clearly,
5 and has done so --
6 LORD WILSON: Well, the House of Commons.
7 MR EADIE: The House of Commons, exactly.
8 THE PRESIDENT: But the Queen in Parliament has not.
9 MR EADIE: Because the House of Lords has not.
10 THE PRESIDENT: No, the Queen in Parliament has not. There
11 is no statute. The argument is that, if you are wrong
12 on your interpretation of the Act, you say this helps
13 you?
14 MR EADIE: My Lord, I respectfully submit that it is
15 significant but not, as it were, as directly legally
16 binding. I certainly do not make that submission.
17 THE PRESIDENT: That is not quite the question.
18 Do you accept that, if you are wrong on the
19 interpretation of the 1972 Act and the 2015 Act and
20 other subsequent acts do not help you, then this motion
21 does not help you?
22 MR EADIE: I do. On that premise, I do.
23 THE PRESIDENT: Thank you.
24 MR EADIE: But I nevertheless respectfully submit that it is
25 a matter that the court can take into account and that

1 it is legally relevant to the answering of that question
2 because what it does in a nutshell --
3 LORD CLARKE: Well, it is good grist to your general mill.
4 MR EADIE: I am going to be accused of making another jury
5 point but, my Lords, you see where it takes you. It
6 takes this court effectively into a place where, if you
7 declare the exercise of the prerogative unlawful,
8 positively unlawful in that way, you are not just
9 leaving the matter in the usual way to the executive and
10 to Parliament to sort out, you are in effect, and this
11 is the only thing that could be done, requiring primary
12 legislation. So in order to withdraw to give affect to
13 the referendum --
14 THE PRESIDENT: Well, we are not requiring it. We are
15 saying the law of this country requires it.
16 MR EADIE: My Lord, that is true and I accept that, but the
17 reason I make the point is because primary legislation
18 would thereafter be the only way to go, and so the
19 Government would in effect have to introduce a bill to
20 Parliament in essence to confirm that which at least the
21 House of Commons has already called upon the Government
22 to do.
23 LORD SUMPTION: If the resolution was enough for your
24 purposes, you would not be proceeding with this appeal.
25 MR EADIE: My Lord, we might have got to day three --

1 (Inaudible) at 7.00 last night.
2 THE PRESIDENT: If you had said it was enough for your
3 purposes, I dare say Lord Pannick and others would have
4 taken issue with that.
5 MR EADIE: I hope you will appreciate, I have not made that
6 submission.
7 THE PRESIDENT: No, you haven't.
8 LORD HODGE: Mr Eadie, what the resolutions might be said to
9 focus is the point that we are dealing with, what is the
10 correct legal mechanism by which it is done, and nothing
11 else.
12 MR EADIE: Exactly so, that was my final -- I don't want to
13 make it an in terrorem submission because they never go
14 down well, particularly up here, but that is indeed the
15 position.
16 My Lords, I am sorry, I have been a little bit
17 longer than I thought.
18 THE PRESIDENT: You had quite a lot of questions towards the
19 end.
20 Thank you very much indeed, Mr Eadie.
21 LORD PANNICK: My Lord, could I make one uncontroversial, I
22 hope, point which is on behalf of all the lawyers, to
23 thank the court staff for the quite extraordinary
24 efforts that they have made to accommodate all of our
25 demands, many of them I am sure unreasonable, before and

1 during this appeal. It is genuinely appreciated by all
2 of us.
3 THE PRESIDENT: That is much appreciated, Lord Pannick,
4 thank you.
5 We would like to thank everyone involved in the
6 presentation and the preparation of this case, including
7 the advocates for keeping to their allotted time. We
8 know that a great deal of work has been done behind the
9 scenes to ensure that -- the very large number of
10 documents that have been made available to us in
11 a well-organised form and in a very tight time schedule.
12 We are very grateful for that.
13 In addition to counsel, we are also grateful to all
14 those inside and outside the court who have been
15 converting our legal discussions into a more accessible
16 form for members of the public. It bears repeating that
17 we are not being asked to overturn the result of the EU
18 referendum. The ultimate question in this case concerns
19 the process by which that result can lawfully be brought
20 into effect.
21 As we have heard, that question raises important
22 constitutional issues and we will now take time to
23 ensure that the many arguments which have been presented
24 to us orally and in writing are given full and proper
25 consideration. Having said that, we appreciate that

1 this case should be resolved as quickly as possible and
2 we will do our best to achieve that.
3 Thank you again, everybody. The court is now
4 adjourned.
5 (4.10 pm)
6 (The hearing concluded)
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