Wednesday, 7 December 2016

(10.30 am)

THE PRESIDENT: Lord Pannick.

Submissions by LORD PANNICK (continued)

LORD PANNICK: Good morning, my Lady and my Lords, I was completing my fourth submission which is that the 1972 Act, contents and purpose, contains no clear statement that the executive does have a prerogative power to nullify the statutory scheme and indeed if I need to go this far, I say, having regard to the statutory presumptions, that is the Henry VIII clauses, legality and implied repeal, the Act clearly indicates in my submission that the executive does have no such power.

I had reached section 2(2) of the 1972 Act. We deal with that in our written submissions; it is paragraphs 56 to 57, MS 12419. I am not going to take time on repeating that.

The next provision is section 2(4) which I do rely on. I say that since Parliament expressly stated that this Act takes priority, even over a later statutory provision -- therefore there is no doctrine of implied repeal -- Parliament is most unlikely to have intended that the scheme it was creating could be set aside by a minister. That is the submission.

Then we have section 3(1). We deal with that in paragraph 58 of our written case, MS 12420, and I don't want to add to that, save to refer to the divisional court's judgment, paragraph 93.7. I don't ask the court to turn it up. It is in the judgment, MS 11800, paragraph 93.7, where the divisional court says that if all the treaty rights can be removed by the executive using prerogative powers, section 3(1) would make no sense.

I say that the divisional court rightly concluded, rightly concluded, it is paragraph 94 of its judgment, MS 11801, that the clear implication from all these provisions is that Parliament intended that the Crown did not have prerogative power to take action on the international plane to destroy that which Parliament was creating.

My Lady, my Lords, before I move on to my fifth point, can I briefly return to three matters which were raised yesterday afternoon which I promised to deal with. The first is my Lord, Lord Reed's question about authority that Hansard can be relevant to identifying statutory purpose, and not simply a Pepper v Hart type exercise.

I think we have put on the desks of your Lordships and your Ladyship a Privy Council case which I don't ask

your Lordships to go through. It is called Gopal. And it is paragraphs 3 and 7 which I say support my contention. It is nothing to do with human rights.

However, I should also draw to the attention of the court the judgments of the appellate committee in the Spath Holme case volume 8, tab 75, please don't turn it up, but it is volume 8, tab 75, MS 2991. It is [2001] 2 Appeal Cases, and I do accept there the majority of the appellate committee said Hansard could not be used to identify the purpose of an act. So I draw attention to that.

What I would say, however, is that if in this case this court is going to look, if it is going to look, at what ministers said about the 2015 bill, it would be wrong, in my submission, to exclude what Mr Lidington said in the House of Commons; it would be an artificial exercise to look at some of the statements but not what was said on the floor of the House of Commons. That is my submission and that is the first point.

LORD MANCE: I think there is further authority. I remember Lord Steyn dealing with this point and there is certainly another case --

LORD PANNICK: Yes, Lord Steyn is 2002, I think, it is the local government case your Lordship may have in mind.

LORD MANCE: Saying you could look at -- is there

inconsistency between that and Spath Holme? On the face of it, it seems to be.

LORD PANNICK: If it matters, I would say the law has moved on, with great respect, since 2001. Your Lordships and your Ladyship, of course, have many important constitutional issues to decide in this case; I am not suggesting that the court adds to the list the rather important question, the extent to which Hansard can be used in order to determine the scope or mischief of legislation.

THE PRESIDENT: It may have considerable practical importance in more cases than the points we are being asked to decide.

LORD KERR: I think we might say that there is a certain air of unreality, if we are considering what effect the 1972 Act had and what purpose the 2015 legislation had, to ignore what was said about that.

LORD PANNICK: I respectfully agree. The point I make is the point I was making to my Lord, the President, that my case is: look at what the Act actually said; but if the court is to be persuaded by my friends for the appellant that one should look at other material, it is quite artificial to look at some of the other material but not at what Mr Lidington expressly said on the floor of the House.

THE PRESIDENT: Yes, I mean, the only trouble with looking at what was said on the floor of the House, and as you say, we don't want to go too much into this, is what a minister or somebody else says does not necessarily represent the reason why people vote, or what they believe when they vote.

It is like going into what people say about their contracts when construing their contracts, and that way madness can be said to lie, because you then start looking at everything said in Parliament and balancing up -- it can be a very treacherous course.

LORD PANNICK: It can. Of course the point being made by the appellant is what the Government's intention was, what the Government was putting forward because Mr Eadie draws attention, footnote 4, to what ministers said from time to time: this was our intention.

THE PRESIDENT: That is what Government said but in the end that is -- highlights the problem. We are here concerned with two separate entities, the Government and the legislature.

LORD PANNICK: I entirely accept that, and that is why I put the point, I hope very modestly, it is not my submission, if the court is being told by the appellant: look at what the Government's intention was; it is a bit more blurred than that. But my submission is what the

court should focus on, is what the Act actually said, which is not ambiguous in any way; it is a limited act for a very specific, very important purpose. I don't in any way seek to denigrate the purpose; to hold a referendum is a very important matter. My submission is, however, it has nothing whatsoever to do with the issue before the court, which is who enjoys the power to notify; is there a prerogative power once the referendum has taken place; and that is what I invite the court --

LORD CARNWATH: I suppose what ministers say might be relevant as creating some sort of legitimate expectation as to what they are going to do, but that tells you nothing about the machinery with which they are going to do it.

LORD PANNICK: Absolutely, and this case is nothing to do with legitimate expectation, and any such argument would be exceptionally difficult to sustain.

That is the first additional point. The second point is I promised to answer my Lord, Lord Mance's question about the debate in the 1970s. My Lord said, what was I talking about, this debate in the 1970s on whether Parliament could reverse the 1972 Act. What I had in mind is the Blackburn case, and if your Lordships and your Ladyship look -- I don't ask the court to turn it up -- at core authorities 2, tab 11, it

is MS 302, Lord Denning at page 305 H adverts to what was then a contemporary debate: could Parliament itself go back on what it had enacted?

All I was saying to the court is, it is not my understanding that that is nowadays a point that causes concern, nor could it in the light of section 18 of the 2011 Act, if it was otherwise a point of concern.

The third point I promised to -- I need to come back to is my Lady, the Deputy President, asked about the acts of Parliament which have amended section 1(2) of the 1972 Act to add the new treaties. The court will find what I hope is a helpful annex to our written case. It is MS 12438, and there we set out the relevant acts which have amended section 1, subsection 2 to take account of the new treaties, Maastricht, Amsterdam, Nice, Lisbon and all the others.

What the annex shows is that all of these acts amending section 1(2) were in fact enacted before Parliament ratified the relevant treaty and that is because as the court already heard --

LADY HALE: Before the Government ratified.

LORD PANNICK: Your Ladyship is absolutely right, before the Government ratified, I apologise, and that is because Parliament needed to amend domestic law before the new EU law treaty came into force which would alter domestic

rights.

THE PRESIDENT: Just like the 1972 Act, the Government signs, Parliament, as it were, enacts and then the Government ratifies.

LORD PANNICK: Precisely so.

THE PRESIDENT: Thank you.

LORD PANNICK: Precisely so. If one looks at these acts, some (Inaudible) parliamentary approval because of the post 1972 legislation, the 1978 Act and the others.

THE PRESIDENT: Yes.

LORD PANNICK: Some of them need parliamentary approval because they are being added to section 1(2), because they affect domestic law rights. Some of them need parliamentary approval for both reasons, so if one looks, for example, at core authorities volume 1, tab 3, the court will see the European Union (Amendment) Act 2008.

This is the one that addressed the treaty of Lisbon and if the court goes -- sorry, it is MS 117, MS 117, core authorities 1, tab 3. If the court, please, would turn to MS 118, at the top of the page, section 2, it is not set out in detail, but the court can see what it does, is it amends the 1972 Act by adding a new section 1 (Inaudible) and if the court then looks on the next page and looks at section 4, this Act does another

job. What it does is it approves the treaty of Lisbon for the purposes of the 2002 Act, that is parliamentary approval, as it says, of treaties increasing the European Parliament's powers.

So each of the two different functions is addressed separately by Parliament, and there are some treaties for which parliamentary approval was not required under the post 1972 legislation, but it was still necessary to add the treaty to section 1(2) of the 1972 Act. If the court would please look at volume 19 of the materials and look, please, at tab 221, which is MS page 6463.

The court will see that that treaty, which was the treaty for accession of Spain and Portugal, that was added to section 1(2) of the 1972 Act, but there was no need for approval under the post 1972 legislation as it then existed, so Parliament is very careful to treat separately the two distinct areas that we are here concerned with.

So that is the 1972 Act. There are, of course, many other relevant statutes in many areas of life, competition law, communications law, equality law, environmental law, and many others, at least some of the terms of which would be frustrated if the appellant terminates the UK's membership of the EU, notifies of the termination that is to take effect in two years'

time unless there is an extension. We have given the example in our written case of the European Parliamentary Elections Act 2002, and we have given extensive analysis of this in the written argument. It is in our written case, in particular, paragraph 17.3 a), which is MS 12394. But it is only an example.

It is no answer for the appellant to say, as he does, that of course these rights lapse when we leave the club -- that is their answer -- but that begs the question, and the question is whether the appellant can lawfully use prerogative powers in such a way as to nullify these statutory provisions.

But there are many other examples. Can I give the court one other example of our concern. It is volume 13 at tab 130, which is MS 4481, volume 13, tab 130, the Communications Act 2003, MS 4481. I am inviting the court's attention to section 4 of the Communications Act 2003 -- 13130 -- section 4 of the Communications Act is headed "Duties for the purpose of fulfilling EU obligations":

"This section applies to the following functions of Ofcom ... (a) their functions under chapter 1 of part 2 ..."

That is electronic communications --

LORD CLARKE: This is section 4A, is it?

LORD PANNICK: No, section 4. It is on MS page 4481.
LORD CLARKE: Sorry, I beg your pardon. My fault.
LORD PANNICK: "Duties for the purpose of fulfilling EU obligations", section 4(1):

"This section applies to the following functions of Ofcom ..."

First of all, their functions under chapter 1 of part 2 which concerns electronic communications, networks and services, their licensing function, and there is a lot more detail, none of which matters. My point is under section 4(2):

"It shall be the duty of Ofcom in carrying out any of those functions to act in accordance with the six Community requirements which give effect among other things to the requirements of the framework directive. Then subsection 4, the second Community requirement is:

"... a requirement to secure that Ofcom's activities contribute to the development of the European internal market."

The third Community requirement is:

"... a requirement to promote the interests of all persons who are citizens of the European Union, within the meaning of Article 20."

My Lords, this simply does not make sense, it doesn't make any sense if the Secretary of State has

a prerogative power to notify and to terminate all our -- all the UK's obligations under the EU treaties. All of that is simply frustrated or nullified and I could make the same point -- I am not going to -- but I could make the same point on dozens, perhaps hundreds of statutes covering vast areas of national life. Parliament has adopted sections in primary legislation that proceed on the basis that the United Kingdom is a member of the EU, and these provisions make no sense if we are not a member of the EU.

LORD HUGHES: Are you saying what would be needed to undo these -- for example the Communications Act, supposing you are right and the service of the notice requires legislation, what kind of legislation? Are you addressing us on that or not?

LORD PANNICK: No, I am not because my submission is a very simple one. My submission is that the Secretary of State cannot proceed along the path of notification without Parliament addressing the problem that will inevitably arise, and I am concerned only with the notification stage. I am coming on to deal with the argument that is going to be there is going to be a Great Repeal Bill and we don't need to worry about it, I will deal with that.

My submission to your Lordships is that the statute

book has so many provisions, and this is an example, that proceed on the assumption that this country is a member of the EU, that the Secretary of State cannot by prerogative powers take the step of notifying, leading to us withdrawing, without Parliament itself addressing this issue.

LORD HUGHES: That is very clear. I understand that perfectly. But supposing you are right and Parliament does address the service of the notice, what is the effect of such an address by act of Parliament on the Communications Act 2003, or do you have the same problem with a legislative authorisation of the notice as you do with a prerogative authorisation?

LORD PANNICK: No, because I would accept that if Parliament were to say next week that section 1 of the authorisation Act, the Secretary of State is authorised to notify pursuant to Article 50 of the TEU, then it would be exceptionally difficult to run an argument that there is any legal impediment in him doing so. He would have express statutory authorisation and Parliament no doubt would proceed on the basis, because it would be told to this effect in the parliamentary debates: all of these problems, Communications Act problems and others will be addressed before we actually leave the EU.

LORD SUMPTION: This is not an ambulatory statute, so

technically the position is that if we were to, if notice is served and we consequently leave the EU this would remain in force, absurd as it is; no doubt in practice it would be changed, but the problem to which statutes like this give rise is a completely different problem to the one arising from the 1972 Act, isn't it; this is simply something which will look very strange but will continue to have effect until Parliament gets round to repealing it.

LORD PANNICK: Yes.

LORD MANCE: I suppose it might be impliedly repealed or frustrated if there was a statute authorising an Article 50 exit.

LORD PANNICK: Frustration is the point. I entirely accept the point my Lord, Lord Sumption puts to me that it would look a bit strange. My point is that when the court is asking itself whether the Secretary of State really has a prerogative power to notify, it is an important dimension of the argument that that which he seeks to do will frustrate, will render insensible, a large number of statutory provisions.

That is the submission, and that is not just my view, it is the view -- it is not just my submission, it is the view of the Secretary of State himself, because my friend Mr Eadie handed up to the court yesterday the

statement that was made by the appellant, Mr David Davis, to Parliament on 10 October 2016. Does the court still have copies of that? It is the three-page document -- I can't remember, I think Mr Eadie asked the court to put it in the black folder.

THE PRESIDENT: He did.

LADY HALE: The "next steps" document you are referring to.

LORD PANNICK: Yes.

LADY HALE: Yes.

LORD PANNICK: "Next steps in leaving the European Union". If the court has that --

THE PRESIDENT: Yes.

LORD PANNICK: I am grateful. On the second page, it is the third paragraph of Mr Davis' comment. He says:

"In all, there is more than 40 years of European Union law in UK law to consider and some of it simply will not work on exit."

We respectfully agree and we therefore submit that it is impossible to understand as a matter of law how the Secretary of State can claim a prerogative power to notify. He must, in my submission, obtain a parliamentary authorisation to take steps which will leave large elements of the statute book to be rendered insensible.

THE PRESIDENT: I understand your argument, Lord Pannick;

parliamentary authorisation would not extend even to a motion of both Houses after the issue had been fully debated.

LORD PANNICK: Yes, that is the seventh point, which I am coming on to.

THE PRESIDENT: Fine, okay.

LORD PANNICK: I am going to deal with that expressly, my Lord.

THE PRESIDENT: Okay.

LORD PANNICK: Can I come on to the fifth topic which is De Keyser and the other case law.

LADY HALE: Have I been mispronouncing that case all my adult life?

LORD PANNICK: Would your Ladyship like to tell me the correct --

LADY HALE: De Keyser.

LORD PANNICK: I will call it De Keyser.

LADY HALE: I may be wrong, I am often wrong.

LORD PANNICK: You say De Keyser, I say De Keyser.

LORD CLARKE: Down here we think it is De Keyser.

THE PRESIDENT: We can each stick to our own because the transcript will not give away what we have called it.

LORD PANNICK: It is my fifth topic, whatever it is called, and whatever it is called, MS 228 CA 2, tab 10, what it was concerned with was Parliament impliedly removing

a prerogative power. My submission is that that is not the only type of case where the courts will impose limits on the exercise of prerogative power. Here, we submit there simply is no prerogative power to act under a treaty so as to defeat, nullify, frustrate statutory rights. That is one additional principle.

Another principle is where the exercise of prerogative powers would frustrate the provision made by Parliament; that is ex parte Fire Brigades Union, core authorities 2, tab 15, MS 444.

My Lord, Lord Mance made the point in argument, I think it was yesterday, that in ex parte Fire Brigades Union, the majority recognised that it was not a De Keyser type case; see Lord Browne-Wilkinson, and I don't ask the court to go back to it, see Lord Browne-Wilkinson, page 553 F to G; see Lord Lloyd at 573 C to D; and Lord Nicholls, 578 F, his analysis also does not proceed on a De Keyser basis.

So De Keyser in my submission is not, cannot be, an exclusive code as to the limits of prerogative powers.

I also need to address Rees-Mogg, ex parte Rees-Mogg. Here I would ask the court to turn it up; it is in core authorities volume 2 at tab 14 and it is MS 424. The court will recall that the applicant there was

seeking to challenge the ratification of the Maastricht agreement; in particular his concern was the protocol on social policy.

Now, it is essential to, in my submission, understanding the case, to recognise that this protocol had no effect in domestic law and therefore did not remove, or indeed extend, domestic law rights, and that is stated by the divisional court at 568. It is MS 440. 568 of the report. Can I take the court to that, please. 568 A, MS 440:

"Would the ratification of the protocol on social policy alter the content of domestic law.

"The protocol itself makes clear that it was not intended to apply to the UK, nor is the UK party to the agreement which is annexed to the protocol. The protocol is not one of the treaties, which for this purpose includes protocols, included within the definition of the treaties in section 1(2) of the 1972 Act. It is specifically excluded by the 1993 Act. It follows that the protocol is not one of the treaties covered under section 2(1) of the 1972 Act by which alone Community treaties have force in domestic law. It does not become one of the treaties covered by section 2(1), merely because by the Union treaty, it is annexed to the EEC treaty, see section 1(3) of the Act of 1972."

So what was being complained about in Rees-Mogg had no effect on domestic law rights.

LORD WILSON: I think Mr Eadie says that that paragraph is a second free-standing reason for the disposal of the application. Do you agree?

LORD PANNICK: The case has to be understood in its context; I am not avoiding giving an answer to your Lordship's question, but can I come back to that after I have just shown your Lordship one other matter.

LORD WILSON: Do.

LORD PANNICK: Because the other matter is that at the time when the case was brought, Parliament had already approved that which was to be done at the international level. So if your Lordship looks at page 562, which is MS page number 434, the court will find set out just under letter C the text of section 1 of the 1993 Act, section 1 of the European Communities (Amendment) Act 1993, which received royal assent, so it had already received royal assent on 20 July, and the case was brought on 26 July. It provides:

"In section 1(2) of the 1972 Act, in the definition of the treaties and the Community treaties, after paragraph F, there shall be inserted the words ... and ... titles 2, 3 and 4 of the treaty on European Union, signed at Maastricht on 7 February 1992, together with

the other provisions of the treaty so far as they relate to those titles and the protocols adopted at Maastricht on that date and annexed to the treaty establishing the European Community with the exception of the protocol on social policy ..."

So there are two points by way of background, essential background, to understanding what it was the divisional court was deciding in the paragraph on which Mr Eadie relies. The first is that there is no effect on domestic law rights and duties by reason of the protocol on social policy, but secondly, Parliament had approved the treaty, including the protocols.

Now, in that context, one goes to the passage to which Mr Eadie invites attention and what the divisional court are rejecting at 567 G to H is an argument, an ambitious argument, as the divisional court concluded --

LADY HALE: There being ambitious counsel.

LORD PANNICK: Very ambitious counsel in 1993. The divisional court rejected what it regarded as an unsustainable argument, that despite the fact that Parliament had given its approval, despite the fact it had no effect, the protocol, on domestic law rights, nevertheless, the 1972 Act curtailed generally what would otherwise be a prerogative power to amend or add

to the EEC treaty. That is what Lord Justice Lloyd is rejecting and the argument is set out at 567 E to G, in particular just above F:

"By enacting section 2(1), Parliament must therefore have intended to curtail the prerogative power to amend or add to the EEC treaty."

That is what he is rejecting, his Lordship, and just above H:

"We find ourselves unable to accept this far-reaching argument ... when Parliament wishes to fetter the Crown's treaty-making power in relation to Community law, it does so in express terms such as one finds in section 6 ..."

Et cetera, et cetera. That is the point and my point is this has absolutely nothing whatsoever to do with the issue before this court on this occasion, which is whether or not the Secretary of State has a prerogative power to act on the international plane in a way which will frustrate, nullify domestic law rights and duties and the statutory scheme. That is not what was there being considered. That is my answer and that is why, although I accept -- in answer to my Lord, Lord Wilson's question, although I accept that 567 G to H is a separate answer given by the divisional court to the answer given at 568 B, it is only by understanding what

is said at 568 A to B and what is said at 562 C to E, that one can understand what it was that the divisional court was rejecting at 567 H. That is my submission.

LORD MANCE: Can you just help me understand your argument in 1994 or whenever. The amendment, which you pointed to on page 562, excluded the protocol from the definition of the treaties and yet your argument was, on 567, accordingly the protocol will have effect not only on the international plane but also by virtue of section 2(1) on the 1972 Act on the domestic plane. How so?

LORD PANNICK: That was the divisional court's reaction. That -- I don't want to complain but it may perhaps be an unfair question to ask me to defend an argument that the divisional court said simply didn't get off the ground.

LORD MANCE: I see, it is as simple as that.

LORD PANNICK: I plead guilty, my Lord.

LORD KERR: Not least because you now support the divisional court on this particular point.

LORD PANNICK: Of course I am not inviting this court to say that anything said by the divisional court in the context of what it was deciding was wrong. So that is Rees-Mogg and that is my fifth topic.

My sixth topic is the post 1972 legislation and the limitations placed on the use of prerogative powers.

The court has heard that Mr Eadie relies on the statutory provisions post 1972 and they have imposed various limits on the power of the Crown to act on the international plane. Mr Eadie first referred to part 2 of the 2010 Act, CRAG, and your Lordships and your Ladyship have that at core authorities 1, tab 5, MS page 131. My Lord, Lord Mance I think it was, asked about the green papers and the white paper that preceded the 2010 CRAG legislation. I do invite the court, please, to look at the green paper; the green paper can be found in volume 15 at tab 166. 15, 166. And for the court's note, the white paper appears --

LORD CARNWATH: Do you have the MS number?

LORD PANNICK: Sorry, MS 5189.

LORD CARNWATH: Thank you.

LORD PANNICK: That is the green paper. The white paper is the next tab, tab 167 and that is MS page 5213 but could I ask the court, please, to focus on the green paper, 5189, volume 15, tab 166 and the particular passage to which I invite the court's attention is at MS page 5207. It is under the heading, "Ratifying treaties".

MS 5207.

"Ratifying treaties", paragraph 31:

"Every year the UK becomes party to many international treaties. These result in binding

obligations for the UK under international law across a wide range of domestic and foreign policy issues. It is right that Parliament should be able to scrutinise the treaty-making process.

"32. The Government's ability to ratify treaties is currently constrained in two ways. Treaties that require changes to UK law need the enactment of prior legislation which, of course [of course] requires the full assent of Parliament [and they give examples] ... many other treaties [many other treaties] are covered by a convention known as the Ponsonby rule which is explained in box 3 ..."

Box 3 is over the page, and the court is very familiar with the Ponsonby rule, that the instrument is laid before both Houses of Parliament as a command paper for 21 days. Back to page 5207, 33:

"The Government believes that the procedure for allowing Parliament to scrutinise treaties should be formalised. The Government is of the view that Parliament may wish to hold a debate and vote on some treaties, and with a view to its doing so, will therefore consult on an appropriate means to put the Ponsonby rule on a statutory footing."

That is what ends up as CRAG, part 2. It is a statutory enactment of what was the Ponsonby rule,

obviously with variations, but that is the purpose and effect of CRAG part 2. It is nothing whatsoever to do with the other constitutional principle, which is recognised in paragraph 32 of that document, that if a treaty is going to require a change to UK law, of course it in any event requires the enactment of prior legislation which requires the full assent of Parliament.

In my submission, therefore, CRAG part 2 is nothing to the point. It doesn't assist in answering the question in this case, which is a question concerned with whether there can be a prerogative power in order to amend the -- in order to frustrate legislation which has been enacted.

So that is the 1972 Act -- that is, sorry, the 2010 Act.

Mr Eadie also refers to the other post 1972 statutes. The court has been taken through them, the statutes that specifically relate to the EU from the first one in 1978, which addressed increases in the powers of the then European assembly, through to the 2011 Act, which is the culmination of this process, requiring not merely an Act of Parliament but in any context a referendum on changes.

Now, my Lords, my Lady, leaving aside the post 1972

statutes, if we get to this point in the argument, then I have submitted that there was and is no prerogative power to take action on the international plane to nullify the statutory scheme created by the 1972 Act, particularly in relation to a statutory scheme which introduced a new source of domestic law. I have submitted that the 1972 Act, having regard to relevant principles of interpretation, that is the Public Law Project case, on Henry VIII clauses, legality, no implied repeal, that the Act is simply inconsistent with any prerogative power to set it aside.

Now, if either of those submissions is correct, I say it would require the clearest of statements by Parliament in any later legislation, that it was intending, Parliament was intending, to create a prerogative power which did not otherwise exist. And I say that nothing in the later legislation comes close to establishing a clear parliamentary statement that a prerogative power that did not otherwise exist now exists.

What Mr Eadie relies on is --

LADY HALE: It would not be a prerogative power, would it, if it was created by statute?

LORD PANNICK: It would be a statutory power.

LADY HALE: It would be a statutory power.

LORD PANNICK: But of course Mr Eadie does not put his case like that. He doesn't suggest that there is any statutory power to notify, he is very clear about this; he is not saying: look at the 2011 Act or any of the other post 1972 statutes, they confer a statutory power. His case is and has to be that the later legislation is, as he puts it, confirmatory of a prerogative power that previously existed.

LORD MANCE: Could it not be a revival of a prerogative power? I mean, you have assumed that the 1972 Act properly construed has the effect of abolishing the prerogative power, eliminating it, but that may require close study of what was actually being decided in the De Keyser and the Fire Brigades cases; on one view, perhaps they might simply be suppressing the prerogative power, and therefore it might be capable of being revived; or they might simply be saying that it was inappropriate to exercise it; do we have to look a little more closely at what they were in fact saying?

LORD PANNICK: My submission at its height is that there is simply, and never has been, a prerogative power in the executive to use treaty-making functions in order to nullify that which Parliament has enacted, and that is the strong submission. If that is right, it is not a question of reviving a prerogative power; it has never

existed. It would need to be created for the first time.

LORD KERR: One should beware of metaphors, of course, but one of the things that has emerged in the course of submissions has been that the 1972 Act constituted a clamp on the power, and the 2015 Act was the means by which this clamp was dismantled. What do you say about that argument?

LORD PANNICK: That the 2015 Act constituted a removal --

LORD KERR: Of the clamp.

LORD PANNICK: I have made my submissions on the 2015 Act. I don't accept that it has any effect, any legal effect on the contents of the 1972 Act or the constitutional principles that apply.

LORD KERR: I think you take an anterior point, don't you, and that is it is not a question of a clamp. Once the 1972 Act invested the rights of the United Kingdom citizens -- with these rights, then that invoked a superior or at least a different principle, namely that those rights cannot be taken away.

LORD PANNICK: They cannot be taken away because Parliament has enacted them, Parliament has provided them, it is basic to parliamentary sovereignty. However, I do accept that a consequence of parliamentary sovereignty is that Parliament can say something different.

LORD KERR: Yes.
LORD PANNICK: And it is a question of interpretation. All I am saying is that given the significance of that which Parliament did in 1972, and given the other principles of interpretation to which I have referred, it does require the clearest of parliamentary statements post 1972 to vary that position.
THE PRESIDENT: You say they are the clearest possible words, but we have had to spend a lot of time looking at the statute to persuade ourselves or to be persuaded that the 1972 Act did remove, or put into abeyance, or abolish, or whatever, or did not give rise to, however one chooses to put it, a prerogative; but it seems to me that it could well be said that the statute had the effect of putting a clamp on the prerogative, particularly bearing in mind what Lord Bingham said about the importance of our constitution being seen as flexible in the Robinson case. And in those circumstances, you are not relying on an express term in the 1972 Act, in itself to clamp the prerogative. So we shouldn't be too surprised if we can conclude that the 2015 Act impliedly removes or relaxes the clamp.
LORD PANNICK: Yes, but there is nothing in the language of the 2015 Act which can be focused upon, there is simply nothing there.

THE PRESIDENT: If one sees it in the sort of sense -- the way Lord Wilson puts it, of some sort of partnership between Parliament and the executive, between Parliament and the Government, then it seems to me there may be some force in the argument that says, when Parliament comes to face up to this issue, they say: well, let the British people vote; it is not decisive, of course, because the Government has to decide; but one could say it is Parliament ceding the ground so far as its role is concerned to the people, to a referendum; it has done that; and then it is over to the Government.

LORD PANNICK: The former is, with respect, self-evident, that Parliament is saying that the people are entitled, should be given a voice. Where I would respectfully take issue is the second part of your Lordship's question to me. It doesn't follow in my submission that the people having spoken, they are advising the Government as opposed to Parliament.

THE PRESIDENT: One of the problems if you are right is that, in terms of the law, the referendum has no consequences at all and the whole Referendum Act has no consequences.

LORD PANNICK: It has a very important consequence. Its consequence is a political consequence.

THE PRESIDENT: I know but I am saying as a matter of law --

in the concept of a flexible constitution, that could be said to be a little surprising.

LORD PANNICK: In my submission, it is not surprising, given that that was the intention of Parliament; Parliament intended, in my submission, to establish a referendum which would advise those --

THE PRESIDENT: Advise who, precisely?

LORD PANNICK: Advise both the Government and Parliament.

THE PRESIDENT: Maybe just advise the Government. Parliament was saying: over to you. "Advisory" is not in the statute. We find it in one statement, in a ministerial statement; there are lots of other statements one could look at. It is quite dangerous to look at advisory, but if we are into advisory, I am not sure where it takes us.

LORD PANNICK: But one has an Act of Parliament that simply says: there shall be a referendum; it says nothing more, nothing more. What your Lordship is putting to me is that that is sufficient to overturn, if I am otherwise right, what is a fundamental constitutional principle that the Government, the executive, lacks power on the international plane, to set aside an act of Parliament, the 1972 Act, which is nowhere mentioned in the 2015 legislation. That is the first point: an absolutely fundamental constitutional principle is to be removed,

as it were, as an implication; and I would respectfully submit that that would be a very surprising proposition.

THE PRESIDENT: You say as an implication, but that depends how one looks at it; if one looks at the 1972 Act as imposing a fetter by implication on the prerogative, because there is nothing expressly imposing any fetter, then it is not particularly surprising that the fetter is removed by implication.

LORD PANNICK: But the fetter is a fundamental constitutional principle. What your Lordship is putting to me is that such a fundamental constitutional principle, that the executive cannot frustrate or nullify a statutory scheme, can be removed without the clearest of statements, and here we don't have any statement at all. It is not that my friends focus on a particular word, and they say, well, in the constitutional context, the language of the legislation ought to be interpreted in a certain way.

THE PRESIDENT: But as Lord Bingham said, one doesn't look at the language so much as the purpose.

LORD PANNICK: With respect, that is not what Lord Bingham says; he says: within the scope of the language. That is what he says.

THE PRESIDENT: But the problem with your argument, and I see the force of what you say, is that in law, and

I repeat this, as a matter of law, the referendum has no effect. I understand your point that it has a political one, but it could be said to be a bit surprising that in a flexible constitution, an act such as the Referendum Act and an event such as the referendum, has no effect as a matter of law.

LORD PANNICK: But that, with respect, begs the question: what is it that the referendum was designed to achieve. It is open to Parliament to institute a referendum which does have a binding legal effect, and there are many, many examples of where Parliament has done so. Parliament has deliberately chosen a model which does not involve any binding legal effect, and it is a perfectly coherent statutory scheme for Parliament to say that: it is very important that the people be given a voice; this is a highly contentious political issue, and before any steps are taken as to the future of the UK's membership of the EU, the voice of the people should be heard. That is not an event of no significance, but it begs the question: what is to be the consequence?

THE PRESIDENT: I quite accept, just as much as you can say, quite rightly, that it doesn't tell us that the effect is intended to be binding; so anyone arguing against you can say it does not say it is not intended to be

binding; and one comes back to Lord Mance's point, that one has to look at the act, your point in terms of its language; but one also has to look at its consequence. And it may not be binding on the Government, nobody suggests that the Government is obliged to serve an Article 50 notice, and therefore it is not binding. In the other acts you refer to, it is not merely binding, it is binding on the Government. This Act may be enough for the Government to say: Parliament has ceded the issue, as far as Parliament is concerned, to the people; we can now go ahead.

LORD PANNICK: So the argument being put to me is that the 2015 Act does not have any binding force as against the Government. It doesn't commit the Government. And no one could, I think, seriously suggest it does commit the Government to notify -- the Government could say, we have decided, actually, we don't ...

But nevertheless your Lordship is putting to me it is intended to have a different legal effect, which is to remove what is otherwise the absence of prerogative power on the Government, should it decide to notify, it is now perfectly entitled to do so, even though it would otherwise have no prerogative power to do so.

THE PRESIDENT: Yes, it basically revives the prerogative power, the point that was being put to you, of course

there is nothing to stop Parliament, before the Article 50 notice is served, calling the matter in and reconsidering it; that is a different point.

LORD PANNICK: I am coming on, if I may, to the question of parliamentary involvement.

LORD KERR: You could say this illustrates the dangers of metaphors, because if you regard the 1972 Act as suppressing or placing a fetter on or a clamp on the prerogative, then that begs the question how is that fetter or clamp removed. As I have understood your argument, you submit it is not a question of a fetter, it is a question of the 1972 Act creating a new context; and the new context is that, given that powers, rights, have been given to the British citizens by this means, a new constitutional principle is in play, by reason of the different contexts.

And therefore when one comes to examine the 2015 Act for its efficacy in putting at nought that constitutional principle, you are not addressing the question: are you removing a clamp or dismantling a fetter; you are asking yourself the question: is it sufficient to displace the fundamental constitutional principle which you say obtains?

LORD PANNICK: I respectfully agree. I am relying -- the 1972 Act arises in the context of a fundamental

constitutional principle which applies generally. It is a fundamental constitutional principle that that which Parliament has created, ministers cannot set aside. Then one has the 1972 Act which adds greater force to the submission for all the reasons that I have sought to give, that it is not just an ordinary Act of Parliament, it is an act of constitutional importance, which contains section 2(4), which makes it even less likely that ministers would have a power to exercise the prerogative.

But I respectfully agree, there is no clamp, it is the application of fundamental constitutional principles of the United Kingdom. I do submit that if those fundamental principles are to be removed by Parliament itself, it is necessary for there to be clarity. Whatever else one might say about the 2015 Act, I respectfully submit that it cannot be said that the 2015 Act clearly removes the inability of the executive to act so as to frustrate the statutory rights. There is no clarity at all. What one has is an act of Parliament in very simple terms, there shall be a referendum, and that is all it says.

LORD WILSON: So in 2015 Parliament says we must have a referendum. Now there has been a referendum, and the significance of the outcome is enormous, but can one

discern in the Referendum Act, Parliament going on to say: and by the way the political significance will be for you, the executive, to weigh; or rather, as you say, isn't Parliament more likely to have said, having called for it, and when it has been done, we will assess the significance of it.

LORD PANNICK: That is precisely my submission, and I do say that, if the case against me is that the 2015 Act has altered the position, has altered what the position otherwise would be, then it is incumbent on those who make that submission to show that Parliament has clearly altered what is otherwise the basic constitutional position, and there is no clarity whatsoever in support of the appellant's position.

One has an act in the most general terms that simply does not address the division of power between executive and Parliament. That is not the subject of the act, that has nothing whatsoever to do with that topic, and I therefore respectfully submit that one cannot discern from this Act of Parliament any alteration of constitutional fundamentals, far less in the context of the 1972 Act.

LORD REED: It might be argued that it is a different type of act from most acts that Parliament passes. Its whole point is to have political effects. It is not altering

anybody's rights, for example, it is not the sort of legislation that Parliament passes day in, day out. It is an act which is designed to result in an event which will have enormous political significance.

The steps that then require to be taken in response to that are inevitably going to be steps taken by Government. It might decide to introduce a bill into Parliament, it might decide not to. Parliament can then respond. If there is a bill introduced, it can decide whether it is going to pass it or not; if there is no bill introduced, Parliament has the means of making the Government accountable to it for that failure.

So looking at it that way, it is an essentially political measure designed to have consequences at the political level between the political actors. If you look at it in that way, really, why is the court -- what role does the court have to play? There is not a legal issue really that arises here, other than our ensuring that the political actors are operating their roles in a lawful manner.

LORD PANNICK: My answer to your Lordship is that there is a role for the court to play. The role for the court is to identify whether or not the Secretary of State enjoys a power to act on the international plane, using his treaty making, and departing from prerogative, in such

a way as it will nullify statutory rights. For all the points that your Lordship makes, the essence remains, and what remains is that, before the 2015 Act, there is a body of statutory rights and statutory principles, the 1972 Act, and after the 2015 Act, all of those provisions remain. They are simply untouched by the 2015 Act.

Also untouched by the 2015 Act is the legal division of responsibility between the executive and Parliament. The Act says nothing about that, and nobody has produced any material whatsoever to suggest that the 2015 Act was intended to touch upon that issue. There is no material before the court in which ministers have said: and the division of responsibility between ministers and Parliament is going to be affected by all of this; none whatsoever.

Therefore I do not accept that the political significance of the 2015 Act, which I do not dispute, in any way touches upon the issue before the court, or touches upon the constitutional question. It was open to Parliament, open to Parliament, if it wished to do so, to say whatever it liked on this topic, and it said absolutely nothing.

For the court to infer matters that are simply not addressed in the Act, when they touch upon

constitutional fundamentals, in my submission, would be fundamentally wrong; it would be wrong for the court to infer, on a matter of this importance and sensitivity, that is the relationship between Parliament and the executive, a radical change of position by reason of an act which says nothing on the subject.

LORD REED: The way I have put it to you, obviously the court's role is to interpret the 2015 Act, but if it interprets it the way that I have put to you for your comments, the result is to allow for a flexible response by Government, depending on the outcome of the referendum, obviously, which is subject to parliamentary control in the normal way.

If we construe it in the way that you are arguing, inviting us to, the consequence is that the court then, as I understand it, has to effectively compel a Government minister to introduce a bill into Parliament, which is constitutionally a novelty, to say the least, and if, for example, Parliament were to pass a resolution in both Houses approving of notification under Article 50, the court would say to Parliament: that is not good enough, we, the court, are telling you that will not do.

LORD PANNICK: Can I come on to that, my Lord, that is the next point. Let me just deal if I may, try to deal with

the point your Lordship has made.

The court is not being asked in my submission to interpret the 2015 Act. There is no language in the 2015 Act which comes close to supporting the contention that is being made by the appellant. There is nothing. The appellant does not focus on any language in the 2015 Act, and in my submission, with great respect, it is a constitutional solecism to say that the court can somehow divine an intention from the 2015 Act, without focusing on the language that the legislation uses.

There are many statements to that effect, that it is simply not the court's role, even in a constitutional context; it is Lord Hoffmann's famous statement, approving the judgment of Associate Justice Kentridge(?) in the Zuma(?) case, I can't remember the case where Lord Hoffmann said it but I will track it down, the court has to look at the language of the governing instrument; and this is the 2015 Act; there is nothing in it that the appellant has drawn attention to which begins to support a contention that it touches upon the issues with which the court is concerned.

Indeed, I repeat, it is not the appellant's argument that power to notify is to be derived from the 2015 Act. That is not their case. It is somehow by means of legal osmosis that the argument is being constructed. There

simply isn't anything there; there is nothing there upon which I say this argument can be framed. In my submission, it is not surprising that Parliament has not expressly addressed the question of whether ministers can use prerogative power in order to nullify a statutory provision. The principle is so basic that one would not expect Parliament expressly to address the question.

So I say the 2015 Act is an act of political significance; it is entirely neutral on the issue before the court, as to whether or not the minister has power to notify.

LORD MANCE: On the question of whether all acts must have legal significance, you might -- I am not sure what your answer is in relation to Lord Keen, the submission relating to the Sewel convention, but the Sewel convention as enacted in section 28(8) of the Scotland Act might be said to be an example of a piece of legislation which doesn't have any legal significance. It simply enacts the convention and -- on one view I appreciate it is an issue in this case, and that people are saying it does have legal significance.

LORD PANNICK: I can see the force of that submission. I am entirely neutral, of course, and the court will decide, but it is not unknown for Parliament to pass legislation

that has an exhortatory intention. It doesn't necessarily have a concrete legal consequence, and I repeat, it is not difficult to understand why Parliament was enacting the 2015 Act. The court is not ignorant, of course, of the political realities. The political reality is a highly controversial political issue; it is considered appropriate, and understandably so, that there should be a vote, so that all those political actors understand what are the views of the electorate; but that tells you in my submission absolutely nothing as to what is to follow as a consequence of the vote.

LADY HALE: But the Act did have an effect. The Act had an effect. It provided for the referendum. The franchise in the referendum, which is different from the parliamentary franchise, made it lawful for the whole of the referendum to do everything. The Act undoubtedly had an effect.

LORD PANNICK: Absolutely.

LADY HALE: The question is whether the result has a legal effect.

LORD PANNICK: Yes, my Lord, Lord Sumption.

LORD SUMPTION: I was going to ask you exactly the same question.

LADY HALE: I am sorry.

LORD PANNICK: I apologise, I am labouring the point but that is the point, that Parliament has spoken. What Parliament required has occurred. This is not a nugatory act of Parliament, and some of your Lordships are putting to me questions that are seeking to divine from the Act a purpose and intention and effect that is simply not there, in my submission.

THE PRESIDENT: I think the case you had in mind where Lord Hoffmann approved Zuma is Mattadene(?).

LORD PANNICK: Your Lordship is right, 1999 appeal cases. Your Lordship is familiar with it.

THE PRESIDENT: I have found it. I cannot pretend to be familiar with it.

LORD PANNICK: Lord Hoffmann says, quoting Associate Justice Kentridge, that even in a constitutional context, even in a constitutional context, it is absolutely vital that what the court does is it looks at the language of the relevant instrument, here the 2015 Act.

What the court cannot do, because otherwise -- I think the term used is divination, what the court cannot do is somehow to infer from the general context a purpose and intention and effect that has no support whatsoever in the language. That is creation. That would be, in my submission, objectionable to traditional

law-making.

THE PRESIDENT: If the language used by the lawyers is ignored in favour of a general resort to "values", the result is not interpretation, but divination.

LORD PANNICK: Precisely so, and what Lord Bingham said in Robinson is entirely consistent with that, because the statement by Lord Bingham in Robinson is within the scope of the language that is used by the instrument. That is my submission.

THE PRESIDENT: Thank you.

LORD CARNWATH: I am trying to get a word in edgeways here, Lord Pannick. We have jumped from 1972 to 2015. Are you going to come back to the --

LORD PANNICK: My Lord, very, very quickly --

LORD CARNWATH: I would like at some point to get clear your submission as to what happened in 2008, because that is when Article 50 is created, and undoubtedly Article 50 created a new power operating at the international level, which one could assume would be something operated by the prerogative, so a new power which the UK Government has operating in international law; I think we need to ask ourselves what the effect of the 2008 Act was, if anything, on that.

LORD PANNICK: I say no effect for these reasons. First of all, I accept, and it is the Government's case, that the

United Kingdom had power to withdraw from the treaties prior to the changes made by Lisbon. It is not suggested by the Government this was a new power; it is a new means, it formalises the process. That is the first point.

The second point is that Article 50 does not say anything about the way in which domestically the state should act. It refers to the constitutional requirements of the state in question.

Thirdly, as Mr Eadie accepted, Article 50 does not have effect as part of section 2(1) of the 1972 Act. Therefore, I submit that it is simply not possible to suggest that what happened in 2008 affects the question of the division of responsibility between the Government and Parliament.

LORD CARNWATH: Except that Parliament in the 2008 Act constrains various exercises of prerogative specifically set out in that Act, doesn't do it to Article 50, and then in the 2011 Act, we get this acknowledgment that Article 50 is within the scope, as it were, but simply a reference to Article 50(3).

LORD PANNICK: What Parliament has done from 1978 onwards is to impose an increasingly rigorous form, set of controls, and Mr Eadie's argument is that the power -- what he says is the prerogative power to notify is not

the subject of any specific restraint, and my answer to that is one would not expect it to be, because it is so fundamental an aspect of constitutional law that ministers cannot use prerogative powers in order to remove that which Parliament has created.

But of course Parliament has not set out expressly that constitutional principle. It is a fundamental common law principle. The later acts are concerned, essentially, to constrain ministers from taking action at international level to expand the scope of EU law. That is the main focus of all the later legislation.

The fact that Parliament has from time to time imposed such constraints cannot establish that Parliament intended to remove a basic constitutional limit. Indeed, if one looks at the authorities, the authorities show that one should be very careful indeed before you use later legislation in order to amend or affect earlier -- the effect of earlier legislation.

My Lord, Lord Mance asked about the authorities and my Lord helpfully referred to two authorities. One in your Lordships' and your Ladyship's House most recently is the JB (Jamaica) case, Lord Toulson's judgment. It is in volume 22, tab 276, JB (Jamaica), MS 7778 and it is at paragraph 24 and I invite the court to look at that. I don't have time to take your Lordships or your

Ladyship to it.

THE PRESIDENT: Sorry, it is as much my fault as anyone else's; we have been rather taking up your time.

LORD PANNICK: I don't complain about that, my Lord; I am happy to seek to try to answer the points the court wants to raise.

My seventh and final topic is the role of Parliament, and the submission that is made by the appellant is there have been debates in Parliament. There have been Select Committee reports, there will be more such debates, and the appellant says it is a matter for Parliament to decide the nature and the extent of its involvement. Of course we agree, subject to an important qualification.

We say it necessarily follows from our submissions, if they are correct, that only an act of Parliament could lawfully confer power on the appellant to notify under Article 50(2). Why is that? Well, because notification would nullify statutory rights and indeed a statutory scheme. The law of the land is not altered by a motion in Parliament; this is a basic constitutional principle. The court knows a motion may be approved in the House of Commons today. I want to be very clear on this. Our submission is that a motion in Parliament does not affect, cannot affect, the legal

issues in this case. This issue arose in the Laker case. Can I take your Lordships back to the Laker case; it is core authorities, volume 2, and it is tab number 12.

THE PRESIDENT: Which page?

LORD PANNICK: MS 307. It is at page 367 of the MS, MS 367. This is Lord Denning, and what Lord Denning explains between E and F is that the action of the Government had been the subject of approval in both Houses of Parliament. E to F. At G, Lord Denning says:

> "... mark you, this approval even by both Houses was not the equivalent of an act of Parliament. It could not override the law of the land ... see Hoffmann-La Roche."

That is the point and I can take the court, if the court wants to see the passages in Hoffmann-La Roche, I won't do so because of time, but it is volume 21, tab 257, MS 7183. So a motion in Parliament simply cannot rectify what is otherwise the legal deficiency in the appellant's case.

If, as we submit, the appellant cannot act on the international plane by the exercise of the prerogative because it will nullify statutory rights, then an act of Parliament is necessary to change the law of the land.

One other authority that your Lordships and your

Ladyship may wish to be reminded of, it is the ex parte Federation of Self-Employed case. Volume 8 of the authorities and it is tab 68.

THE PRESIDENT: Thank you.

LORD PANNICK: National Federation of Self-Employed, volume 8, tab 68, MS 2782. The relevant passage is to be found at MS 2809 in the speech of Lord Diplock, between F and G if your Lordships and your Ladyship have that, at tab 68, Lord Diplock says:

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

That is the point. It is no answer for the Attorney General to say in his submissions, as he did on Monday, and I quote:

"Parliament can stand up for itself."

With great respect, that is a bad legal argument. The same could have been said in Laker, the same could

have been said in ex parte Fire Brigades Union. It is the role of the court and my Lord, Lord Reed asks me about the role of the court, it is the role of the court to address whether there is legal power to act in the relevant respect, and the ability of Parliament to control that which the minister is proposing to do is, with great respect, nothing to the point.

This is as fundamental as any other principle in this case and I invite the court not to accept any suggestion that the legal limits -- I emphasise legal limits -- on ministers' powers are to be left to or influenced by political control, or parliamentary control, short of an act of Parliament.

The appellant then says, well, the procedures under the 2010 Act, the CRAG act, are very likely to apply to a withdrawal agreement. That is not good enough. There may not be a withdrawal agreement and the UK would still leave the EU under Article 50(3). We don't know. If Parliament were to refuse to give approval to a withdrawal agreement, Article 50(3) would still apply. We would still leave. Parliament's approval is not a necessary condition for us to leave.

For the same reasons, the so-called Great Repeal Bill does not assist the appellant. There is no such bill at present. The court cannot proceed, in my

submission, on any assumption as to what Parliament would or might do with a Great Repeal Bill. My Lord, Lord Sumption put to Mr Eadie the court cannot assume that the Great Repeal Bill will repeal the 1972 Act. Mr Eadie agreed, and, with respect, so do we. It may be enacted, it may be rejected. Come what may, the act of notification commits the United Kingdom to leaving the EU with the consequence for statutory rights that we have drawn attention to.

One other very brief point. The court, I know, will have been much assisted by the various analyses by academic lawyers, of real distinction, on both sides of the argument on this appeal. Each side has extracted from the academic analysis the points which support our respective arguments and the court will decide who has the better of the arguments.

My Lords, my Lady, the submission for Ms Miller is that the volume of materials before the court, indeed the volume of lawyers before the court, and the eloquence of my friends the Attorney General and Mr Eadie and the Advocate General for Scotland should not be allowed to obscure the basic principles of constitutional law which I say the appellant's argument would violate.

Those are the submissions I want to make, unless

there are other matters on which I could seek to assist the court.

THE PRESIDENT: Thank you, Lord Pannick. Thank you.

Mr Chambers.

Submissions by MR CHAMBERS

MR CHAMBERS: My Lady, my Lords, I appear on behalf of the second respondent and I gratefully adopt the submissions of my learned friend Lord Pannick. We invite the court to approach this appeal from first principles, based on the fundamental legal doctrine of parliamentary sovereignty. Applying that doctrine, the answer to the issue posed in this appeal is straightforward and the result is clear. It is a three-stage argument which I shall summarise first and then develop.

Stage one is the doctrine of parliamentary sovereignty itself. Parliament is supreme. No person or body apart from Parliament itself can override, nullify or set aside legislation enacted by Parliament or the operation or effect of such legislation.

Stage two is the concession by the appellant that by triggering Article 50, EU law rights will undoubtedly and inevitably be lost. Those EU law rights are enshrined in primary legislation, most notably the 1972 Act and the 2002 European Parliamentary Elections Act. The clear legal effect of those concessions, of

that concession, is that by triggering Article 50, those statutes will be nullified and overridden.

Stage three is the absence of any parliamentary authorisation for the executive to override or nullify that primary legislation. In the absence of such parliamentary authorisation, by triggering Article 50, the Government will be acting contrary to the doctrine of parliamentary sovereignty and so the Government will be acting unlawfully.

It follows from these three simple propositions in our submission, that the appellants' appeal must be dismissed. At heart it really is as straightforward as that.

So, starting with stage one, which is the doctrine of parliamentary sovereignty, we have set out in our printed case the relevant principles. I am not going to go through them now, but I do want to highlight some of the core jurisprudential principles behind the doctrine, because they make it clear that the aspect of the doctrine which we rely on is absolute and it admits of no exceptions whatever.

The doctrine itself was forged in the fires of the battlefields of 17th century England, and it arose on the basis of the clash between Crown and Parliament for supremacy. At the culmination of the Glorious

Revolution of 1688, the Bill of Rights was enacted. Now, the doctrine itself long predated the Bill of Rights but it is in the Bill of Rights that the doctrine finds its legislative expression, and if I could take the court first of all to the Bill of Rights, which is in core authorities 1 at tab 106, electronic 4150 at 4152.

At 4150, we have the heading of the Bill of Rights, and then at 4152, suspending power:

"... that the pretended power of suspending laws or the execution of laws by regal authority without consent of Parliament is illegal ..."

Late dispensing power:

"... that the pretended power of dispensing with laws or the execution of laws by regal authority as it hath been assumed and exercised of late is illegal."

Articles 1 and 2 are clear in their terms. No ifs, no buts, no exceptions. Legislation enacted by Parliament is supreme, and the executive cannot act to undo that which Parliament has done. That which Parliament has granted, only Parliament can take away.

The most celebrated exposition of the doctrine of parliamentary sovereignty is that given by Professor Dicey in his seminal work, "Introduction to the Study of the Law of the Constitution", which was first published

in 1885. In our printed case we have cited extracts from the eighth edition of 1915 which was the last edition which Dicey himself wrote. I have described Dicey's exposition as the most celebrated. It is also the most influential and in its relevant respects, Dicey's magisterial exposition still holds good today.

If I could take the court to some relevant extracts from Dicey as quickly as I can, that is core authorities 5 at tab 157, that is electronic 4989. And at 4990, the sovereignty of Parliament is from a legal point of view the dominant characteristic of our political institutions. If you go down to under heading A, "Nature of parliamentary sovereignty":

"Parliament means in the mouth of a lawyer, though the word has often a different sense in ordinary conversation, the King, the House of Lords and the House of Commons. These three bodies acting together may be aptly described as the King in Parliament and constitute Parliament. The principle of parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has under the English constitution the right to make or unmake any law whatever, and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."

Then if you would go down about ten lines into the next paragraph, there is a section which reads, halfway down the page:

"There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an act of Parliament or which, to express the same thing in other words, will be enforced by the courts in contravention of an act of Parliament."

If you would then, please, move to the next tab --

LORD MANCE: That is the issue, isn't it, whether what is proposed here is in contravention of the 1972 Act?

MR CHAMBERS: My Lord, precisely, that is the issue. That is going to be my stage two, which is looking at the rights to see whether or not there is a contravention, but your Lordship is absolutely correct, on the principle, the question is will there be a contravention.

LORD MANCE: Just because rights are lost, which is your stage two, does not mean to say that they are lost in contravention of the statute which granted them; it may be that they are conditional or ambulatory.

MR CHAMBERS: My Lord, it could be, if they are conditional, but the point is this, if they are granted by Parliament -- a right is a right, if it is a statutory

right, that is something granted by Parliament. The effect will be to override or nullify that primary legislation, because the rights which are afforded by that legislation will have been taken away.

THE PRESIDENT: It depends, doesn't it; I mean, if the legislation said so long as the executive agrees, for example, there would be no problem.

MR CHAMBERS: My Lord, that is absolutely correct. That is my stage three, which is, is there any parliamentary authorisation.

So, for example, there would be parliamentary authorisation if the statute, there was a Henry VIII clause or whatever it may be, made specific provision, for example, for rights to be taken away.

So it is a three stage argument and I am on stage one, which is just setting out the principle, before I get to my stage two and then stage three. In stage three I will also be making submissions on the 2015 Act.

LORD MANCE: Yes, they could be conditional upon something other than a specific decision to take them away; they could be conditional upon -- any event but in particular they could be conditional on membership of the EU.

MR CHAMBERS: My Lord --

LORD MANCE: The EU existing.

MR CHAMBERS: Yes, that is an example. The one I was going

to draw your Lordships' attention to was the argument under the European Parliamentary Elections Act where what is said: well, what if there is no EU Parliament? In our submission, that does not matter. What matters is if there is a right to vote or to stand for elections to the European Parliament which has been granted under the 2002 Act, that is a domestic statutory right which, even if it cannot be exercised, has still been granted by Parliament, and it is Parliament's choice whether or not that right should be taken away.

LORD SUMPTION: The rule that the prerogative cannot take away rights is not limited to statutory rights, is it?

MR CHAMBERS: My Lord, it is not limited to statutory rights; we would say it applies to all rights, including common law rights.

I was going to move quickly to tab 331, which is the next tab, and it is electronic 9343.

LORD KERR: What is that number again, please?

MR CHAMBERS: Electronic 9343, we are still in Dicey but it is spread over two tabs, I am afraid. The relevant extract is 9343. The very bottom of the page:

"Thirdly, there does not exist in any part of the British empire any person or body of persons, executive, legislative or judicial, which can pronounce void any enactment passed by the British Parliament on the ground

of such enactment being opposed to the constitution on any ground whatever, except of course it being repealed by Parliament."

Then if we go back to the previous tab, which is 157, sorry to jump around but it is just that it is spread over two tabs, if we then go, please, to page 5005, in the electronic numbering, you will see halfway down the page:

"Two points are, however, well established. First, the resolution of neither House ..."

This is a substantial -- result of the case of Stockdale v Hansard, a point which my learned friend Lord Pannick was on, and then specifically relevant to the question of the role of the people in terms of political power and legal power. If you move on, please, to 5010, you will see at the top of the page, the vote of the parliamentary electors and halfway down that page:

"The sole legal right of electors under the English constitution is to elect members of Parliament. Electors have no legal means of initiating or sanctioning or of repealing the legislation of Parliament. No court will consider for a moment the argument that a law is invalid as being opposed to the opinion of the electorate. Their opinion can be legally

expressed through Parliament and through Parliament alone."

Then in the same vein --

LORD SUMPTION: That needs to be modified, at any rate to some extent, in an age of referenda.

MR CHAMBERS: My Lord, I am going to come to that but in our submission, the answer is yes, if Parliament has authorised a binding referendum. But if there is no binding referendum which has been authorised, this still obtains.

LORD HODGE: Does that include the first sentence you read out?

MR CHAMBERS: "The sole legal right of electors under the English constitution is to elect members of Parliament."

That is correct because it would be for Parliament then to confer rights on the people to hold a referendum, for example, but the sole legal right is to elect.

LORD MANCE: There is an anonymous and slightly droll publishers' note at the next section of Dicey, 9322, which says the word "referendum" is a foreign expression derived from Switzerland. 30 years ago it was almost unknown to Englishmen, even though they were interested in political theories.

MR CHAMBERS: Certainly Dicey changed his view on referenda

because he was terribly against Irish home rule, and he wanted referenda introduced to try and defeat Irish home rule. He didn't succeed.

LORD SUMPTION: He wanted a referendum in England about Irish home rule.

MR CHAMBERS: That's correct. He didn't get it.

My Lords, and my Lady, 5024, halfway down the page:

"The matter indeed may be carried a little further, and we may assert the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country ... this is a political, not a legal fact. The electors can in the long run always enforce their will, but the courts will take no notice of the will of the electors. The judges know nothing about any of the will of the people, except insofar as that will is expressed by an act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word 'sovereignty' is, it is true, fully as important as the legal sense or more so but the two significations, though intimately connected together, are essentially different."

The final extract is over the page on 5026, five lines from the bottom:

"The electors are a part of and the predominant part of the politically sovereign power but the legally sovereign power is assuredly, as maintained by all the best writers on the constitution, nothing but Parliament."

Now, the appellant says that he does not dispute what he terms the general principle of the doctrine of parliamentary sovereignty, and he goes on to say that nevertheless it is the case that the executive can by the use of the prerogative alter the law of the land, including that set out in statute.

Now, from a parliamentary sovereignty purpose, that striking proposition is, we submit, simply wrong. The doctrine of parliamentary sovereignty is not a general principle, it is the fundamental legal doctrine upon which our constitution stands.

As we have explained in our written case, and as the courts of the highest authority have said over the centuries, the doctrine of parliamentary sovereignty conditions and refines and defines other relevant concepts. Most importantly in this context, the issue and the extent and use of the prerogative.

The United Kingdom's dualist approach to

international treaty-making upon which the appellant so heavily relies is a product and a reflection of that fact. The UK's dualist approach exists precisely because the executive cannot alter domestic law by the use of the foreign affairs prerogative and the use of the prerogative of withdrawal. There has to be authorisation by Parliament.

The two relevant authorities for that, which I will not ask you to turn up but I will simply ask you to note, is Rayner, that is core authorities 3, tab 43, page 500 in the report at letters B to D, electronic 1179; and Higgs, which is core authorities 4, tab 260 at page 241 of the report, electronic 7244.

Now, contrary to the submissions made by my learned friend Mr Eadie, parliamentary sovereignty is not a new or a newly discovered principle. It has been well established and operated for over 300 years. But it does not in any way represent a challenge to the way in which the Government operates on the international plane. Nor will it require in the future any parliamentary micromanagement of what the Government does on the international plane. This is because it does not impact treaties which do not require implementation in domestic law. It does not impact on the exercise of power by Government on the

international plane which is authorised by Parliament. For example, participation of ministers in the decision-making of EU institutions. The doctrine does not impact on the use of the prerogative in respect of the myriad of examples which are given by the appellant in his case, for example Post Office v Estuary Radio, or in relation to the (Inaudible) of diplomats, so that is stage one.

That brings me to stage two, which is the appellant's concession, which is in paragraph 62A of his printed case, the page reference is 12353, and the concession is that the triggering of Article 50 "will undoubtedly lead to the removal ... rights and obligations currently conferred or imposed by EU law".

LORD MANCE: Could you just give that page again.

MR CHAMBERS: That is 62A of the appellant's printed case, the page reference is 12353.

The appellant's description of these rights as being conferred by EU law is not an accurate description of the source of these rights as a matter of domestic law. For the purposes of the doctrine of parliamentary sovereignty, the source of the relevant rights in domestic law is absolutely critical. Of course the source of the EU law rights which are being referred to here are primarily the 1972 Act and the 2002 Act.

Now, those rights were directly conferred in domestic law by those two acts of argument. These rights are available in domestic law only because Parliament has expressed its will by primary legislation that this be so.

Now, in this context, it is important to have a full appreciation of the circumstances in which and the reason why Parliament decided to enact the 1972 Act at all.

LORD CARNWATH: Could I just pick up on a point where these rights come from. In the case of Youssef, we had to deal with a rather unusual situation where one had a decision made by a United Nations body in the terrorism context which then took effect under a European regulation, which then in turn came into domestic law via the 1972 Act.

Now, I said in agreement with my colleagues that that was something which arose not from domestic law, although it was brought into domestic law, it is a sort of typical example of the conduit approach.

MR CHAMBERS: Yes.

LORD CARNWATH: Is that the correct analysis in your view, or is that an oversimplification?

MR CHAMBERS: My Lord, with respect, that is not the correct analysis.

LORD CARNWATH: I put it to you because it is relied on by -- in one of the papers -- cases before us.

MR CHAMBERS: Yes. Under our dualist approach, for any rights to be conferred in domestic law, requires the intervention of Parliament.

LORD CARNWATH: I accepted that. That was one of the issues in the case, was whether that had been done effectively, given the particular power interfered very drastically with the rights of a citizen of this country.

MR CHAMBERS: Yes.

LORD CARNWATH: Now, are you saying we got it wrong or --

THE PRESIDENT: Do you need to see the case, really, in order to answer that?

MR CHAMBERS: Yes (Inaudible). The general principle as I say in our dualist system requires the intervention of Parliament in order to create these rights. These rights are not just being transposed through a conduit; the domestic legal order is being changed by the 1972 Act.

LORD CARNWATH: It may be, as my Lord says, better to have a look at the case. I think it is in the papers somewhere, because it is mentioned by the lawyers --

MR CHAMBERS: Perhaps I can come back to that after the adjournment so that we can speed on.

In 1971 the Government was proposing that we join

the then EEC and to do that, they were proposing that the UK sign the accession treaty.

Now, joining the EEC would have two important consequences for the UK. The first is that membership would necessarily involve the UK in the significant fiscal obligations of membership. These fiscal obligations could only be sanctioned by Parliament, by primary legislation. We saw that happened in section 2(3) of the 1972 Act.

Membership would also involve changes to domestic law and again that could only be achieved by Parliament through primary legislation.

So it was that on 28 October 1971, Parliament was asked to give its consent in principle to the UK joining the EEC. The terms of the relevant parliamentary resolution, which were referred to by my Lord, Lord Mance earlier, were identical, they were put separately to both Houses and the terms are important. The court will find them in volume 17 of the authorities at tab 193, and the electronic reference is 5787.

LORD CLARKE: You set this out in your case, don't you?

MR CHAMBERS: My Lord, we have set out the terms of the resolution. I want to just show your Lordship also a short passage in the debate which we have not set out in the case. I just wanted to first of all take you to

that.

LORD CARNWATH: Sorry, the page again?

MR CHAMBERS: It is page 5787, and you will see the terms of the resolution:

"This House approves Her Majesty's Government's decision in principle to join the European Communities on the basis of the arrangements which have been negotiated."

So by these resolutions the Houses of Parliament were being asked to give their consent in principle to the Government's in principle decision to join the EEC; in other words if the resolutions were passed, Parliament could next expect the introduction of a European Communities bill to give effect to the in principle decision to join the EEC. But if those resolutions had not been passed, the UK's proposed membership of the EEC would have been stopped in its tracks.

Now, this was made clear by Mr Heath, the then Prime Minister, and if I could just take you to two very short passages, first of all at 5846, electronic 5846, which is towards the very end of this tab, 193, for those who have it in paper form. 5846, at the very top of the page, this is Mr Heath winding up the debate:

"I do not think that any Prime Minister has stood at

this box in time of peace and asked the House to take a positive decision of such importance as I am asking it to take tonight. I am well aware of the responsibility which rests on my shoulders for so doing. After ten years of negotiation, after many years of discussion in this House and after ten years of debate, the moment of decision for Parliament has come. The other House has already taken its vote and expressed its view. Frontwoodsmen have voted in favour of the motion ... I cannot over-emphasise tonight the importance of the vote which is being taken, the importance of this issue, the scale and quality of the decision and the impact it will have, equally inside and outside Britain."

So that was the momentous occasion which was the presager to the 1972 Act. If you then go to 5849, at the very bottom, four lines up, this is still in Mr Heath:

"It is well known that the President of France, supported by the Chancellor of Germany, has proposed a summit meeting of heads of Government ... This meeting will settle the European approach."

Then over the page:

"If by any chance the House rejected this motion tonight, that meeting would still go on and it would still take its decisions which will affect the greater

part of western Europe and affect our daily lives but we would not be there to take a share in those decisions."

So if the resolutions had not been passed, the reality is that the Government would not have been able to go on to sign the accession treaty because if it had done so, it would have been acting directly contrary to the will of Parliament if those resolutions had been rejected. Of course if they had been rejected, there would have been no European Communities bill. However, the resolutions were passed and they led to the signing of the accession treaty on 22 January 1972 and the introduction of the European Communities bill which became an act on 17 October 1972. So that is the context in which the Act was passed.

In our submission, everything from then on has to be seen through the prism of the 1972 Act. On the very next day, 18 October, the UK ratified the accession treaty and these dates are no coincidence. Prior to ratification, it was necessary for Parliament to pass legislation which would enable the UK to meet its fiscal obligations and would enable the UK to change domestic law.

THE PRESIDENT: As a matter of domestic law, would it have been open to the executive, to the Government, to decide not to ratify the treaty once the 1972 Act had been

passed?

MR CHAMBERS: My Lord, strictly speaking, as a matter of law, it may have been. Our submission is that if Parliament had expressed its will that the UK join the EEC through these resolutions, if it then passed the Act which makes provision for that joinder, then we would say it would in fact be unlawful for the executive to go against the will of Parliament, because the 1972 Act makes express provision for our entry into the EEC, so that domestic law could be altered, so once the Act was is passed, that is it.

LORD MANCE: My Lord's question related to whether there was an obligation to enter into the Act.

THE PRESIDENT: No, ratify the treaty.

LORD MANCE: To ratify the treaty. But once it was ratified, then at any rate the rights were created. I suppose therefore that there are two stages we have to consider it at.

MR CHAMBERS: Yes.

LORD MANCE: It is really the latter which is the critical one.

MR CHAMBERS: It is the latter, it is the 17 October enactment, 18 October ratification.

THE PRESIDENT: Of course that is the history once it has been ratified, but I just wondered whether that tiny

24 hours or whatever it was, the position there throws any light on the subsequent position; and it seems to me in some ways that you may well be right, consistently with your argument, there was an obligation to ratify.

MR CHAMBERS: Yes, we would say it would have been an abuse of power under Fire Brigades Union principles if there was no ratification.

THE PRESIDENT: I see the force of that, thank you.

MR CHAMBERS: Article 2 of the accession treaty itself mandated that the accession treaty be ratified in accordance with the UK's "own constitutional requirements", obviously a familiar phrase. We say those constitutional requirements included the passing of the 1972 Act by Parliament.

Now, the correct constitutional position, so far as ratification is concerned, is clearly set out by the late Lord Templeman writing extra-judicially in 1991, in his article, "Treaty-making and the British Parliament -- Europe".

The court will find that in volume 28, tab 351, electronic, 9688, and I would ask you to turn that up, please. This is an article published in the Chicago-Kent Law Review, volume 67. You see the title page at 9688. If we go to 9689:

"Under English law the capacity to negotiate and

conclude treaties falls entirely to the executive arm of the Government. Nominally Parliament plays no role at all in the process."

If we drop down a few lines:

"An understanding of how treaties are entered into and implemented in British law depends on an appreciation of the division between the international aspects of treaty-making and the domestic aspects of implementation. Parliament has very little involvement in the former but almost complete control over the latter aspect."

Then at 9690, halfway down the page:

"The theoretical powers of Parliament in relation to treaty making may be summarised as follows ...

"(2) Parliament may prevent a treaty being ratified if the Government submits the treaty to Parliament before ratification. However, if the House of Commons carried a vote against ratification, this result would also lead ... the Government.

"(3) If treaty provisions affect private rights or otherwise conflict with English common law or United Kingdom statutes, Parliament may ensure that such provisions are not effective by refusing to pass the necessary statute which gives effect to the treaty. There again the failure of the Government to retain the

enactment of the necessary provisions would lead to the fall of the Government. The threat of defeat means that a Government will always do all in its power to ensure that when negotiating a treaty, the provisions of the treaty will be acceptable to the majority of the legislature into the electorate."

Then, over the page at 9691, just above the heading "(2) Negotiations and conclusion of a treaty", four lines up:

"In practice a treaty approved by a Government which retains the support of a majority in the House of Commons will be ratified and the effect of the treaty will be given if the necessary in English law by the passage through Parliament of statutory incorporation of the provisions of the treaty."

Then at 9693, under the heading "(3) Parliamentary approbation or approval of treaties":

"Broadly speaking, Parliament will need to be involved where taxation is imposed or where a grant from public funds is necessary to implement the treaty where existing domestic law is affected ..."

And then he gives a few more examples.

At 9694, under the heading "Ratification of treaties," the last line of the page:

"It is also envisaged that between the time of

negotiation and the act of ratification, the legislature of a state may require to be given an opportunity to scrutinise the proposed international agreement, even in those states where legislative involvement is greater than in the UK, in order to give the necessary approval of the treaty."

There is then a reference to Article 14 of the Vienna Convention and then:

"Ratification, once an opportunity for the sovereign to confirm that the representative did in fact have full powers to conclude a treaty, is now a method of submitting the treaty making powers of the executive to some control of the legislature, so the state may give proper scrutiny to the treaty before it allows the Government to bind the state to it."

Then under the heading "The Ponsonby rule", Lord Templeman sets out on page 9695, at footnote 11, the preface by Mr Ponsonby to the Ponsonby rule, and at the beginning he says:

"It has been the declared policy of the Labour Party for some years to strengthen the control of Parliament over the conclusion of international treaties and agreements and to allow this House adequate opportunity to discuss the provisions of these instruments before their final ratification.

"As matters now stand, there is no constitutional obligation to compel the Government of the day to submit treaties to this House before ratification except in cases where a bill or financial resolution has to receive parliamentary sanction before ratification."

So there is a distinction being drawn between, on the one hand, bills where there is a constitutional obligation, treaties to put them before Parliament because they contain fiscal obligations or change the law of the land, and separately the treaties which do not require to be so put forward, but are under the new Ponsonby rule which is coming.

We had that at 9696, and at the top of the page I come therefore to the inauguration of a change in custom and procedure. Then about eight lines down, he says:

"There are two sorts of treaties. There is the present treaty out of which a bill and a financial resolution arise which necessarily comes before Parliament and in regard to which no change is necessary ... there is another sort of treaty out of which no bill arises, and that is the sort of treaty which, according to the present practice, need never have been brought before the House at all."

That then becomes the Ponsonby rule.

So we are dealing with the accession treaty with a situation where there was in our submission a constitutional obligation to bring it before Parliament so that domestic law could be changed.

There is just one further reference. My learned friend Lord Pannick took you to the green paper in relation to CRAG. There is also a relevant passage in the white paper, which is at bundle 15, tab 167. That is electronic 5213. The relevant electronic page number is -- in this document we are looking at the white paper -- 5282 and it is paragraph 119 of the white paper. Under the heading, "Treaties in domestic law":

"In the UK international treaty rights and obligations are not automatically incorporated into national law upon ratification. They are given effect in national law where necessary by primary or secondary legislation. The Government practice is not to ratify a treaty until all the necessary domestic legislation is in place, to enable it to comply with the treaty, since to do otherwise could put the UK in breach of its international obligations. Parliament, including where necessary the devolved legislatures, had the opportunity to debate enabling legislation ... this practice applies equally to all EU treaties that require enabling legislation. Most parliamentary debates take place

under this process rather than the Ponsonby rule."

LORD CLARKE: Can you just say again what paragraph that was.

MR CHAMBERS: 119, my Lord, forgive me.

LORD CLARKE: That is all right. Thank you.

MR CHAMBERS: So even before the Ponsonby rule came into effect in 1924, there was this constitutional requirement, we submit, for Parliament's consent to be given to ratification of the accession treaty. Now, neither the Ponsonby rule nor CRAG apply to treaties which are required to be implemented under domestic law. Contrary to my learned friend Mr Eadie's submissions, CRAG and the subsequent legislation is nothing to the point on the question of withdrawal from a treaty under Article 50. There is this prior fundamental lock, we would submit, and that lock is brought about by the fact that the EU treaties require implementation in domestic law.

Now, the reason I go through all that history at quite some length is for two reasons. First, it demonstrates, we submit, the interaction of the doctrine of parliamentary sovereignty and the UK's dualist approach to international treaties. The treaties could have no impact on domestic law without the 1972 Act, but it was an absolutely essential feature of the treaties,

as international law instruments, that much of them should have and should be given effect in domestic law.

So the 1972 Act was essential. If the treaties could not have had effect in domestic law, without Parliament passing the 1972 Act, so it must be that the effects of those treaties in domestic law can only be removed by Parliament and not by the executive. The key point about the dualist system from a parliamentary sovereignty perspective is that, when the UK enters into a treaty which requires domestic implementation, Parliament remains in control of the process. It remains in control if the necessary enabling legislation is passed or not. Parliament has a free choice. If Parliament refuses to pass the legislation, the treaty is not ratified.

Now the corollary of Parliament having that control is that parliamentary control must equally apply to the withdrawal process. It is for Parliament to choose whether it will repeal the legislation which implemented the treaty in domestic law.

For that reason, Parliament remains in effective control, whether the UK withdraws from the treaty or not.

The difficulty with the appellant's argument is that the triggering of Article 50 by the Government alone

will bypass that parliamentary control, and it will rob Parliament of any substantive choice as to whether or not to repeal the 1972 Act.

LORD MANCE: Isn't there a missing middle or -- in that proposition? Take the example of the double taxation treaties and the legislation giving effect to them, it gave effect to them, I think you argue, on the basis that the double taxation treaties would confer domestic rights so long as they were in existence, ie it remained in the executive's power what double taxation treaties to enter into and whether to abrogate them.

So that merely because treaties would not have had an effect without an act does not mean to say that they could only be disapplied by an act; the initial Act may itself contemplate, permit, their disapplication because it has a limited effect, the initial Act, and the question in this case comes down to whether the 1972 Act is that sort of limited legislation.

MR CHAMBERS: My Lord, yes. I am coming on to that, but specifically so far as the double taxation treaties are concerned, under TIOPA, of course there is the enabling legislation, and then orders in council are made and so the Government has authority.

LORD MANCE: Yes, that is because TIOPA says that, and, I mean, TIOPA could have been formulated differently,

perhaps, but for good reason, no doubt, it was formulated as it was.

MR CHAMBERS: Yes, it could have been but we have the 1972 Act, and when I come to the point, my stage three, we will say there is nothing in the Act to deal with that.

LORD MANCE: Yes.

MR CHAMBERS: Secondly, the reason I go through this history, is because it throws into stark reality in our submission, our respectful submission, the fallacy in the appellant's proposition that the EU law rights enshrined in the 1972 Act are somehow not domestic statutory rights, or they are a conduit, to use my Lord, Lord Carnwath's point.

It is absolutely essential to the whole function and the purpose of the 1972 Act, and to the operation of the treaties themselves, and to the UK's membership of the EU, that these rights are precisely that, domestic law rights. That is fundamental to being a member of the EU. They have to be put into domestic law and only Parliament can do that.

That is how the position has been understood by the courts in this country over a number of years, and I give two examples, again without asking the court to turn them up but just for your note. The first is

Thoburn in core authorities 3, tab 22, it is paragraph 66 of the judgment, electronic page 746; and the second one is McWhirter, which is paragraph 6 of the judgment, which is in core authorities 3, tab 46, electronic 1849.

The position is also clear, we submit, from the European Union Act of 2011, section 18, which my learned friend Lord Pannick took you to yesterday. That is the declaratory provision which says that EU law rights fall to be recognised and available in law only, and I stress the word "only", because of the 1972 Act.

LORD WILSON: I have to say that I still don't really understand what Parliament was getting at --

MR CHAMBERS: I am just about to hopefully enlighten your Lordship because I am going to take the court now to the explanatory notes, which is helpful on this, certainly in the parliamentary sovereignty context.

LORD WILSON: You set them out in your case and having read it this morning, I still don't understand it.

MR CHAMBERS: Then I am determined to make sure that your Lordship reaches the short adjournment hopefully with a better understanding.

The explanatory notes are in volume 30 of the authorities, tab 403. And it is electronic 10362, they start at 10352 and the relevant provisions are

paragraphs 118, 119 and 120, and that is at page 10362. Perhaps I could just ask the court to read very quickly 118, 119 and 120 and I hope that will answer my Lord, Lord Wilson's question. If not, I will do my best to answer any further questions.

(Pause)

Does my Lord, Lord Wilson have the relevant passage?

LORD WILSON: Yes, I do.

MR CHAMBERS: So we see from that in parliamentary sovereignty purposes, the reason this has been done was because although it was thought the doctrine of parliamentary sovereignty was sufficient to ensure that EU law was not supreme in the parliamentary sovereignty sense, section 18 is declaratory, and it is really belt and braces, to make it absolutely clear to everybody that EU law rights solely take effect under English domestic law through the will of Parliament.

It is --

LORD WILSON: What has been said to the contrary which concerned Parliament?

MR CHAMBERS: My Lord, I imagine various noises in certain sections of the House of Commons, by certain MPs who may have been concerned about what they might term the encroachment -- this was --

LORD SUMPTION: It had been suggested at one stage, had it

not, that the doctrine of primacy, combined with the statements of principle in cases like Costa v ENEL, did have precisely that effect, and indeed Ms Sharpston made a submission to that effect to the divisional court in Thoburn which was rejected.

MR CHAMBERS: Yes. My Lord, that is very helpful. Of course there is also Factortame which is in a similar vein.

LORD MANCE: There is the long-standing discussion between constitutional courts around Europe and the European Court of Justice as to which is supreme in areas falling within the scope of the local constitution, isn't there; it is the same point?

MR CHAMBERS: My Lord, it is.

LORD SUMPTION: It generally resulted in the conclusion which is the same as the one that exists here, essentially based on the local constitutional arrangement.

MR CHAMBERS: Yes.

My Lord, moving on, the appellant's argument based on the phrase "from time to time" in section 2(1) of the 1972 Act, in our submission, does not detract from parliamentary sovereignty. You have our printed case on that, I will not ask you to turn that up, but it is paragraph 38 of our printed case, at 12470. But I do

want to deal with one particular argument which was in fact raised by Lawyers for Britain in its written intervention, and that argument to a certain extent was taken up to a certain extent by Mr Eadie. The argument is that from the passing of the 2008 Act, the rights given by section 2(1) must be read as rights granted from time to time subject to the operation of Article 50.

Now, you have heard from my learned friend, Lord Pannick in relation to that, and the broad point is that Article 50 throws you back to domestic constitutional requirements, but I want to add this, that the introduction of Article 50, specifically in the context of the doctrine of parliamentary sovereignty and the 1972 Act, was considered by Parliament. It was considered by the House of Lords select committee on the constitution, during the passage of the bill which eventually became the 2008 Act. The select committee's report is at volume 17 of the authorities at tab 198.

LORD CLARKE: Does this get a mention in your case?

MR CHAMBERS: My Lord, it does, I believe, get a mention in our case. I will just check, certainly we have referred to it below but I believe it is in our case as well. I will give your Lordship the reference. It is electronic 5977. This is 17 at 198 -- sorry, it

actually starts at 5917 which is the sixth report of the select committee. It is a report with evidence.

If you start, please, at page 5922 and paragraph 6, you will see that the committee wrote to the foreign secretary to ask him to set out the Government's view of how the Lisbon treaty would affect the UK constitution, and his reply is produced and the court will find that at 5974. The relevant passage is at 5977, and it is the final two paragraphs above the heading, "Courts and the judiciary":

"The Lisbon treaty has no effect on the principle of parliamentary sovereignty. Parliament exercised its sovereignty in passing the 1972 Act and has continued to do so in passing the legislation necessary to ratify subsequent EU treaties. The UK Parliament could repeal the 1972 Act at any time. The consequence of such repeal is that the UK would not be able to comply with its international and EU obligations and would have to withdraw from the European Union. The Lisbon treaty does not change that and indeed for the first time includes a provision explicitly confirming member states' rights to withdraw from the European Union."

That then led to the committee's relevant conclusion in paragraph 95 of the report itself, which is at 5943. In paragraph 95 the committee say this:

"We conclude that the Lisbon treaty would make no alteration to the current relationship between the principles of primacy of European Union law and parliamentary sovereignty. The introduction of a provision explicitly confirming member states' rights to withdraw from the EU underlines the point that the United Kingdom only remains bound by European Union law as long as Parliament chooses to remain in the Union."

Now, in our submission, that explains at a general level why there was no need for any parliamentary control under article -- control of Article 50, under section 6 of the 2008 Act. Because Parliament was proceeding on the basis that under the doctrine of parliamentary sovereignty, it was for Parliament to decide whether or not to remain in the EU.

So my Lords, that is the position in relation to the 1972 Act. The point can also be illustrated in relation to the European Elections Act 2002 and there, I don't ask you to turn it up but for your note it is at core volume 1, page 128, electronic 4434, the rights granted under that Act, rights to stand for election and to vote, are conferred by the 2002 Act itself.

There is no reference made to rights deriving from a different legal system, or rights obtained in any other instrument; in other words, the source of the

rights in every sense is legislation enacted by Parliament. And that is all that is required to engage the doctrine of parliamentary sovereignty.

I have already dealt with the existence of the European Parliament point and my learned friend, Lord Pannick, has dealt with the other point which arose on this, which is the rights are contingent on the executive deciding to exercise the prerogative to withdraw. That, as Lord Pannick submitted, simply begs the question of whether the executive can give an Article 50 notification without the approval of Parliament.

For parliamentary sovereignty -- so far as the 2002 Act is concerned, the rights which are granted to citizens take effect of and function under the domestic legal order. It is precisely because those rights take effect under the domestic legal order that the principle of parliamentary sovereignty has been engaged. It is important to note that the "from time to time" argument could not in any event work in relation to the 2002 Act, and nor could the supposed impact of the advent of Article 50 have any impact on the 2002 Act, because the point there is there is no warrant to make those rights contingent on the introduction of Article 50; the 2002 Act is such that the rights are set out in stone.

So just before the short adjournment, I can now return to the core of my stage two argument, which is that once it is understood that the source of the relevant rights in domestic law is primary legislation passed by Parliament, then the legal effect of the appellant's concession in paragraph 62A of his case can be properly understood, because what it amounts to is that rights granted by Parliament under primary legislation will undoubtedly and inevitably be lost or removed by notification under Article 50.

Not just EU law rights, but rights granted by Parliament under acts of Parliament.

So that brings me to stage three which is whether Parliament has authorised the executive to bring about the inevitable loss of rights. Under the doctrine of parliamentary sovereignty, the authorisation of Parliament is needed because only Parliament can override, set aside or nullify legislation. It is important here to underline that the appellant does not claim any parliamentary authorisation; he says he doesn't need it, he says that the prerogative power suffices.

But this, in our respectful submission, goes back to the flaw in the appellant's argument because the appellant's approach, we submit, betrays a fundamental

misunderstanding of the doctrine of parliamentary sovereignty. Looked at through the prism of parliamentary sovereignty, the prerogative is nothing more than a label for executive action. The prerogative can only be exercised through executive action. And executive action is unlawful if it contravenes the doctrine of parliamentary sovereignty, and given that in this case, in our submission, the exercise of the prerogative will lead to this loss of rights in primary legislation, the only question which remains is whether or not there is parliamentary authorisation. And under the doctrine of parliamentary sovereignty, that is the correct approach to the issue, but the appellant seeks to persuade the court to look at matters from the wrong end of the telescope.

The appellant says that the starting point is to look to see whether there a prerogative and, if there is, he says the issue becomes whether or not the prerogative power has been limited by Parliament in the relevant respect.

But that, in our submission, looks at the matter completely the wrong way round, because it turns the doctrine of parliamentary sovereignty on its head. No, once it has been accepted, as it has here, that executive action will override primary legislation, the

correct approach in our submission is for the executive to show that Parliament has authorised the loss of rights in question.

It is not a question of looking to see if there a prerogative power which has or has not been limited, it is for the executive to show in clear terms that Parliament has authorised the loss of statutory rights intended to be brought about by this executive action.

So just to finish this point off, in answer to a question my Lord, Lord Reed raised yesterday, and that was whether or not the referendum result could provide a basis for the rational use of the prerogative, if there was a prerogative. Well, we submit this case does not involve the question of whether or not what the appellant proposes to do is a rational use of the prerogative; without parliamentary authorisation, the proposed executive action is not lawful, so there is simply no prerogative at all, in our submission, in that respect.

THE PRESIDENT: Is that a convenient moment?

MR CHAMBERS: My Lord, I was just about to ask.

LORD CARNWATH: Could I mention the Youssef case, if you want to come back to, I think it is at 36, 496 in the supplementary bundle, MS 67.

MR CHAMBERS: That is very helpful, thank you.

THE PRESIDENT: Thank you very much. Court is now adjourned.

We will resume again at 2.00 with Mr Chambers. Thank you.

(1.01 pm)

(The Luncheon Adjournment)

(2.00 pm)

THE PRESIDENT: We are going to try a new angle, Mr Chambers.

MR CHAMBERS: My Lady and my Lords, in accordance with the registrar's excellent ambulatory seating plan, I have moved slightly to the right -- or the left.

In answer to my Lord, Lord Carnwath.

LORD CARNWATH: I thought you were trying to escape from me.

MR CHAMBERS: My Lord, the reference to Youssef, as your Lordship very kindly pointed out, is in tab 496. At paragraph 34 of the judgment, supplementary electronic page 693, it was the Secretary of State who exercised prerogative powers at the international level to sanction or to list Mr Youssef on the sanctions list. The effect of that was to cause alterations to his domestic law rights under the EEC regulation 881, or EU regulation 881, which of course comes into English domestic law through section 2(1) of the 1972 Act. So it is no different in our submission to any European

Union law which is given domestic legal effect through section 2(1).

My Lords, I am going to go back to my stage three, and that is parliamentary authorisation. In our submission, there is nothing in the 2015 Act which could provide parliamentary authorisation, whether it is viewed through the prism of the prerogative or parliamentary sovereignty. Parliament passed the 2015 Act knowing full well that in our system of representative parliamentary democracy, referendums are not legally binding.

That was the legal position back in 1975, when the 1975 referendum was held on then EEC membership, and the 1975 Referendum Act is in volume 12 of the authorities at tab 111, electronic 4213. The reason I am taking you to that is because it is in materially identical terms to the 2015 Act, which is in core authorities 1, tab 7, electronic 1601.

Both are in section 1 and both say:

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

"the European Union" for 2015, or "the EEC" for 1975.

Under the terms of the 1975 Act, in our submission, the 1975 referendum was not legally binding. This is

clear from a variety of sources but I will take the court to two, if I may. The first is Professor Vernon Bogdanor's book, "The new British constitution", which the court has in volume 15 at tab 168. That is electronic 5308.

Unfortunately the front page to the book is missing, and we can have that copied, but "The new British constitution", Professor Vernon Bogdanor, 2009.

This is in chapter 7, the referendum. The relevant passage is at 5325. It is the last paragraph on 5325:

"In countries with codified constitutions, the outcome of a referendum generally binds both Parliament and Government. In Britain, however, with an uncodified constitution, the position is much less clear. Although neither Parliament nor Government can be legally bound, the Government could agree in advance that it would respect the result, while a clear majority on a reasonably high turnout would leave Parliament with little option in practice other than to endorse a decision of the people. Shortly before the European Community referendum in 1975, Edward Short, then leader of the House of Commons insisted to the House that 'this referendum was wholly consistent with parliamentary sovereignty. The Government will be bound by its result but Parliament of course cannot be bound'. He then

added 'although one would not expect honourable members to go against the wishes of the people, they remain free to do so'.

"That was an accurate statement of the constitutional position only on the assumption that Short meant that the Government would be morally bound. It could not be legally bound for in the purely formal sense, it was still the case that the British constitution knew nothing of the people."

There are echoes of Dicey there which I took the court to this morning.

At footnote 19 there is a reference to Mr Short which I would like to take the court to; it is volume 17 at tab 195. Electronic reference 5904, it is volume 17, tab 195. This is the Lord President of the council and the leader of the House of Commons, Mr Edward Short, and the relevant passage is at 5905, the very top of the page:

"I understand and respect the view of those devoted to this House and to the sovereignty of Parliament who argue that a referendum is alien to the principles and practices of parliamentary democracy. I respect their view but I do not agree with it. I will tell the House why. This referendum is wholly consistent with parliamentary sovereignty. The Government will be bound

by its result but Parliament of course cannot be bound. Although one would not expect honourable members to go against the wishes of the people, they remain free to do so. One of the characteristics of this Parliament is it can never divest itself of its sovereignty. The referendum itself cannot be held without parliamentary approval of the necessary legislation, nor, if the decision is to come out of the Community, could that decision be made effective without further legislation. I do not, therefore, accept that the sovereignty of Parliament is in any way affected by the referendum."

Then, to follow the history through, we have the Government's response to the House of Lords select committee's report on referendums of 2010. The court will find that in volume 18 at tab 201. That is electronic reference 6265. Tab 201, 6265, this is the fourth report of 2010 to 2011, the Government response to the report on referendums in the United Kingdom, published on 8 October 2010.

This report is incorporating the Government's response to the select committee's report on referendums. What the committee does is it sets out its conclusions and the Government's response to each of its conclusions. The relevant page is 6275, where, if you go to 6275, you will find two columns, one headed

"Recommendation" and one headed "Government's response". It is recommendation number 3 on that page, the third one down:

"We recognise that because of the sovereignty of Parliament, referendums cannot be legally binding in the UK and are therefore advisory. However, it would be difficult for Parliament to ignore a decisive expression of public opinion."

The Government's response was:

"The Government agrees with this recommendation. Under the UK's constitutional arrangements, Parliament must be responsible for deciding whether or not to take action in response to a referendum result."

Then to complete the story, we also rely on the House of Commons briefing paper, which was referred to in paragraph 107 of the divisional court's judgment. The briefing paper is also in volume 18 and it is in the next tab, 202. The electronic reference is 6279. This is briefing paper number 07212, 3 June 2015. European Union Referendum bill by Elise Uberoi from the House of Commons library.

If you go to 6281, under "Summary", the bill was introduced in the House of Commons on 28 May 2015 and requires the holding of a referendum on the UK's continued membership of the European Union before the

end of 2017.

LORD CLARKE: What page is this?

MR CHAMBERS: 6281. This is the first paragraph of the summary. This paper has been prepared as a guide in advance of the second reading debate on Tuesday, 9 June 2015.

Then if the court would please go to 6303, in section 5, with the heading, "Types of referendum":

"This bill requires a referendum to be held on the question of the UK's continued membership of the EU before the end of 2017. It does not contain any requirement for the UK Government to implement the results of the referendum, nor set a time limit by which a vote to leave the EU should be implemented. Instead, this is a type of referendum known as a pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the Government in its policy decisions. The referendums held in Scotland, Wales and Northern Ireland in 1997 and 1998 are examples of this type where opinion was tested before legislation was introduced. The UK does not have constitutional provisions which would require the results of a referendum to be implemented, unlike, for example, the Republic of Ireland, where the circumstances in which a binding referendum could be held are set out in its

constitution.

"In contrast, the legislation which provided for the referendum held on AV in May 2011 would have implemented the new system of voting without further legislation, provided that the boundary changes also provided for in the Parliamentary Voting System and Constituencies Act 2011 were also implemented. In the event there was a substantial majority against any change."

LORD CLARKE: Do we know who the author of this was? We were referred to it before.

MR CHAMBERS: Yes on the first page at 6279 on the cover sheet, does your Lordship see "Elise Uberoi"?

LORD SUMPTION: Who is she?

MR CHAMBERS: Elise Uberoi is a member of the House of Commons library. I am being helpfully referred to the back page at 6311, where the status of this briefing paper is set out in the sense that it is a publication of the House of Commons library research service, which provides MPs and their staff with impartial briefing and evidence, based -- they need to do their work in scrutinising Government, proposing legislation and supporting constituents.

Now, we relied on this briefing paper in the divisional court to evidence the historical fact that during the passage of the bill which became the

2015 Act, parliamentarians were informed that under the form of the bill, the result of the referendum would be advisory only. Which was consistent in our submission, which was the law as it then stood or the law as it was then understood by those who were going to consider this legislation. When the referendum is referred to as advisory only, what that means is that it was not legally binding.

The distinction sought to be drawn by my learned friend Mr Eadie about whether it was advisory for the Government or advisory for Parliament is not to the point, because the only point for this court, in our respectful submission, is whether the result of the referendum has any legal effect. In our submission it has no legal effect, consistent with the history, with the wording of the Act, and the law as it was understood at the time.

LORD CLARKE: What was the wording of the previous, the 2011 -- whichever date it was.

MR CHAMBERS: There was the 1975 Referendum Act but as I say, the wording is materially identical to the 2015.

LORD CLARKE: But is there any wording which made any of these compulsory, if you like?

MR CHAMBERS: My Lord, yes, there is the AV referendum. That was the 2011, forgive me.

LORD CARNWATH: But there was no question of a prerogative, that was simply being done as a matter of domestic law, and so in a way, the question of prerogative under foreign powers, whether that exists is a separate question which didn't arise under the AV referendum.
MR CHAMBERS: No, but what one is looking at is the question of where power lies.
LORD CARNWATH: I understand your point but I am saying that is not a direct parallel.
MR CHAMBERS: My Lord, I fully take that point. All I would submit is that there are two types of referendum and this was the first type and therefore Parliament did not surrender its sovereignty to its people --
LORD CLARKE: What was the relevant provision in the AV referendum? Do we have that?
MR CHAMBERS: We do have that and the relevant provision --
LORD CLARKE: If you just give me the reference.
MR CHAMBERS: Yes, we will get that for you, my Lord, certainly.
LORD CARNWATH: Perhaps while that is going on, can I ask you a more general point which is one that has been troubling me, and it arises out of what Lord Reed was saying, whether really the question we are dealing with is not so much a question of parliamentary sovereignty, which everyone accepts, but whether we as a court can

tell Parliament how to exercise that sovereignty. Imagine this situation, assume after the referendum vote the Government said: we think we should regard this as Brexit means Brexit, but we want to make sure that Parliament is with us on that, so we will put a motion before Parliament, rather as they did back in 1972; saying: we want your approval, Parliament, to launch Article 50 and we are not going to go ahead with Article 50 unless we get it.

Now, they would say: of course, we accept that is not legislation, we will need in due course, in two years' time or after our negotiations, to have a repeal bill which will deal with the rights that can be transposed into domestic law, make sure there isn't a black hole of rights which cannot, but that will all be done, but for the moment what we are doing is simply making sure that Parliament is with us.

Now, as I understand it, you say that would not be good enough. It would be open to us, the court, to say to Parliament: no, no, that motion, even though it has been supported by a large majority (Inaudible) is not good enough, you have to have a one-line bill which makes all the difference. The one-line bill does not solve any of the problems, it doesn't solve any of the problems of what we do about all the detail; but you say

that is a magic wand that makes all the difference.

MR CHAMBERS: My Lord, certainly not an magic wand. There are two stages, first of all the trigger stage and then what is going to happen after the trigger stage. Your Lordship referred to the Great Repeal Bill; that is after the trigger stage. We have to concentrate on the trigger stage itself.

LORD CARNWATH: Not necessarily, because obviously everyone accepts that there has to be legislation in due course -- as indeed the Great Repeal builds on that. So one cannot simply look at the trigger stage without having regard to what is going to follow from it. So the real question is, can we as a court say to Parliament, the trigger stage, a motion would not be good enough, even a motion supported -- a unanimous motion, that would not be good enough; there has to be this one-line bill that says: yes, you can trigger.

MR CHAMBERS: My Lord, that is absolutely correct. First of all a resolution would not be sufficient, because what one is looking at is primary legislation on the basis that rights, which are granted in domestic law, are going to be lost. But this court in our submission is the guardian of parliamentary sovereignty.

LORD CARNWATH: I understand all that, but still you are saying that Parliament over the road has voted in

a motion unanimously that we should go ahead; Ms Miller or Mr dos Santos can come to this court and say: stop them, they cannot go ahead, an injunction, until they have got this two-line bill.

MR CHAMBERS: My Lord, no one is stopping Parliament passing whatever resolutions it wants, and this court is not saying to Parliament --

THE PRESIDENT: No, it is saying to the executive: you cannot do it.

MR CHAMBERS: Exactly.

THE PRESIDENT: But that is Lord Carnwath's question; what we would say in those circumstances to the executive: even though Parliament has given you a clear pass through a motion of both Houses, you still have to go back to Parliament and pass the statute.

MR CHAMBERS: My Lord, yes, that is absolutely correct.

LORD CARNWATH: That is the case. I understand it and so be it.

LORD KERR: That is one way of casting it but surely your argument is that it is for this court to decide whether or not the 1972 Act can be set at nought, as Lord Pannick has put it, by the exercise of the prerogative. If we decide that is the position, it is then up to Parliament and indeed the executive to decide what to do. We are not issuing an edict to Parliament or to the

executive that you must do this or you must do that; we are simply saying what the law is.

MR CHAMBERS: My Lord, that is precisely right, and obviously the divisional court was very careful to ensure that there was no encroachment on any -- Privy Council(?) and the like -- so everyone is being very careful to ensure that Parliament is not being dictated to or the executive is not being dictated to.

THE PRESIDENT: I understand that. It sounds very fine to a lawyer who understands the difference, but to the average person in the street, it seems a bit odd if one says to the Government: you have to go back to Parliament and have an act of Parliament passed to show who Parliament's will is; when you have already been to Parliament and had a motion before both Houses which approves the service of the notice. That is really Lord Carnwath's point, and it does seem a bit odd, doesn't it?

MR CHAMBERS: My Lord, it may seem odd to the man on the Clapham omnibus, if I put it that way, but for lawyers, that is the correct result, for constitutionalists, that is the --

LORD SUMPTION: It is a vital distinction, isn't it? More than for the lawyers, if both Houses of Parliament were to pass a resolution inviting the executive no longer to

have any regard to the 1972 Act, that would be totally ineffective --

MR CHAMBERS: My Lord, yes, it would.

LORD SUMPTION: The reason is that resolutions do not change the law whereas statutes do. It is completely fundamental.

LORD CARNWATH: I understand that from a legal point of view, but to say that this is all in the name of parliamentary sovereignty does seem a little odd. It seems to me a vitally important legal point, but it is not about parliamentary sovereignty.

LORD SUMPTION: It is about the rule of law.

LORD MANCE: It is about what Parliament is, and I don't think that either Professor Dicey or Professor Hart would have been very surprised to find our rule of recognition defined in the way you are defining it.

THE PRESIDENT: Your point is that Parliament speaks to the people, and in particular to the courts, ultimately through statute.

MR CHAMBERS: That is absolutely right, my Lord, yes, they do.

LORD SUMPTION: Resolutions are political acts, whereas legislation is directly affects the law.

MR CHAMBERS: Yes.

LORD REED: Life has moved on since the time of Dicey. The

1 referendum result is the people speaking to the
2 political institutions, it is giving them
3 an instruction. That is one way of looking at it.
4 MR CHAMBERS: Yes.
5 LORD REED: If that is so, then the question, if that is the
6 right way of looking at the 2015 Act, that it has
7 provided a mechanism enabling effectively the people to
8 give an instruction to politicians, that they want to
9 leave the EU, then the law then has to work out what the
10 constitutional implications of that are. Falling back
11 on Dicey is not going to help because Dicey didn't have
12 to address that kind of situation.
13 MR CHAMBERS: Yes. My Lord, this court's task as part of
14 this appeal is to decide whether or not the instruction
15 which your Lordship refers to is binding or not. In our
16 submission it is not binding because the Act is very
17 clear, the 2015 Act is very clear, and on that point,
18 the ministerial statements which are relied on by the
19 appellant, we would say are not admissible because under
20 Pepper v Hart principles, they would only be admissible
21 if there was any ambiguity in the 2015 Act which in our
22 submission there is not. In any event, these
23 ministerial statements are matters of Government policy
24 and Government policy is not the law.
25 LORD MANCE: They are not admissible any more than your

House of Commons library briefing note.

MR CHAMBERS: My Lord, my House of Commons library briefing paper, with respect, is admissible, because it falls under the historical facts exception as established in many cases --

LORD MANCE: On that basis you would be looking at everything that was said and done there, and there is an issue as to whether the House of Commons briefing statement, library briefing statement is accurate; as soon as that issue arises we are incapable of dealing with it, it would be contrary to the Bill of Rights to go into it. I think there is a limit here to what we can look at.

MR CHAMBERS: My Lord, yes, but this does not raise the Bill of Rights issues, it doesn't raise the section 9 issue of the Bill of Rights because it is not technically a publication under a command paper.

THE PRESIDENT: It is a statement of what somebody thinks. MPs who voted on it may or may not have agreed with it, but that is why it is so unsatisfactory, looking at all this material, particularly when it is a controversial bill which has produced a lot of material, a lot of inconsistent statements and it is a classic reason why Pepper v Hart in some quarters is not very popular, and in remaining quarters is strongly to be kept to its

limitations and not to go outside them.

MR CHAMBERS: Yes, my Lord, the only point I would say is that this is what Parliament was told, there was no debate as far as we know about the form of the bill. It was brought in in that respect, it is in familiar form and in our submission it is clear what the result is.

THE PRESIDENT: Your short point is this, is it, that it would have been only too easy for the legislature to provide what its effect was if it wanted to tell us. It has not told us, and it is not for the courts to try and guess what the legislature intended, leave it to the legislature to decide what the effect of the referendum is; is that really it?

MR CHAMBERS: My Lord, yes.

My Lord, could I just finish up on this point and the court's point about the distinction between, if I may put it this way, political sovereignty and legal sovereignty, because obviously it is important that the people do not feel in our constitution that they have no power. Of course they have power; as Dicey said, their power is a political power to elect members of Parliament and it is members of Parliament who, under our constitution, make the law. So the people are not powerless, they always have the right to get rid of their members of Parliament if they want to.

LORD SUMPTION: His point was wider than that; they also have a power to bring pressure on their members of Parliament, so that politically they feel an obligation to act in a particular way which need not necessarily coincide with their personal opinions.

MR CHAMBERS: My Lord, that is absolutely correct, yes. That is one of the ways of expressing people's power.

So my Lords, conscious of the time, our submission, my stage three, is that there is no parliamentary authorisation for this loss of rights, whether it is under the 2015 Act, or any other legislation which has been passed by Parliament, and in the absence of that authorisation, in our submission, the appeal should be dismissed because each of my stages one, two and three lead to that conclusion.

Unless there are any further questions --

THE PRESIDENT: Thank you very much. Thank you, Mr Chambers.

MR CHAMBERS: My Lord, Lord Clarke wanted the reference to the AV referendum Act. It is volume 13, tab 136, electronic 4611 and it is section 8 of the Act which is at 4612.

THE PRESIDENT: Thank you.

LORD CLARKE: Thank you.

THE PRESIDENT: Thank you very much. Mr Scoffield.

MR SCOFFIELD: I am very grateful, my Lord.

My Lady, my Lords, I appear with professors McCrudden and Antony for the applicants in the Agnew case, and my learned friend Mr Lavery appears in a separate case, the McCord case. The court has given us a speaking allocation of 45 minutes for the Northern Ireland claimants as a whole.

Subject to the court, my Lords, my Lady, Mr Lavery and I have agreed that 30 minutes of that allocation will be given to the Agnew case and 15 minutes for the McCord case.

THE PRESIDENT: If you have agreed that, that is fine with us, thank you.

MR SCOFFIELD: My Lords, my Lady, probably the only authorities volume that I will be taking the court to is the Northern Ireland authorities volume 1, if that is of assistance.

My Lords, my Lady, the applicants in the Agnew case, as you will have seen, are a cross party and a cross community grouping of politicians, individuals and human rights organisations who are concerned about how withdrawal from the EU will uniquely affect Northern Ireland -- and further concerned, as the lead claimant is in the other case, to ensure that the process of

dealing with the referendum result is both lawful and properly considered.

As the court will have seen, there were four issues dealt with by Mr Justice Maguire in the court below, which its common case are broadly reflected in the questions referred for this court. In the time available, I intend to focus my hopefully economical submissions on issues one and two, and within those contexts to avoid duplication of the submissions already made or to be made by parties or interveners in the Miller appeal.

If time permits I want to say something very briefly about issue three and to make three short points in response to the Government's case on issue four.

My Lords, my Lady, issue one is whether an act of Parliament is required before notice can validly be given to the European Council under Article 50 TEU in light of the provisions of the Northern Ireland Act 1998. In summary we say that the Northern Ireland Act, like the European Communities Act, is not neutral as to whether the UK is a member of the EU, or whether the treaties continue to apply in Northern Ireland. There are three strands to the argument we advance on that issue.

My learned friend the Advocate General was right to

identify paragraph 80 of our printed case as containing a summary of those strands, and that is to be found at MS 23716.

LORD MANCE: Say that again.

MR SCOFFIELD: MS 23716, my Lord. The three strands are these: first, that the removal of rights granted by the Northern Ireland Act cannot be achieved by the exercise of the prerogative alone.

Second, that significant alteration of the devolution settlement in Northern Ireland also cannot be achieved by the exercise of the prerogative alone.

Third, that the giving of an Article 50 notice with frustrate the purpose and intention of the Northern Ireland Act in the context particularly of the north/south cooperation established under the Belfast and British-Irish agreements.

I want to make extremely brief submissions about the first and second of those two strands, since they are addressed by other parties who are before the court and I want to develop the third strand in just a little more detail.

THE PRESIDENT: Right.

MR SCOFFIELD: My learned friend the Advocate General said that the third submission was a complex area. If it seems that way, then I am sure that is a fault on my

part, but I hope to persuade the court that it is really not that complex at all.

My Lords, my Lady, the first strand, the removal of rights, the Northern Ireland Act confers rights under EU law on Northern Ireland citizens. It does so by providing that the legislative and executive branches of a Northern Ireland administration have no competence and no power respectively to act in a way which is contrary to EU law. That is sections 6(2)(d) and 24(1)(b) and your Lordships find those at MS 20048 and MS 20068.

Those rights can be and have regularly been relied upon by individuals against the Northern Ireland administration in the courts in Northern Ireland to challenge legislation or executive action. Perhaps a recent example is JR 65's application in which the court, this court, refused leave to appeal on Monday of this week, to my client, unfortunately.

But, my Lords, those rights can be relied upon in the courts, and the Government accepts that in this way the Northern Ireland Act is, in their language, "a further conduit" for the operation of EU law rights within the UK. Those provisions represent the UK Parliament embedding the new legal order of the EU into the constitution of Northern Ireland as well as the constitution of the UK.

Importantly, my Lords, my Lady, the Government also candidly accepts that each of those provisions will become otiose or will beat the air, when the EU treaties no longer apply. We see that, my Lords, my Lady, in the Government's case in Agnew and the court proceedings at paragraph 57, and that is at MS 25161.

THE PRESIDENT: Thank you.

MR SCOFFIELD: We submit that those rights cannot lawfully be defeated, frustrated or stripped of all content by the exercise of the royal prerogative.

Now, the court will immediately see that that argument is a variation on the central case which is advanced by Lord Pannick for Ms Miller. I gratefully adopt his submissions on that issue and don't for a moment pretend that I could improve upon them, but the court has a brief written summary of our response to the Government's case in Miller, in our printed case at paragraphs 92 to 104. We simply add the concise point that the essential purpose of the dualist theory is to protect the position of Parliament as against the executive, rather than, as the Government seeks to have it, to protect the position of the executive against Parliament.

My Lords, my Lady, issue one, the second strand, the alteration of the devolution settlement. This strand of

our case is that the removal of EU law obligations as they apply in the EU, or as they apply in the UK rather, significantly alters the competence of the devolved administration in Northern Ireland. In other words, it materially alters the carefully constructed devolution settlement, and it does so, we submit, in at least two ways.

Firstly, as we have seen, since the legislative and executive competence of the devolved authorities of Northern Ireland is limited by the operation of EU law, that is section 6 and section 24 read with section 98(1), the removal of EU law obligations necessarily increases that competence. The administration will be able to do things which up to now it has been precluded from doing by EU law restrictions.

But, secondly, since observing and implementing obligations under EU law is a transferred matter -- that is in a provision we will look at in due course -- the hollowing out of EU law obligations also necessarily removes some areas of devolved responsibility. So the administration will not be able to do some things which up to now have been its responsibility.

In our submission, such an alteration of the devolution settlement in Northern Ireland cannot be affected by the executive alone acting by means of the

1 royal prerogative. To do so offends the legal principle
2 that the law cannot be altered by means of the
3 prerogative alone; much less, we say, can
4 a constitutional statute or indeed a constitution as the
5 Northern Ireland Act is. That would require clear
6 words, even in a later statute, for it to be impliedly
7 repealed or become otiose.
8 My Lords, my Lady, a distinct but related point in
9 this strand is that the use of the prerogative in this
10 way also circumvents or sidesteps the usual requirements
11 for an amendment of the devolution scheme. That usually
12 requires either an act of the Westminster Parliament or
13 an order in council under section 4 of the
14 Northern Ireland Act, converting a reserved matter into
15 a transferred matter, or vice versa, and the court will
16 find section 4 at MS 20044.
17 When one looks at section 4, one sees that any such
18 order in council requires not only approval by each
19 House of Parliament, but also a resolution passed in the
20 Northern Ireland assembly itself, praying in favour of
21 the change, and, given the sensitivity that there is
22 with tinkering with the devolution settlement in
23 Northern Ireland, that resolution also requires to be
24 passed with defined cross-community consent. That is
25 section 4(2)(a) and 4(3).

We submit that the use of the prerogative permitting the executive to effect such a change without those protections frustrates the purpose and effect of those provisions.

My Lords, my Lady, that strand of our case on issue one has been taken up by both the Lord Advocate on behalf of the Scottish Government and the Counsel General on behalf of the Welsh Government in their submissions to the court, and assuming their submissions orally are consistent with their written cases, we respectively adopt those submissions also.

THE PRESIDENT: That is very helpful, thank you.

MR SCOFFIELD: But in our submission, my Lords, my Lady, the UK Government's contentions on the extent of its prerogative power are, with respect, cavalier, perhaps in this context with both a small C and a large C; in respect, my Lords, my Lady, of the effect which the cessation of the EU treaties will have on the delicately balanced constitutional settlement in Northern Ireland.

I heard my learned friend Mr Eadie to say in his submissions that real clarity is required in a statute before the constitutional balance is upset. His submission, of course, was addressed to what he would suggest is the removal by statute of a well-established prerogative power, and on that, we agree with the

claimants in Miller that that is to look at the matter from the wrong end of the telescope.

But my Lords, my Lady, Mr Eadie is right to say, where a constitutional balance is being upset, clear statutory authority is required. And where what we have called a pillar of the constitution set out in the Northern Ireland Act is being removed or hollowed out, that can only be done by an act of Parliament.

My Lords, my Lady, the third strand of issue one, this is an argument which is peculiar to the circumstances of Northern Ireland, it arises from the proves of the Northern Ireland Act giving rise to the Belfast agreement, which require -- sorry, giving effect to the Belfast agreement which require north/south cooperation in the context clearly, we say, of continued EU membership.

The submission is that continued membership of the EU is an integral part of the scheme of the Act, on this basis, as well as the two bases just mentioned, and the royal prerogative cannot be used in a manner inconsistent with that statutory purpose.

As the court will hopefully have seen from our written case, the British-Irish agreement, which we accept is unenforceable as a matter of domestic law but which forms the interpretative backdrop to the

Northern Ireland Act, expressly envisaged that the UK and the Republic of Ireland would develop close cooperation between their countries as partners in the European Union. Your Lordships, and your Ladyship, will find that at MS 20373.

That partnership, we say, is necessary because the Belfast agreement not only envisaged but required, as part of the north/south cooperation it established, the implementation of EU policies and programmes on an all-Ireland basis and a cross-border basis, or at the very least the possibility of such implementation.

Now, we say that that is a core part of the scheme of the Northern Ireland Act, and the purpose for which the north/south machinery has been established in part 5.

My Lords, my Lady, the kernel of our case on that point is set out in paragraphs 46 to 51 of our written case. It may be helpful if the court would turn briefly to strand two of the Belfast agreement. Your Lordships will find that in Northern Ireland authorities, volume 1, tab 14, beginning at MS 20354.

THE PRESIDENT: 20354?

MR SCOFFIELD: Yes, my Lord.

THE PRESIDENT: Thank you. Yes.

MR SCOFFIELD: My Lord, Lord Wilson summarised the

Government's case on this yesterday as being that the Northern Ireland Act does not carry this issue far enough. That is because we say the Secretary of State's submissions do not read strand two fairly and as a whole. The North South Ministerial Council is not, as the Government's case essentially suggests in paragraph 38, it is not merely a talking shop; it is set up as a joint executive body which is required to agree and implement policies, including EU policies and programmes on an all-Ireland and cross-border basis.

Now, we say, my Lords, my Lady, that simply cannot be done if one part of the island is no longer a part of the EU. Now, none of that, we say, should be surprising in the context of the Belfast agreement and the British-Irish agreement, because the whole context of those agreements is a commitment to developing cooperation, growing closer together and increasing areas of mutual interest, rather than driving a wedge between Northern Ireland and the Republic, but it also emerges, we say, from a simple reading of the text of strand two.

LORD MANCE: How do you get this into the Northern Ireland Act?

MR SCOFFIELD: I will come to that in a moment, my Lord; two reasons, perhaps three reasons. Firstly, my Lord, it is

clear from the long title of the Northern Ireland Act that it is to implement specifically the Belfast agreement. We have seen that.

LORD MANCE: Not necessarily the whole of it, at any rate, carry on, yes.

MR SCOFFIELD: The second point, my Lord, is as we know from Robinson, this document forms the interpretative background to the Act generally, and when we are looking at constitutional statutes, we are looking at, as we know from Axa, the general message. But perhaps, I hope most convincingly, we will see in a moment or two that a number of these provisions are expressly referenced either in the 1998 Act or in legislation flowing from it. I will come to that in just a moment, my Lord.

If I might just very briefly run through some of the provisions of strand two.

THE PRESIDENT: Yes.

MR SCOFFIELD: As I have said, my Lords, that begins at MS 20354.

THE PRESIDENT: Yes.

MR SCOFFIELD: I will just summarise what we say is the effect of a number of the key provisions. Paragraph 1, the North South Ministerial Council is a joint executive body. It is designed to take action and implement policies on an all-Ireland and cross-border basis. At

paragraph 3(iii), it is required to meet in an appropriate format to consider institutional and cross-sectoral matters, and that includes in relation to the EU.

Paragraphs 5.3 and 5.4 and paragraph 9, it must make decisions on policies for implementation, both separately in each jurisdiction and on policies and action at an all-Ireland and cross-border level to be implemented by the implementation bodies.

Paragraph 11, those implementation bodies will implement the relevant policies on an all-Ireland and cross-border basis.

Then importantly, we say, at paragraph 17, those policies must include EU policies or at the very, very least, it must be possible for those policies to include EU policies.

So your Lordships, and your Ladyship, see there, the council is to consider the European dimension of relevant matters, that is any relevant matter of mutual interest under paragraph 1. That must include the implementation of EU policies and programmes and proposals under consideration in the EU framework.

THE PRESIDENT: The Attorney General made the point that this would still be possible because the Irish Republic would be in the European Union.

MR SCOFFIELD: I respectfully say not, my Lord, and that is why we say the Government's case and indeed the Attorney's case does not read strand two as a whole, because in paragraph 17, when one is talking about the implementation of EU policies and programmes, that is a reference back, we say, to paragraphs 1, 5, 9 and 11. Implementation in this context does not mean implementation in one jurisdiction only, it plainly means implementation at an all Ireland and cross border level.

We see that phrase repeated a number of times through strand two.

We say, respectfully, that is the key flaw in the Government's case. They say it is fine, there will still be things of mutual interest to talk about, but they don't appreciate the executive nature of the North South Ministerial Council and the implementation bodies which follow on, and that they are required to implement policies each side of the border. Finally --

LORD SUMPTION: Which provisions of the Northern Ireland do you say that this point assists in interpreting?

MR SCOFFIELD: My Lord, part 5 of the Northern Ireland Act deals with the north/south machinery and architecture, and indeed in answer to your Lordship's question and that of my Lord, Lord Mance a few moments ago, these

provisions are referred to and we say given statutory effect and essentially incorporated into part 5 in a number of statutory provisions in or under the Northern Ireland Act. So if I can give your Lordships a number of brief references, paragraph 5 of strand 2 is referred to in section 52(c)(5) of the Northern Ireland Act, that is MS 20105. That defines the obligation on ministers in Northern Ireland to participate in the North South Ministerial Council. It is not a matter of choice; they are obliged to operate these arrangements.

Paragraph 11, of strand two is referred to in sections 53(5) and 55(5), that is MS 20106 and 20107. That defines the purpose of the implementation bodies. Then the scheme generally is referred to in article 2(2) of the north/south cooperation implementation bodies Northern Ireland order 1999, and the court finds that at MS 20253.

THE PRESIDENT: With the exception of paragraphs 5 and 11, the only reference you are telling us is in -- is it a statutory instrument, or is it -- does it have the force of a statute, the regulation?

MR SCOFFIELD: It is a statutory instrument made under the Northern Ireland Act, my Lord, giving effect to it, because as the Attorney pointed out yesterday, there had

to be a further agreement after this to establish the six implementation bodies, but we say, looking at this statute, the implementation of EU policies and programmes on a joint all Ireland basis is clearly a core part of the North South Ministerial Council's functions set out in part 5, and it is therefore likely to form a significant element of the work of several, if not all, of the implementation bodies which were required to be established by the agreements, and which were in fact established by the implementation bodies' order which I have just mentioned.

So the point could rest there, we say, on the basis of the 1998 Act, but it is strengthened, we submit, when one has regard to the establishment of the special EU programmes body, which was one of the few implementation bodies agreed, north and south, and which was specifically set up by the 1999 order.

Its functions are to administer EU programmes both north and south of the border, to assist both governments in continuing negotiations with the EU commission about future programmes, and indeed whose current work involves programmes extending into 2020.

So, my Lords we say if there was ever any choice on the part of the North South Ministerial Council to leave EU policies to one side, we say that is an incorrect

reading of strand two, but if there was ever such a choice, that choice has now gone by the legislative choice set out in the 1999 order. My Lords, my Lady, we say the work of this particular body and the statutory functions which have been assigned to it will essentially evaporate in the event that the UK and Northern Ireland leave the EU.

It is not sufficient to say, as the Government does, that those who staff the body may still have some interesting things to talk about. These are bodies, see strand 2, paragraph 11, which must have a clear operational remit and actually implement policies on an all-Ireland, all-island, and cross-border basis. We say, my Lords, that this is not a matter of small moment.

As the court will recall, the Belfast agreement makes absolutely clear that all of the arrangements hang together and are interlocking and interdependent. Your Lordships see that reference at paragraph 5 of the declaration of support, MS 20343 to 20344.

So, my Lords, even if breaking faith with these agreements is something which as a matter of domestic law, Parliament can do, it can amend the 1998 Act, it can make clear that the North South Ministerial Council no longer has all of the functions set out in strand

two, it can amend or scrap the implementation bodies' order or parts of it; the point we make is that that is something that must be done again by legislation, because otherwise legislation of constitutional significance would be frustrated or defeated by the effects of an Article 50 notice without parliamentary sanction.

My Lords, before I move on to issue two, there is one further discrete submission I want to make in response to the Government's case on the devolution statutes. The Advocate General took a very broad brush approach to the devolution statutes, and said under each of them, foreign relations are expressly reserved and that the devolved legislatures have no competence in relation to them, and that therefore they can have nothing to say about the exercise of the foreign affairs prerogative. We say that in Northern Ireland that is not a correct starting point as a matter of law, and in any event the conclusion does not follow from the premise.

Can I just give your Lordships a reference to paragraph 3 of schedule 2 of the Northern Ireland Act, which your Lordships will find at and your Ladyship will find, MS 20154. That makes clear that there are certain elements of international relations which are

transferred to the Northern Ireland authorities.

So carved out of the general accepted matter of international relations are north/south cooperation in relation to policing; the exercise of legislative powers to give effect to the north/south arrangements and agreements of implementation bodies; the observance and implementation of obligations under the British-Irish agreement; and effectively all of part 5 of the Act; and also observing and implementing obligations under EU law.

So these are all areas of international relations which are not accepted and which are therefore transferred.

But even assuming that international relations was entirely an accepted matter under the Northern Ireland Act, that says nothing about the power of the Westminster Parliament in that act to displace or abrogate the prerogative.

My Lords, my Lady, issue two arises only if the court determines in this reference or in the Miller appeal that an Act of Parliament is required to authorise the giving of an Article 50 notice.

The further question is whether that is a constitutional requirement in the United Kingdom, that the legislative consent convention be complied with. We

say that it is, and on this issue we are supported again by the Lord Advocate, and again I adopt the Lord Advocate's submissions in his written case and hope to confine my submissions accordingly.

Two brief introductory points, although as I see the time, it may be two brief final points.

THE PRESIDENT: I am afraid it might.

MR SCOFFIELD: The first is this, my Lord: there is nothing heretical about a contention, particularly in a largely unwritten constitution such as ours, that a constitutional convention may be a constitutional requirement, even if it is not strictly a matter of constitutional law. In fact, my Lords, my Lady, that is an entirely orthodox view and it is covered in paragraphs 20 to 22 of the Lord Advocate's written case and paragraphs 122 to 123 of our written case.

Conventions are non-legal rules but they may nonetheless be rules which are fundamental to the operation of the constitution, and the court has seen the reference to the Canadian case, the Canadian Supreme Court case, re a resolution to amend the constitution, which we respectfully commend on that issue.

The final point, my Lords, is this. There is a temptation to rush to the endpoint on this question and ask what the result would be if Parliament

legislated, in the absence of legislative consent from one or more of the devolved legislatures, and indeed that is how the Attorney General for Northern Ireland has framed the issue, perhaps for presentational reasons, but we are, we say, at this stage a long way off that point.

If legislative consent is sought, it may be granted and certainly there would be likely to be, as Mr Gordon says in his submissions, engagement between the executive and Parliament and the devolved administrations. What we are asking the court to do at this stage is simply to clarify whether and how the convention is engaged, and the central case that we make on that, as you will see in our written case, is that this is an obligation on the executive to put Parliament in the position where it is informed on that issue.

My Lords, I am sure that my learned friend the Lord Advocate will have much more to say on that question.

My Lords, I see that I've got through about two-thirds of a speaking note that I had prepared. Time has defeated me. In the admittedly unlikely event that the court is overwhelmed with suspense about what the remainder of what my submissions would be, or if it otherwise thinks it would be helpful, I am happy to provide the full speaking note to the court and to my

learned friends.

THE PRESIDENT: If you could make arrangements to do that when we rise or tomorrow, that would be fine.

MR SCOFFIELD: I will do that. I am very grateful, my Lord.

THE PRESIDENT: Thank you very much indeed. I am sorry about the attenuated time. Thank you very much indeed, Mr Scoffield. Mr Lavery.

Submissions by MR LAVERY

MR LAVERY: My Lady, my Lords, I appear on behalf of the appellant Raymond McCord, with Mr Fegan, and our position is one which goes further than my friend, and in fact in some respects is contrary to it, because we say that as a matter of the constitution of the United Kingdom, that it would be unconstitutional to withdraw from the EU without the consent of the people of Northern Ireland and we say that for two reasons.

First of all, being part of the EU is part of the constitutional settlement which in some respects overlaps with the arguments made by my learned friend. But we say, secondly, that there has been a transfer of sovereignty by virtue of the Good Friday agreement, the Downing Street declaration and section 1 of the Northern Ireland Act, so that in fact the people of Northern Ireland now have sovereignty over any kind of constitutional change, rather than Parliament.

The notion that Parliament is supreme, that it has primacy is now gone. There have been various dicta from your Lordships, including Lord Mance in Axa, about a law which might discriminate against red-headed people, and of course the dicta from Lord Steyn and Hoffmann in Jackson, that the Lords would have to intervene if Parliament were to act in a way which the court might regard to be unlawful or unconstitutional.

What is supreme, my Lords and my Lady, is the rule of law, in my respectful submission, and in interpreting what the rule of law is, it is useful to take a look at some of the Canadian cases, which, although there is a written constitution in Canada, which the UK of course does not have, looked at areas where the constitution did not apply.

Some extracts from the cases are set out in our printed case and for time reasons, I wonder could I refer your Lordships and my Lady to that; it is core volume 1 of the McCord case, it is a very small binder.

THE PRESIDENT: Thank you.

MR LAVERY: And the Quebec secession case. First of all, my Lords, my Lady, one of the principles which is extracted by the Canadian cases is that the consent of the governed is a value that is basic to our understanding of a free and democratic society, and

indeed that has been historically part of the problem in Northern Ireland, and it was to obtain that very consent of the governed that the Good Friday agreement was arrived at, so that institutions, political institutions and the ultimate question of which country Northern Ireland should be a part of, whether it is part of the United Kingdom or a united Ireland, was determined and looked at.

That is the Supreme Court Quebec secession reference, paragraph 77 of our printed case, but paragraph 74, it looks at this question of -- this is distinct before we even look at the Good Friday agreement, my Lords, my Lady, that when one is looking at a federal system, which Canada is, and arguably England, Scotland and Wales may be, that the notion that a majority in one region may simply trump a majority in another is not a fair reflection of what a modern democratic society should do.

Paragraph 74, the Canadian courts looked at this question in the case of the Quebec secession reference -- sorry, my Lords, my Lady, paragraph 73, first of all, they say that in looking at the underlying principles of what a constitution should look like, that it should be animated by the whole of the constitution, including the principles of federalism, democracy and

constitutionalism.

At paragraph 74, then, another extract from the same case is set out, and it looks at the -- a negotiation process which they say should take place if there is a conflict between majorities in a federal system. And that negotiation process, precipitated by a decision of a clear majority of the population of Quebec, on a clear question to pursue secession, would require the reconciliation of various rights and obligations by the representatives of the two legitimate majorities, namely the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be.

There can be no suggestion that either of these majorities trumps the other political majority, that does not act in accordance with the underlying constitutional principles we have identified, puts at risk the legitimacy of the exercise of these rights.

What we say, my Lady, my Lords, is that that is in the context of a federal system. But what section 1 of the Northern Ireland Act does is it puts Northern Ireland's place within the United Kingdom on a voluntary basis. It is more in the nature of confederalism than federalism. To equate the devolution structure of Northern Ireland with the other devolution arrangements

for Scotland and Wales does no justice to history, and does no justice to the right of the people of Ireland to self-determination, as set out in the Anglo-Irish agreement, the Good Friday agreement, and does no justice to the principle of consent which is enshrined in section 1 of the Northern Ireland Act. Section 1 of the Northern Ireland Act enshrines, we say, is a statutory expression of both of these principles. When you look at it, which it is in Northern Ireland volume 1, one can see -- my Lords, Northern Ireland authorities, volume 1, tab 3.

LORD KERR: 20021.

MR LAVERY: I am very grateful, my Lord.

THE PRESIDENT: Is this the status of Northern Ireland, 20044.

MR LAVERY: Section 1 -- we say first of all, what the court should take from section 1 is it is declaratory and says:

"It is hereby declared Northern Ireland in its entirety remains a part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland."

So there is a transfer there of power, of sovereignty, over the ultimate question, from Parliament, we say, to the people of Northern Ireland.

We say it is not simply the ultimate question, which has been transferred, but it is all rights of self-determination up until that point.

That is the unique distinguishing feature of Northern Ireland -- well, perhaps there are two distinguishing features. I will look at section 2 in a moment. But first of all, the voluntary basis upon which the people of Northern Ireland remain part of the United Kingdom, and secondly, that we share power and share sovereignty in respect of the all-Ireland implementation bodies. That is unique to Northern Ireland and does not exist anywhere else.

Subsection (2) says:

"But if the wish expressed by a majority in such a poll is that Northern Ireland should be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed."

Again, my Lords, my Lady, we say that is an expression of the voluntary basis that the people of Northern Ireland remain part of the United Kingdom.

LORD WILSON: Insofar as you are saying that section 1 confers on the people of Northern Ireland the say in respect of legislation, and we certainly see that it confers a power in respect of the decision to remain

part of the UK or to join a united Ireland, what are the areas of legislation which the people of Northern Ireland under this have? Where does it all end?

MR LAVERY: We say, my Lord, that every other section of the Northern Ireland Act, and if one looks at legislative consent motions, they simply divvy up legislative consequences between Westminster and the Northern Ireland assembly and have no real impact upon the point which we are making, which is that the ultimate right, the ultimate sovereignty has transferred by virtue of section 1. One doesn't need to look at, as I say, simply this divvying up of legislative competencies. I am not sure if I answered my Lord's question.

THE PRESIDENT: I was simply going to say subsection (2), I suppose, could be said to be another example of a statutory provision which actually says what happens as a result of a referendum or, in this case, a poll.

MR LAVERY: The context of that, we say, is important, my Lord, and to the extent that the United Kingdom has no written constitution, we say that the Good Friday agreement now forms a written part of the constitution of Northern Ireland, and unlike my friend, we say that it is binding, parts of it, not all of it but certainly that section of it that deals with constitutional issues is binding, it is a binding arrangement. As a matter of

constitutional law, in that it may derive its legitimacy from the rule of law and what has been agreed between the parties, between Britain and Ireland and between Britain and Northern Ireland, it derives legitimacy from that. But it also derives legitimacy as an international agreement, a binding international agreement which has been incorporated into UK domestic law by virtue of section 1.

My Lords, if I can just turn very briefly to that agreement, it appears at volume 1, tab 14, 20342 and the constitutional issues which are set out, they are, it must be said, set out initially in what is -- what may be described as binary terms, but what I would say to the court is there is very little about Northern Ireland that can be described in a binary basis.

Take the applicant, my client, for instance, he is a Protestant from north Belfast, he is a victim of the Troubles, he is a victims' rights campaigner. He is here, has always attended court with his friend who a Catholic. But his son was murdered by loyalist paramilitaries. He regards himself as British, although many people in Britain may regard him as Irish. It is a complex situation, my Lords, my Lady, northern Ireland, and there is a complex constitutional settlement.

It would be very disturbing for the people of Northern Ireland to imagine that the terms so agreed in the Good Friday agreement were not binding to some extent, did not have a constitutional status.

Lord Hoffmann in Robinson at paragraph 13, page 3286, refers to the fact that the agreement should be looked at in terms of interpretation of section 1, but in Robinson itself, my Lords, my Lady, the court made a strained interpretation of section 16 of the Act in order to give effect to the agreement and the purpose of the agreement -- in a purposive general way. That is a sort of device employed by courts that have a written constitution. It is a device employed by courts here in this jurisdiction in terms of looking at the European Convention on Human Rights, and we say that is the basis upon which the Good Friday agreement should be looked at.

If I could bring your Lordships very quickly to subparagraph (1), sorry, my Lords, it is 20374, where the constitutional issues, and there are simply five of those set out and, to the extent that it has been argued by the Government and in fact by Mr Justice Maguire that there was no provision within the Good Friday agreement which sets out our contentious, if I could direct your Lordships towards subsection (3) and the very last

subclause of that, it is after the semi-colon. To put that into context, that is part of the constitutional issues which enshrines the principle of consent.

THE PRESIDENT: Reference to changing the status?

MR LAVERY: Yes:

"... that it would be wrong it make any change in the status of Northern Ireland save with the consent of the majority of its people."

It is there beside the principle of consent because we say, my Lord, the history of the agreement, when one looks at it, and it is in the following page, it replaces the Anglo-Irish agreement, the 1985 agreement, which was imposed upon the people of Northern Ireland, it was a joint arrangement between the Republic of Ireland and Britain, imposed upon the people of Northern Ireland, much to unionist disconnect.

LORD HODGE: One has to read what is said at the end of paragraph 3 in the context of what is said before.

MR LAVERY: One does. It is said in binary terms but it is an addition to the principle of consent and why it is given separate status. My submission is that it is to avoid a scenario like joint sovereignty, like the Anglo-Irish agreement, ever happening again, for the will of the people of Northern Ireland in constitutional issues to be overridden by Parliament against their

wishes.

Can I say one final point, my Lords, my Lady, that it would be unthinkable that section 1 of the Northern Ireland Act could be repealed and I would refer to the remarks made by Lord Denning in the Blackburn case where he referred to whether one could repeal the acts which give power back to the dominions, and he said it would be unthinkable for such matters to be repealed but he said if that ever did happen in terms of the European arrangements, then the court would look at it but the phrase he used, "What has been given away cannot be taken back", and we say section 1 is a statutory expression of that, my Lords, my Lady, and in those terms the triggering of Article 50 would impede that expression of self determination and the principle of consent.

THE PRESIDENT: Thank you very much indeed, Mr Lavery. Thank you very much.

Lord Advocate.

Submissions by THE LORD ADVOCATE

THE LORD ADVOCATE: My Lord President, my Lady, my Lords, may I adopt my written case with the relatively brief supplementary remarks which I will make today and tomorrow.

THE PRESIDENT: Yes, of course.

THE LORD ADVOCATE: Two days ago, Mr Eadie observed that constitutional issues have to be determined in light of current constitutional circumstances. I agree.

I should say, my Lady and my Lords, I am going to make some remarks about the general issue before the court and then turn to the legislative consent question.

On the general issue, others have focused on the effect of withdrawal from the European Union on rights and nothing I have to say is intended to detract from those submissions but I invite the court also to attend to the effect of withdrawal on the constitutional arrangements by which we in the United Kingdom are governed.

I identify at paragraph 35 and following of my case some constitutional consequences of withdrawal from the European Union. If I may simply refer the court to those paragraphs.

One might add to those constitutional consequences the effect which withdrawal from the European Union would have on the rule of recognition which applies in the United Kingdom. It is a point that my Lord, Lord Hodge made yesterday about withdrawal altering the sources of law and not simply the law itself.

LORD MANCE: Which was the paragraph you said set out --

THE PRESIDENT: 35.

THE LORD ADVOCATE: It is paragraph 35 and following, my Lord. It is where I identify the --

LORD MANCE: No, I had the wrong case, I am sorry.

THE LORD ADVOCATE: It is at MS 12585, and I identify that withdrawal -- and of course this is the point -- would deprive legislative, executive and judicial institutions which currently exercise power as regards the United Kingdom of that power and would mean that none of the legislatures and public authorities of the UK would operate within the framework, as they currently do, of European Union law. I make some other observations in those paragraphs.

I say that the only body which has the legal power to authorise and effect such changes to the constitutional law of the United Kingdom, indeed to the constitution of the United Kingdom, is the Queen in Parliament, and I invite the court to take the view that the claim by the executive in this case to effect such changes to the law of the land by an act of the prerogative is inconsistent with the principles, the constitutional principles, articulated in the Claim of Right Act 1689 for Scotland and the Bill of Rights for England and Wales. Those can be found at MS 6358 and MS 4152.

That 17th century legislation reflected and enacted

in statute what I submit is an imperative rule of constitutional law which sets an outer limit to what may lawfully be done by virtue of the prerogative. The foreign affairs prerogative does not normally buck up against that imperative rule because of the dualist approach which we take to international treaties but when it does, in my submission, the prerogative gives way to that imperative rule of our constitution.

LORD REED: That is really a crucial proposition. Now, is there any authority for saying the one trumps the other?

THE LORD ADVOCATE: Well, I start from the proposition that what I call the imperative rule is articulated in statute, the Claim of Right Act 1689, the Bill of Rights. But I also respectfully adopt and accept the submissions that have already been made to the effect that it reflects a basic constitutional principle of our constitution.

Perhaps I can put it this way, that that principle enshrined in the 17th century constitutional statutes reflects and flows from a recognition of the proper institutional roles in a representative democracy as regards the law of the land of, on the one hand, the representative legislature and, on the other, the executive.

That remains the case, notwithstanding that the

nature of the our representative democracy has changed since the 17th century, and indeed notwithstanding that today, by the will of Parliament, we have four representative legislatures in the United Kingdom. It is perhaps not an entirely incidental point that when the United Kingdom was founded in 1707, it was to Parliament and not to the Crown that the power to change the laws in use in Scotland was given. That is Article 18 of the Act of --

LORD HODGE: Exclusively given?

THE LORD ADVOCATE: Well, the power was given in terms of the Acts of Union.

LORD HODGE: I thought you said only by the British Parliament.

THE LORD ADVOCATE: It certainly was not given to the Crown. To Parliament and its delegates, and of course Parliament has through the 1972 Act and through the devolution statutes, transferred legislative powers or acknowledged legislative powers on the part of others.

I say that, if that is correct, then we are talking about the scope and limits of the prerogative power relied on here, and that is quintessentially a question of law for the court.

Can I make clear that I do not contend that there is any speciality of Scots law as regards the prerogative

that affects this case. First of all, the capacity of the Crown in right of the United Kingdom to engage in relations on the international plane on behalf of the United Kingdom is an incident of the Crown in right of the United Kingdom, and it frankly makes no sense to suggest that that might change in the different jurisdictions of the Union.

Equally, the limits which Scots law places on the effects which acts of the Crown in the exercise of its foreign affairs prerogative may have within the domestic legal order in Scotland are the same limits as I understand English law to place on those effects, first of all, because Scots law adheres to the dualist theory, as English law does, and, secondly, because Scots law like English law contains the same limiting rule which I mentioned a moment ago which precludes the executive, I say, from changing the law of the land by an act of the prerogative.

So, with those remarks on the general question and on the relevance of Scots law in relation to the prerogative, let me turn to the question of legislative consent. I say that the executive's claim in this case not only misconceives the respective roles of Parliament and the Crown in relation to the law of the land, but would elide the constitution the mechanism through which

the question of whether the devolved legislatures, which have power to change the law of the land, consent or do not consent to legislation which has the effect with regard to devolved matters. It would elide the mechanism, the legislative consent convent, through which that consent is treated as an issue of constitutional significance.

Can I make clear that I do not assert that the Scottish Parliament has a veto on the decision to withdraw the United Kingdom from the European Union. That decision is ultimately, I say, for the Queen in Parliament. What I do say is that the question of whether the Scottish Parliament consents or does not consent to the effects of withdrawal with regard to devolved matters is, by virtue to the legislative consent convention, a matter of constitutional significance. I will elaborate on that and explain what I say the position is.

But, ultimately, I say that the approach that I invite the court to take reflects the proper institutional roles of the United Kingdom Parliament on the one hand and the Scottish Parliament on the other, in a context where the Scottish Parliament has wide legislative competence and where the effect of withdrawal from the European Union would be significant,

with regard to devolved matters.

In other words, in that context, it is constitutionally relevant and significant to know whether the Scottish Parliament consents to those effects. It is then for the United Kingdom Parliament to decide, in light of the views of the devolved legislatures and its own assessment, what to do.

LORD REED: I should say Mr Wolffe, for those of us at the edges of the room, it would help if you keep your voice up.

THE LORD ADVOCATE: I do apologise, my Lord, and I hope the transcript will at least pick up what I am saying.

Yesterday, I think it was yesterday, Mr Eadie reminded the court of the magnitude of the task which is presented by withdrawal from the European Union and the United Kingdom Government will, I hope, not dispute the magnitude of the task which withdrawal will present not only for the United Kingdom Parliament and the United Kingdom Government but also for the devolved legislatures and devolved administrations and I have given examples and illustrations at paragraphs 43 to 49 of my case, but I can perhaps summarise the points in this way.

First of all, directly affected European law in policy areas which are within the legislative competence

of the Scottish Parliament will lapse, to use Mr Eadie's word. Legislation enacted by the Scottish Parliament and Scottish Government which depends for their operation on the subsistence of applicable European law will become potentially ineffective and one might think for example of the regulations which deal with the administration of the Common Agricultural Policy. Other legislation made by the Scottish Parliament and the Scottish Government which cross-refers to EU law will have to be considered from the point of view of whether it can operate or can operate as intended when those laws no longer apply.

At a constitutional level, withdrawal from the European Union will effect a significant change on the legislative competence of the Scottish Parliament and the executive competence of the Scottish Government.

Mr Eadie accepted in response to a question from my Lord, Lord Reed, that section 2(1) of the European Communities Act would become redundant on withdrawal. In my submission, the same is true of section 29(2)(d) of the Scotland Act, which is at MS 4360, section 57(2) of the Scotland Act, which is at MS 4368, and paragraph 7(2)(a) of schedule 5 to the Scotland Act, which is at MS 4379. These are the provisions which limit the competence of the Scottish Parliament and the

competence of the Scottish Government by reference to EU law and the provision which provides that the reservation of international relations has an exception, namely an exception for the observing and implementing of EU law.

So I say that at withdrawal those provisions become disabled, to use the word that is in the Claim of Right Act, they become redundant. I say if a bill were to come before the United Kingdom Parliament which changed the competences of the Scottish Parliament or the Scottish Government in these ways, let alone the other effects with regard to devolved competence, then such a bill would engage the legislative consent convention.

Can I perhaps draw the court's attention in that regard to the explanatory notes to the Scotland Act 2016. It is quoted in my case at paragraph 76 at the top of page 4, and it appears in the bundle at volume 30, tab 407, MS 10379 -- and I should say the reference in my case is a misreference, it should be to number 407 at MS 10379. In the explanatory notes to the Act it said:

"This Act required a legislative consent motion from the Scottish Parliament on the basis that it contains provisions applying to Scotland which alter the legislative competence of the Scottish Parliament and

the executive competence of the Scottish ministers."

LORD WILSON: We are having difficulty finding the passage you are referring to.

THE LORD ADVOCATE: Sorry, my Lord. It is quoted in my written case at MS 1612.

LORD WILSON: Paragraph?

THE LORD ADVOCATE: It is paragraph 76, subparagraph 4, right at the top of the page. It is paragraph 9 of the explanatory notes.

LADY HALE: Yes, that is what is at 10379, is paragraph 9 of the explanatory notes.

THE LORD ADVOCATE: Indeed, my Lady.

Indeed there was a legislative consent motion and the Act was passed.

LORD MANCE: This Act is what?

THE LORD ADVOCATE: The Scotland Act 2016 changed the competences of the Scottish Parliament.

LORD MANCE: I see.

THE LORD ADVOCATE: And the legislative -- and the executive competence of Scottish ministers, and of course the point that I make is that it is explained to Parliament in the explanatory notes that the Act required a legislative consent motion, on the basis that it contains provisions applying to Scotland which alter the legislative competence in the Scottish Parliament and

the executive competence --

LORD MANCE: Where do you get the binding nature of the legislative consent motion? You get it from the Sewel convention and from the enactment in the Scotland Act?

THE LORD ADVOCATE: I say two things, my Lord, I say first of all that this court is concerned with what are the constitutional requirements of the United Kingdom under Article 50, and I say that it is of the nature of conventions that they constrain the legal power of actors within the constitution to act in accordance with the constitutional requirements.

LORD MANCE: What is it -- that raises the question what a constitutional requirement is and whether -- it is a question of European law, isn't it?

THE LORD ADVOCATE: It is ultimately, it may ultimately be but I don't think the United Kingdom --

LORD MANCE: Is it for us?

THE LORD ADVOCATE: The United Kingdom has not disputed, and I don't think -- I would be surprised if it did dispute that in principle a constitutional convention could be a constitutional requirement.

LORD MANCE: For a constitutional lawyer, no doubt it is, but for a lawyer ... perhaps I should have said for a constitutional specialist, it might be a requirement but for a lawyer ...

THE LORD ADVOCATE: Well, I say that it is germane to the -- it is germane in two ways here. First of all, the Attorney General has invited this court to answer a question, the Attorney General for Northern Ireland has invited the court to answer a question about legislative consent, albeit directed to Northern Ireland; and I also made the submission a few moments ago that the approach that the UK Government is taking here elides not only the proper role of the United Kingdom Parliament, but, I say, of all the representative legislatives of the United Kingdom whose interests are in our constitution protected through the legislative consent.

LORD MANCE: I see that point, but can we be specific; do you in the last instance rely on the Scotland Act, the reference, the incorporation of the Sewel convention as law?

THE LORD ADVOCATE: I would certainly make the submission -- even if it wasn't, if it had not been incorporated into law by section 28(8), I would make the submission. Of course I have the benefit that the convention has been incorporated into statute, and if I could put it this way, in a legal system where the basic rule of recognition is that what the Queen in Parliament enacts as law, that has transformed the juridical status of the

rule from a convention into a rule of law.

LORD HODGE: I wonder about that, Dean of Faculty, because we will look later at the wording of the provision, but it talks about recognising something. It says -- in subsection (7) it gives the principle which you accept and then it is said: but it is recognised. And it can clearly have legal effect. Insofar as political conventions can change with political practice over time, you can say that subsection (8) prevents its desuetude, as it were; in what other sense is it converted into a rule of law?

THE LORD ADVOCATE: In the very straightforward sense that it has been enacted into statute, and I can give the court -- the learned Advocate General referred the court to the Canadian patriation case, which raised a question not very dissimilar from the one that this court has to deal with on this issue. In the patriation case, the court divided on whether it would answer a question about whether a constitutional convention of consent by the provinces was required, and the majority held that they would.

All of the judges agreed that in the true sense, if a convention is not a rule of law, and they all spoke to the potential transformation of a convention by statute, and the references can be seen at MS 8834, in the

opinion of the minority, and 8845 in the opinion of the majority, MS 8834 and MS 8845.

LORD REED: Mr Wolffe, I think many of us are struggling to see exactly how the Sewel convention impacts on the central issue before us. Are you saying simply that the impact is this, that if and to the extent that the Sewel convention would politically oblige Parliament to consult the Scottish Parliament before triggering Article 50, that is an extra argument for why this is a matter for Parliament rather than the executive, or does it fit in in another way?

THE LORD ADVOCATE: I do say that. I also say, I also say, and it is fair to say I come to this case recognising that the Attorney General for Northern Ireland has asked a specific question, albeit focused on the Northern Ireland situation, which raises directly for the court a question which falls to be answered or not answered, if the court takes the view that it cannot appropriately be answered; and that it is right that I make clear what my position is in relation to the convention.

But I do say that on the essential point raised in Miller, that we now are looking to the constitution as it currently exists, we not only have the basic rule which I outlined at the outset, that it is for the Queen in Parliament to change the law of the land; but in

a context where we have four legislatures which can change the law of the land, we have a structure of constitutional convention which engages the -- entitles those legislatures to have a voice in the decision.

Perhaps I shall make this point at this stage. I drew the court's attention to the explanatory notes to the Scotland Act 2016. Similarly, the Scotland Act 2012, where again the legislative competence of the Scottish Parliament was changed, engaged our legislative consent requirement, and the court can see the explanatory memorandum for that act at MS 10369, paragraph 8.

Indeed my Lord reads remarks about the Sewel convention in Imperial Tobacco, volume 5, tab 41, MS 1619, were expressly directed to changes to legislative competence.

So in my submission there is no -- there should be no dispute that the legislative consent convention applies where there are changes to the legislative competence or executive competence of the Parliament and the Government. That has reflected consistent practice which I have sought to provide information about in the narrative in my case.

What that illustrates in particular, what the application of the convention to the two(?) Scotland Act

illustrates, is that a bill may relate to a reserve matter, one which the Scottish Parliament could not itself enact. But may nevertheless, insofar as it has effect with regard to devolved matters, engage the requirement for the consent of the Scottish Parliament.

So my learned friend the Advocate General's argument where he points to the reservation of international relations in my submission is --

LORD MANCE: It doesn't help.

THE LORD ADVOCATE: -- guilty of the fallacy that simply because something is reserved, it cannot engage legislative consent convention, that is simply not the case. That fallacy also underlies the reasoning of Mr Justice Maguire in paragraph 121 of the --

LORD KERR: Which paragraph, please?

THE LORD ADVOCATE: It is MS 742, paragraph 121 of McCord where his Lordship essentially said, because international relations are reserved, therefore this is nothing to do with the Northern Irish assembly.

What I say is that if a bill were presented to the UK Parliament, which had the effects for the competence for the Scottish Parliament and Scottish Government which will take place on withdrawal from the EU, and which had all the other effects within devolved competence, then there would be no doubt in my

submission that that engaged the legislative consent convention.

LORD REED: I don't suppose there is any definition of either "with regard to" or "devolved matters"?

THE ADVOCATE GENERAL FOR SCOTLAND: One of the interesting points, I am going to make a short submission about interpretation directed to section 28(8).

LORD REED: We have had a lot of case law on what is meant by, relates to reserved matters.

THE LORD ADVOCATE: It is an important point, my Lord, that the phrase, "with regard to devolved matters", does not use the conceptual language that is used elsewhere in the Scotland Act. Rather it points back to language which appears in the memorandum of understanding and which has been articulated in practice. It points back, I say, to the convention as it has been applied in practice and indeed the word, it is recognised that, again is pointing one back to the practice, as regards the convention.

LORD REED: Really you have to argue that an act -- hypothesising an act which authorises the Government to give notification under Article 50 is an act which legislates with regard to devolved matters, essentially because of its -- because it has a consequential impact on some devolved matters.

THE LORD ADVOCATE: Absolutely, my Lord, and perhaps I should put it this way, and it is perhaps helpful to test the argument by assuming a one-clause bill that determines to withdraw the United Kingdom from the European Union, and I do make the point that it would have to be a bill making that decision, not -- and no doubt consequentially authorising the notice.

But I say that within that proposition are a whole series of effects with regard to devolved matters, and if Parliament were to unpack the headline proposition, and in separate clauses say all the things that legally would be happening with regard to devolved matters, then it would be plain that the convention is engaged, and I say that it cannot matter as a matter of substance that those propositions are simply implicit in the headline proposition of a determination to withdraw from the European Union.

It may be helpful if I invite the court to look at section 28(8), so that I can perhaps make clear what I am saying and what I am not saying about it.

THE PRESIDENT: Yes.

THE LORD ADVOCATE: The court has that at tab 124 in volume 12 at MS 4359. Can I say immediately that since this is a provision which satisfies our rule of recognition, the question of its meaning and effect,

well, perhaps firstly the question of its effect and then of its meaning, are matters of law for the court.

Can I say that I accept that it is a provision which requires to be construed against the background of relevant constitutional principles. So I acknowledge that it does not displace the Pickin rule and if -- the validity of an Act of Parliament once enacted could not be, I say, challenged under reference to an alleged failure to respect section 28(8).

I also acknowledge that article 9 of the Bill of Rights is part of the relevant constitutional context and that, it may be, is relevant to what the court is to make of the word "normally".

LORD HODGE: Will you be addressing us, Lord Advocate, at some stage on any precedents for the use in statute of the words, "it is recognised that"?

THE LORD ADVOCATE: I can certainly see if I can put myself in a position to do so, my Lord.

LORD WILSON: Equally, "normally" is not a word one sees very often sees in statutes.

THE LORD ADVOCATE: Indeed, my Lord, and I accept that the word "normally" implies that there may be circumstances in which the -- where an act will be passed notwithstanding that the consent of the Scottish Parliament is not forthcoming, albeit I am advised that

that has never happened, at least knowingly, where legislation is proposed with regard to devolved matters.

LORD SUMPTION: Is the question what is normal justiciable?

THE LORD ADVOCATE: In the context of article 9 of the Bill of Rights, I accept that -- I find it difficult to imagine how it would engage a justiciable issue.

LORD KERR: What if Westminster Parliament could be shown to flagrantly be in breach of the provision, that it legislated continuously on matters of the Scottish Parliament, so that the norm became that they did legislate rather than that they refrained from legislating?

THE LORD ADVOCATE: Indeed, my Lord, I proceed on the assumption that Parliament will do what it has said it will do in this provision.

LORD KERR: It is a pure question of justiciability; it is possible to conceive, albeit on a somewhat outlandish scenario, but it is possible to conceive of circumstances in which it could be --

THE LORD ADVOCATE: I can see that, my Lord, I can see that, my Lord. Perhaps I can put it this way: I don't need to make an argument about the word "normally" in this case, because what I say is that the phrase "with regard to devolved matters" is one upon -- it is a phrase upon which the court can adjudicate.

LORD MANCE: But it doesn't have any effect, you say? If the UK Parliament does breach this convention, and breach this convention as recognised in this section, you say it doesn't have any effect. So what is the argument that we would be entitled nonetheless to stop the UK Parliament doing it, if it was proposing to, and -- I suppose the further question is what is the relevance of this? We are not talking about the UK Parliament legislating, we are talking about a case where it is proposing to use its executive powers.

THE LORD ADVOCATE: I say two things, my Lord, in response to that. I say first of all that it is -- perhaps on the second point, I have already made the submission, that part of the current constitutional context in which the court should consider --

LORD MANCE: If you cannot legislate, you cannot do other things, is your basic point, is it?

THE LORD ADVOCATE: The basic point is that, when one is testing whether the Crown can by the prerogative change the law of the land, one has to keep in mind that in the current constitutional arrangements, there are several legislatures that have an interest in that question.

LORD MANCE: Not even Parliament can change, you say, so how possibly could the Government?

THE LORD ADVOCATE: I say there is a convention,

a constitutional requirement, I would say, that Parliament has itself acknowledged in statute.

LORD KERR: I think what you can say is that Parliament at the very least commits itself to the question whether it should legislate within -- on a matter which is within the competence of the Scottish Parliament, it would be incongruous with that situation that the Government would in effect change the law of Scotland.

THE LORD ADVOCATE: Absolutely. Absolutely, my Lord.

LORD REED: I suppose you have to read subsection (8) also in the light of subsection (7), which tells us about the section as a whole, (Inaudible) not affecting the power of the Parliament of the UK to make laws for Scotland.

THE LORD ADVOCATE: Yes, but, sorry, my Lord, I might just --

LORD REED: 28(8) --

LORD MANCE: I don't dissent from Lord Reed's proposition.

THE PRESIDENT: You deal with the questions in turn. We will not ask you any more until you have finished.

THE LORD ADVOCATE: I am happy to deal with questions and points, but the other point that my Lord, Lord Mance put to me is -- perhaps I can answer in this way. We are concerned with the decision which falls to be made by the United Kingdom under Article 50 of the treaty.

LORD MANCE: Yes.

THE LORD ADVOCATE: The United Kingdom has to make that decision in accordance with its constitutional requirements. I say that those constitutional requirements include an Act of Parliament --

LORD MANCE: And legislative consent.

THE LORD ADVOCATE: And the legislative consent.

LORD MANCE: Would it be a catastrophe for the devolved settlement if one read subsection (8) as simply a non-legally binding or legally effective douceur.

THE LORD ADVOCATE: What I will say, my Lord, is there is plenty of evidence, including statements by the United Kingdom Government which I have referred to in my case about the importance of this convention to the working of the devolution settlement.

LORD MANCE: I am sure the convention -- conventions are incredibly important, but they are not legally binding. That is their nature.

THE LORD ADVOCATE: Indeed, and what I can also say is that the United Kingdom Parliament decided that this convention should be enacted into statute and I might put my Lord's question -- perhaps answer it with what it would be impertinent to suggest is anything other than a rhetorical question, which is, what was the point in enshrining this in law if it doesn't become a provision that the courts can address.

LORD MANCE: It may be it would have looked a bit bleak, subsection (7), by itself.
LADY HALE: It was there for quite a long time.
LORD REED: But subsection (7) is not qualified. It does rather look as though subsection (8) may be symbolic or a douceur, as Lord Mance --
THE LORD ADVOCATE: Well, my Lord says subsection (7) is not qualified, subsection (8) is introduced by the word "but".
LORD HODGE: But you can give legal content to it, that it is more than a douceur, if you say that, as I said at the outset of my engagement with you, it was preventing the convention from slipping away by disveritude or a change of practice, it is a recognition that this a convention that is to apply. That doesn't make the convention a rule of law. It is merely recognising it as something that is fixed, as a convention.
THE LORD ADVOCATE: I would put it this way, my Lord, that, as a provision and an Act of Parliament, it is part of the law of the land. What its effect and interpretation are are matters upon which the court may properly adjudicate.
LORD HODGE: You can ask us to say what does section (8) mean.
THE LORD ADVOCATE: And what effect does it have in

a particular context.

It is perhaps important to address the question in the context in which we are currently considering the question, which I accept is one where there is no bill before Parliament, there is no question of the court being asked to interfere with proceedings in Parliament, there is no question of me inviting the court to invalidate its statute even in the extreme hypothesis that my Lord Kerr put to me.

We are at a point in the process where this court is seized of the question of what the constitutional requirements of the United Kingdom are to make the decision, the important decision, to withdraw from the European Union and what I am inviting the court to do is to acknowledge in the Miller case, for the reasons I have outlined, and in the Northern Irish case in response to the Attorney General's second question, that one of those requirements is the convention.

My Lord, I don't know whether that is a convenient point to --

THE PRESIDENT: If it is convenient for you Lord Advocate, yes.

THE LORD ADVOCATE: Yes, I am planning to break there and resume again in the morning.

THE PRESIDENT: We will resume again at 10.15, and I think

you have half an hour, is that right?

THE LORD ADVOCATE: Yes, thank you.

THE PRESIDENT: And you are on course for that?

Thank you very much. We will adjourn now and resume again at 10.15 tomorrow morning. The court is now adjourned.

(4.00 pm)

(The court adjourned until 10.15 am the following day)

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