IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

UKSC 2016/196

B E T W E E N :

THE QUEEN *on the application of*
(1) GINA MILLER
(2) DEIR TOZETTI DOS SANTOS

Claimants/First and Second Respondents

(3) GRAHAM PIGNEY AND OTHERS
(4) AB, KK, PR AND CHILDREN

Interested Parties/Third and Fourth Respondents

-and-

THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Defendant/Appellant

-and-

(1) GEORGE BIRNIE AND OTHERS
(2) THE LORD ADVOCATE
(3) THE COUNSEL GENERAL FOR WALES
(4) THE INDEPENDENT WORKERS UNION OF GREAT BRITAIN
(5) LAWYERS FOR BRITAIN

Interveners

PIGNEY RESPONDENTS' WRITTEN CASE

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(1) INTRODUCTION AND SUMMARY

1. The Pigney Respondents are an Englishman (whose family includes third country nationals), a Northern Irish man who is a students' representative, a Welshman, two Scotsmen resident in France, and a Gibraltarian with Spanish family resident in Spain. They are concerned that their status as EU citizens, and the rights which arise from that status, may be permanently removed without Parliamentary authority and oversight[1]. Their "People's Challenge" has been crowd-

[1] See Graham Pigney WS (Appx 21) §§ 2, 11 and 12; Robert Pigney WS (Appx 22) §§ 3, 13-16; Christopher Formaggia (Appx 23) §§ 4, 9, 11; Paul Cartwright WD (Appx 24) § 12, Tahmid Chowdhury WS (Appx 25) §§ 4, 10-12; Fergal McFerran WS (Appx 26) §§ 3, 22-23. An Annex to this Written Case explains the fundamental nature of some of the rights will which be lost upon leaving the EU, and their non-replicability.

funded by more than 5000 people through the CrowdJustice platform. The Divisional Court below recognised them as Interested Parties[2].

2. The Pigney Respondents submit that the Divisional Court was correct to accept that the subordination of executive government to the law as made by the Crown in Parliament is the foundation of the rule of law in the UK (DC Judgment, §§26-29). It was also right to hold, as a result, that the Appellant has no power to trigger the process of withdrawing the UK from the EU without Parliamentary authority (§111).

3. Conscious of the weight and extent of material now before the Court, the Pigney Respondents have avoided duplicating matters that are fully addressed in the Written Cases of other participants[3]. This Written Case focuses on two points that are not addressed by the other parties to the Appeal:

    a. A "historical inquiry" into the existence and effect of a foreign relations prerogative to dispense with domestic statutes implementing EU law;

    and

    b. The nature of the rights that the Appellant proposes to dispense with using the foreign relations prerogative power. These include a wide range of domestic law rights that are fundamental in nature and could not be replicated by Parliament, even if it wished to do so[4].

4. The cornerstone of the Appellant's case is the assertion that:

> "... the true position is that acts of the Government in the exercise of the prerogative can alter domestic law".[5]

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[2] The Peoples Challenge Respondents, like the First Respondent, had served a pre-action letter by 19 July 2016 when the Case Management Conference was held before Leveson P and Cranston J. They became interested parties in the *Miller and Dos Santos* proceedings rather than claimants for reasons of convenience and cost.

[3] The Pigney Respondents adopt the submissions of the First and Second Respondents on: the principle of legality; Parliamentary supremacy and the separation of powers; the relevance of the European Referendum Act 2015; and the rule of Law. At first instance, counsel for the Pigney Respondents advanced the principal submissions on the Bill of Rights, the fundamental constitutional nature of EU rights, the Acts of Union and devolution issues. Devolution issues are now covered in the written cases of the Counsel-General for Wales, the Lord Advocate and the Appellants in the Agnew case, in submissions which the Pigney Respondents adopt. The Pigney Respondents do not therefore intend to address the devolution issues in oral submissions.

[4] See the Annex to this submission.

[5] Appellant's Written Case at §11.

5. That is a far-reaching proposition with implications extending well beyond the contours of this case. The Divisional Court was right to hold that the Appellant has no such prerogative power. The Appellant's suggestion to the contrary is based on a constitutionally flawed premise.

6. The Appellant assumes that there is some foreign relations prerogative through which a minister can alter domestic law, and suggests[6] that the proper starting point is to inquire into whether Parliament has expressly (or impliedly) abrogated the government's pre-existing foreign relations prerogative power to trigger Article 50 (and thereby vary the domestic law of the United Kingdom).

7. However, the Appellant's assumption that there is, or for centuries has been, so wide a foreign relations prerogative power to vary the law (and remove fundamental rights) by executive act, absent abrogation, is incorrect. The proper starting point is not to inquire into whether any such prerogative power has been abrogated by Parliament, but rather to investigate the claim that so broad a power exists at all.

8. As Lord Bingham observed in *Bancoult (No 2)*[7], where there is a dispute as to the ambit of a prerogative power:

> "... It is for the courts to inquire into whether a particular prerogative power exists or not, and if does exist, into its extent ... Over the centuries the scope of the royal prerogative has been steadily eroded and it cannot today be enlarged... When the *existence or effect* of the royal prerogative is in question the courts must conduct an historical enquiry to ascertain whether there is any precedent for the exercise of the power in the given circumstances. 'If it is law, it will be found in our books. If it is not to be found there, it is not law' ..."

9. That "historical inquiry" establishes that there is no precedent for the claim that there is a foreign relations prerogative power for a minister to dispense with primary legislation, and in particular to dispense with the fundamental constitutional rights of citizens that flow from that legislation. No such power has existed since at least the Glorious Revolution.

10. The Appellant's case is therefore a bold attempt to expand the scope of the foreign relations prerogative beyond its historically recognised boundaries. It is "350 years and a civil war too

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[6] Appellant's Written Case at §64

[7] *R(Bancoult) v SSFCA* ("*Bancoult No 2*") [2008] UKHL 61; [2009] 1 AC 453 at §69 (**V6/54**), citing *Entick v Carrington* (1765) 19 State Tr 1030. Lord Bingham's approach was accepted by the rest of the House of Lords, although Lord Bingham was in a minority as to the result.

late" for the prerogative to be extended in this way[8]. The submission made by the Appellant as to the broad reach of the foreign relations prerogative is, in particular, contrary to two long established propositions, central to our constitutional settlement:

a. First, the foreign relations prerogative cannot be used to change domestic law. It is contrary to the Bill of Rights to use the prerogative to suspend or dispense with domestic Acts of Parliament, frustrate Parliamentary intention as expressed in those statutes or pre-empt Parliament's will in relation to them. That is not a "general principle" but a foundational constitutional maxim, which has been consistently applied to limit the use of prerogative powers, including the foreign relations prerogative.

b. Second, the foreign relations prerogative cannot be exercised, in any event, to remove fundamental statutory rights enjoyed in domestic law. This proposition applies to any rights; but *a fortiori* in relation to rights established by statutes having constitutional force, such as the Acts of Union, European Communities Act 1972, the European Union Act 2011, and the devolution statutes.

11. Accordingly, the Pigney Respondents submit that the appeal should be dismissed because: (i) it is premised on a proposition contrary to these two fundamental constitutional principles; (ii) the claimed foreign relations prerogative did not exist before 1972 and therefore needs no abrogation; and (iii) the Appellant's submission that Parliament has in some express or implied way permitted the executive unlimited power to control the scope of EU law arising under the EU Treaties, does not bear scrutiny and is wrong. These reasons for rejecting the appeal are <u>not</u> cumulative: this appeal should be dismissed if the Court determines that any one of them is correct in law.

(2) THE APPELLANT'S CLAIM THAT HE MAY ALTER THE LAW USING THE FOREIGN RELATIONS PREROGATIVE IS CONTRARY TO THE BILL OF RIGHTS (AND THE ACTS OF UNION)

(a) Overview

12. The Pigney Respondents submit that:

a. It is no mere "general principle" but a fundamental feature of our constitution that the executive cannot vary the law of the UK by use of the prerogative.

[8] *BBC v Johns* [1965] Ch 32 at 79E per Diplock LJ as he then was (**V4/33**).

b. That proposition applies to the exercise of the foreign relations prerogative as much as to any other prerogative power.

(b) The orthodox constitutional position is that the foreign relations prerogative power cannot be used to vary the law

13. The Divisional Court was correct to conclude that the executive cannot vary the law of the United Kingdom[9]. That is a settled feature of our constitutional settlement. It has been recognised by our courts at least since the Glorious Revolution of 1688.

14. It is set out in the Bill of Rights (**V12/106**), Articles I and II of which provide:

> "Dispensing Power.
>
> That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall.
>
> Late dispensing Power.
>
> That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall."[10]

15. It has an analogue in the Scottish Claim of Right[11] and is also reflected in Article XVIII of the Union with Scotland Act 1706 (**V12/107**), which (together with the parallel Act passed by the Scottish Parliament) harmonised trade laws in Scotland and England but otherwise put in place protection of the separate Scottish legal system following the creation of a unified Parliament[12] by requiring that laws in use within the Kingdom of Scotland would remain in the same force as before "but alterable [only] by the Parliament of Great Britain ...".

16. The constitutional principle that only Parliament may alter the law is also established in a long line of cases stretching back at least to the *Case of Proclamations* [1610] 12 Co. Rep. 74 (**V1/9**). in addition to the authorities cited by the Miller and Dos Santos Respondents[13], the Pigney Respondents draw the Court's attention to the following cases which have developed or relied upon this principle in the United Kingdom and other common law jurisdictions:

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[9] §§25 32, and 84 of the DC Judgment.

[10] The preamble to the Bill of Rights reads: "Whereas the late King James the Second by the Assistance of diverse evill Councellors Judges and Ministers imployed by him did endeavour to subvert and extirpate the Protestant Religion and the Lawes and Liberties of this Kingdom: ... Dispensing and Suspending Power. By Assumeing and Exerciseing a Power of Dispensing with and Suspending of Lawes and the Execution of Lawes without Consent of Parlyament..."

[11] As to which see the Written Case of the Lord Advocate.

[12] See *Imperial Tobacco Ltd v Lord Advocate* [2012] SC 297 (**V5/41**) at §156 per Lord Reed.

[13] §§21, 25 -27 of Miller; and §27 of Dos Santos.

(a) In *The King v The London County Council* [1931] 2 KB 215 (**V32/437**), a local authority granted a licence on terms that demonstrated they would not enforce s. 1 of the Sunday Observance Act, 1780. Scrutton LJ held (at pp. 228-9):

> "... One is rather tempted to inquire whether the Theatres Committee of the London County Council have ever heard of the Bill of Rights. James II lost his throne, and one of the causes of it was that he took upon himself to dispense with the operation of Acts of Parliament, without the consent of Parliament. In the case of Acts preventing Catholics from holding certain positions unless they carried out certain formalities, which their religion did not allow them to observe, James II dispensed with the necessity of these persons obeying the Act of Parliament, whereupon, after the Revolution, one of the causes assigned for the Revolution was that he "did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this Kingdom by assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament"; and Parliament, in passing the Bill of Rights, which used to be considered of equal authority with Magna Charta, provided that "the pretended power of suspending laws, or the execution of laws, by regal authority without the consent of Parliament, is illegal; 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." I take it that the London County Council is in no better position than James II and that laws cannot be dispensed with by the authority of the London County Council, when they cannot by royal authority."

(b) In *R (Nicklinson) v Director of Public Prosecutions* [2014] UKSC 38 [2015] A.C. 657 (**V8/73**), in which Lord Sumption, at §241, relied on the Bill of Rights to find that an undertaking by the DPP as to circumstances in which a criminal law would not be enforced would "exceed... the bounds of constitutional propriety", he also cited Lord Bingham's observations in *R(Pretty) v Director of Public Prosecutions* [2002] 1 AC 800 (**V32/441**) as an example of the constitutional principle that the executive may not suspend the law even on a 'proleptic basis' (per Lord Bingham at §39).

(c) In *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (**V10/97**) the New Zealand Prime Minister made a press statement announcing that a statutory superannuation scheme would no longer be applied, pending the passage of legislation to confirm this policy. The New Zealand High Court held that his conduct conflicted with Articles I and II of the Bill of Rights: "in so doing [the PM] was purporting to suspend the law without consent of Parliament. Parliament had made the law. Therefore the law could be amended or suspended only by Parliament or with the authority of Parliament." (p.622). The declaration of illegality was granted even though the government had a clear intention to introduce legislation and there were "high probabilities" that Parliament would be

summoned within months to implement what the PM said in public announcement (p.623). This case was cited and relied upon by the DC (§86).[14]

(d) In *A v Hayden (No 2)* [1984] HCA 67 (**V32/439**), Brennan J held that the Australian Government's determination not to disclose the identities of various secret service agents who had conducted a bungled training exercise (in the course of which they had broken the criminal law) was unlawful:[15]

> "The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy. A prerogative to dispense from the laws was exercised by mediaeval kings, but it was a prerogative "replete with absurdity, and might be converted to the most dangerous purposes": Chitty, Prerogatives of the Crown (1820), p. 95. James II was the last King to exercise the prerogative dispensing power (see Holdsworth, A History of English Law, vol. vi, pp. 217-225), and the reaction to his doing so found expression in the Declaration of Right. It was there declared 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". By the Bill of Rights the power to dispense from any statute was abolished: 1 Will. & Mar. 2 c. 2, s. XII. Whatever vestige of the dispensing power then remained, it is no more."

(c) There is no exception which permits the use of the foreign relations prerogative to vary domestic law

17. There is no support on the face of the Bill or Rights or otherwise for the Appellant's suggestion that the principle above does not apply to the exercise of the foreign relations prerogative. The Appellant is wrong to suggest that the exercise of foreign relations is in some way excluded from Articles I and II of the Bill of Rights.[16] On the contrary, there is a strong line of authority (judicial and extra-judicial) to support the orthodox view that the executive may not, by exercise of its foreign policy powers, vary domestic law or remove the rights of its citizens:

    a. In the *Case of Proclamations* (**V1/9**) itself, Coke CJ gave as a paradigm example of the improper use of the late dispensing power an attempt by Henry IV to set aside an agreement to allow foreign merchants free access to markets in London:

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[14] For further New Zealand cases enunciating the same principle see: *Professional Promotions & Services Ltd v Attorney-General* [1990] NZLR 501; *Alan Johnston Sawmilling v Governor-General* [2002] NZLR 129 and *Unitec Institute of Technology v AG* [2006] 1 NZLR 65.

[15] See also *Meggitt Overseas v Grdovic* (1998) 43 NSWLR 527.

[16] Appellant's Written Case, §38

> "... we do find divers precedents of proclamations which are utterly against law and reason and for that void .... An Act was made by which foreigners were licensed to merchandize within London; Hen. 4. by proclamation prohibited the execution of it, and that it should be in suspence *usqe at proximum Parliament* which was against law."

b. In 1689, one year after the Glorious Revolution, the justices of the King's Bench and Common Pleas were asked to provide their opinion on whether the Crown could affect, by treaty, the right of English subjects to arrest and claim their goods in prizes brought to England by a foreign captor. Their Lordships held that it could not, since "no article in any treaty can exclude [subjects] from such their right, or disable your Majesty's court to proceed therein".[17]

c. In 1763, at the end of the Seven Years War in North America, a question closely analogous to that being put to the Court in the present case was asked of the law officers and the Advocate-General. The Crown proposed to amend the Treaty of Paris, signed with France, one aspect of which concerned historic French fisheries on the coast of Newfoundland. The advocate, attorney and solicitor-generals were asked to advise on the proposed treaty amendments and specifically, "whether the crown can legally enter into, and has any power, to endorse such regulation" and "whether the articles of this project are consistent with the act of parliament of the tenth and eleventh of William the Third cap. 25. To encourage the trade to Newfoundland".[18] The law officers advised that it could not because the proposed Treaty amendments were not consistent with primary legislation:

> "The articles of this project are not consistent with the act of the tenth and eleventh of William the Third, cap 25. For the encouragement of the trade to Newfoundland, the same containing regulations and restrictions, in several instances, contrary to the provisions of that act, as well in respect to the rights of his majesty's subjects, as to the mode of determining controversies arising there"

d. In 1782, an Act of Parliament was passed to grant George III the power to conclude a peace treaty with the American colonies. The wording of the Act suggests that both Parliament and the King regarded the assent of the legislature as necessary, because the Treaty would contravene various Acts of Parliament:

> "Whereas it is essential to the Interests, Welfare and Prosperity of Great Britain, and of the Colonies or Plantations of [the respective colonies listed], that Peace,

[17] Marsden, *Law and Custom of the Sea* (Navy Records Society) Volume ii, 124 (1689) (**V33/457**).
[18] Chalmers, *Opinions of Eminent Lawyers*, (1814) ii 243-244 (**V33/456**).

> Intercourse, Trade, and Commerce, should be restored between them...[In the name of the King and by the advice of the lords of Parliament] That it shall and may be lawful for his Majesty to treat, consult of, agree, and conclude, with any [Commissioners, agents, delegates, Political bodies] a peace or truce with the said Colonies or Plantations, or any of them, or any Part or Parts thereof; any Law, Act or Acts of Parliament, Matter, or Thing, to the contrary in any way withstanding.
>
> [And, in order to facilitate the treaty making process], his Majesty shall have full Power and Authority, by virtue of this Act, by his Letters Patent, under the Great Seal of Great Britain, to repeal, annul, and make void, or to suspend, for any Time or Times, the Operation and Effect of any Act or Acts of Parliament which relate to the said Colonies or Plantations"

Sir William Holdsworth concluded, in the light of the wording of the statute and his review of the wider case law, that the Glorious Revolution had settled this question: the executive may not enter into treaties which would directly vary English law or affect the rights of Crown subjects.[19]

e. In *The Parlement Belge* [1879] 4 PD 129 (**V24/294**) it was alleged in that Queen Victoria had, by a treaty with the King of Belgium, conferred upon a ship (presumed to be a private trade ship), the immunities of a ship belonging to the sovereign. As a result, a British subject was disentitled from proceeding against her for injuries sustained in a collision. Sir Robert Phillimore (as he then was) held that the British subject could not be denied from exercising his rights by a treaty entered into by the Crown. Sir Robert held (at p. 154), that such an effect of the Crown prerogative would be "without precedent, and in principle contrary to the laws of the constitution." The decision was reversed on appeal, but the Court of Appeal did not disturb the first instance judge's reasoning on the limits of the Crown prerogative[20].

f. Sir Robert Phillimore's statement of principle has been upheld in modern times. In *Littrell v United States of America* [1995] 1 WLR 82 (**V32/440**), the plaintiff was a serving member of the US Air Force based in the UK. He was admitted for treatment to a US military hospital in the United Kingdom and lost the use of one arm following that treatment. The judge at first instance dismissed his claim against the United States Government for negligent medical treatment on the basis that the 1951 NATO Treaty had largely excluded tortious liability arising out of the negligence of US servicemen (p.

[19] W. Holdsworth, "The Treaty-Making Power of the Crown" 58 LQR 175 (1942) (**V33/58**), p. 176

[20] [1880] PD 197, 204. (The Court of Appeal concluded that it had no jurisdiction to try the matter because the statement by the Crown that the ship was a property designated for public purposes must be taken as conclusive under the common law for the purposes of the courts.)

92D-F). Rose LJ and Hoffman LJ allowed the appeal, and applied the reasoning of Sir Robert Phillimore in *Parlement Belge* (per Hoffman LJ at p. 93D):[21]

> "The terms of a treaty cannot confer immunity upon anyone in an English municipal court unless they have been incorporated in an Act of Parliament. Thus in *the Parlement Belge* (1879) 4 PD 129 Sir Robert Phillimore decided that, if a mail vessel belonging to the King of the Belgians was not immune from arrest as sovereign property at common law, such immunity could not be conferred by a treaty on mail carriage concluded between Belgium and the United Kingdom. The Court of Appeal ((1880) 5 PD 197) found it unnecessary to decide this question because it considered that immunity existed at common law. But no doubt has ever been cast on Sir Robert Phillimore's decision."

18. These authorities all illustrate that the Divisional Court was correct to conclude (at §32) that:

> "The Crown's prerogative power to conduct international relations is regarded as wide and being outside the purview of the courts precisely because the Crown cannot, in ordinary circumstances, alter domestic law by using such power to make or unmake a treaty".

19. Indeed, there only continues to be a residual prerogative power for the executive to conduct foreign relations because the power to make treaties can have no effect on domestic law. This was central to the reasoning of Lord Oliver in the *Tin Council* case (**V5/43**)[22] (emphasis added):

> "... as a matter of constitutional law of the United Kingdom, the Royal Prerogative while it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament ... So far as individuals are concerned [a treaty] is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations and it is outside the purview of the court not only because it is made in the conduct of foreign relations which are the prerogative of the Crown but also because as a source of rights and obligations it is irrelevant."

(d) The Appellant cites no authority for the proposition that the foreign relations prerogative can suspend or dispense with the law contained in legislation

20. The Appellant relies on *Darcy v Allin (The Case of Monopolies)* (1602) 11 Co. Rep 84 (**V20/252**)) in attempt to undermine Lord Oliver's reasoning in the Tin Council case[23]. But the Case of Monopolies precedes the Bill of Rights and – unlike the *Case of Proclamations* (1610) – its reasoning cannot stand after it. In *BBC v Johns* [1965] Ch 32 (**V4/33**) Lord Diplock rejected an

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[21] See also Rose LJ at p. 88H.

[22] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500 (emphasis added) (**V5/43**).

[23] Appellant's Written Case, footnote 14

argument for the BBC that it had acted pursuant to any prerogative power to create a monopoly because (at p. 79F) executive government did not have a general prerogative to claim or confer a monopoly thereby making it unlawful for others to trade.

21. The four authorities relied upon by the Appellant at § 56 of his Written Case to submit that the government does have power to vary the law of the land by use of the foreign relations prerogative do not assist him. *CCSU v Minister for the Civil Service* [1985] 1 AC 374 (***"GCHQ"***) (**V4/36**) and *(XH and AI) v Secretary of State for the Home Department* [2016] EWHC 1898 (Admin) (**V8/66**) concern prerogative powers of quite different scope to the foreign relations prerogative in spheres – employment of Crown servants and the power to issue or withdraw passports – where the common law position is that the prerogative may establish the scope of the law, in the absence of statutory restriction (see the Miller Written Case at §§29(7)-29(9)).

22. *AG v De Keyser's Royal Hotel Ltd* [1920] AC 508 (**V1/10**) and *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 (**V4/34**) also do not support the Appellant's assertion that the foreign relations prerogative can be used to vary pre-existing law. These cases do not concern the foreign relations treaty prerogative but the war prerogative. They demonstrate that the executive may in some circumstances act, within the scope of its proper powers, in a manner that affects the *interests* of citizens, e.g. those whose resources are required for the purposes of war. However, the Appellant seeks to derive from those cases an entirely different principle: that unless prevented by statute, the executive may vary the law on a wholesale basis using the foreign relations prerogative[24].

23. The Appellant relies at §38 of his Written Case on *McWhirter v Attorney General* [1972] CMLR 88 (**V5/46**) as authority for recognition of the continued exercise of the foreign relations prerogative; but on a true reading it is an authority for the proposition that the foreign relations prerogative cannot change the content of domestic law in the context of entering EU treaties. The applicant in that case did not wish the UK to enter the EEC (as it then was). On an application for judicial review, he submitted that by signing the Treaty of Accession to the Treaty of Rome, the government of the day had acted contrary to Article III of the Bill of Rights by

[24] In any event *Burmah Oil Co* was not concerned with law applicable in the UK: the Crown's exercise of its war prerogatives in that case led to destruction of property abroad (with the result that compensation was payable); no statutory or other domestic law rights were removed by the executive action. By contrast, where the seizure of a British subject's property on British territory was sought to be justified by prerogative power, the courts have rejected such as "wholly untenable": see *Walker v Baird* [1892] AC 491, 497 **(V9/88)** (per Lord Herschell). In that case, the AG rightly "conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals."

derogating from the "entire perfect and full exercise of the regall power and government". The application for permission was rejected as unarguable by the Court of Appeal because signing the Treaty had no effect on domestic law (including the scope of the ongoing foreign relations prerogatives for the successors of William and Mary). See per Lord Denning MR at §6[25]:

> "Even though the Treaty of Rome has been signed, it has no effect, so far as these Courts are concerned, until it is made an Act of Parliament. Once it is implemented by an Act of Parliament, these Courts must go by the Act of Parliament. Until that day comes, we take no notice of it .... Once the assent of Parliament is obtained, it has the force of law. Until it is obtained, the Courts will not interfere".

(e) Prior parliamentary authorisation is required to enter into, and resile from, EU treaties

24. It is intrinsic to an EU Treaty that it is a source of rights in EU law, which are to have effect in domestic law. It is for that reason that Phillimore LJ recognised in *McWhirter* (**V5/46**) that the government would not, in fact, ratify the Treaty of Rome without prior Parliamentary authority. No EU Treaty creating effects in domestic law[26] has *ever* been ratified unless Parliamentary authority through primary legislation or under an Order in Council made under s2(3) European Communities Act 1972 ("**ECA 1972**") **(V1/2)** has *first* been obtained. Since all the EU Treaties to which the UK is a party do have effects in domestic law, none of them *could* lawfully have been ratified by the government without Parliamentary authority. To have done so would have crossed the line between entering treaties which are *res inter alios acta* as regards domestic law and 'altering the law'[27].

25. By the same logic, the government cannot alter the law by withdrawing from these treaties, which would cross the same line, the other way. If there is no foreign relations prerogative power to make treaties with automatic effects in national law, by parity of reasoning, there is no foreign relations prerogative power to withdraw from treaties which have such automatic effects in national law.

(f) The rule against frustrating statutes

26. The principle that the executive may not, by the exercise of the prerogative power, frustrate the will of Parliament as given effect in a statute is a logical extension of the rule above. The

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[26] Cf the Social Charter which had no domestic law effect, considered in *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Rees-Mogg* [1994] QB 552 (**V2/14**). As to this see DC judgment §§90-91.

[27] Section 18 of the European Union Act 2011 was passed only to put the 'clear' and 'fundamental' principle of Parliamentary sovereignty in relation to EU law 'beyond speculation' by putting it on a statutory footing: see per Lord Howell of Guildford (721 HL Official Report (5th Series) cols WS5-6) (**V1/16**).

executive may not suspend or dispense with primary legislation via the 'conceit' of frustrating it. The Pigney Respondents agree with the Miller and Dos Santos submissions on this point[28], and do not repeat them here.

(g) The consistent judicial assumption is that it is for Parliament, not the executive, to decide to leave the EU

27. It is significant that on each occasion that the Courts have considered the possibility that the UK might withdraw from the EU, they have assumed that this would be a matter for Parliament and not the government to determine:

    a. In *Blackburn v AG* [1971] 1 WLR 1037 (**V1/11**) at p. 1040, Denning LJ (as he then was) said:

    > "If her Majesty's Ministers sign this treaty and Parliament enacts provisions to implement it, I do not envisage that Parliament would afterwards go back on it and try to withdraw from it. But, if Parliament should do so, then I say we will consider that event when it happens. We will then say whether Parliament can lawfully do it or not."

    b. In *Macarthys Ltd v Smith* [1979] [1981] QB 180 (**V2/13**) at p. 329, Denning LJ (as he then was) said:

    > "If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament."

    c. In *R (Shindler) v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 (**V2/18**) at §19 Lord Dyson MR said:

    > "I accept that Parliament is sovereign and that it does not need the mandate of a referendum to give it power to withdraw from the EU. But by passing the 2015 Act, Parliament has decided that it will not withdraw from the EU unless a withdrawal is supported by referendum. In theory, Parliament could decide to withdraw without waiting for the result of the referendum despite the passing of the 2015 Act. But this is no more than a theoretical possibility. The reality is that it has decided that it will withdraw only if that course is sanctioned by the referendum that it has set in train. In other words, the referendum (if it supports a withdrawal) is an integral part of the process of deciding to withdraw from the EU. In short, by passing the 2015 Act, Parliament has decided that one of the constitutional requirements that had to be satisfied as a condition of a withdrawal from the EU was a referendum."

[28] Miller at §§44-47; Dos Santos at §§44 – 47.

(e) Lord Mance in *Pham v Secretary of State for the Home Department* [2015] UKSC 19 (**V6/50**), when considering that the conferral of rights as an EU citizen was the consequence of the passage of ECA 1972, observed (at § 82):

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

(h) Conclusion on the Bill of Rights and the Acts of Union

28. There is no authority for the assertion that the principles reflected in Articles I and II of the Bill of Rights and Article XVIII of the Acts of Union are merely 'high level' or 'general', or somehow inapplicable to the foreign relations prerogative. If the Appellant's characterisation of the law were correct it would be 'found in our books'. It is not. The exercise of the prerogative powers contended for by the Appellant is "without precedent and in principle contrary to the laws of the constitution"[29]. In the absence of an express statutory provision authorising the executive to notify a decision to leave the EU to the Council, the Appellant has no prerogative power to do so.

29. For this reason alone, the appeal should be dismissed.

(2) THE FOREIGN RELATIONS PREROGATIVE CANNOT BE USED TO EXTINGUISH OR ABROGATE DOMESTIC RIGHTS

(a) Overview

30. Rights originating in EU law are enjoyed as an aspect of UK domestic law because Parliament has willed it[30]. There is no other source of enforceable EU law rights for subjects of UK law. That being so, it follows that the foreign relations prerogative cannot be used to remove EU law rights because they have been conferred under a domestic statute.

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[29] Sir Robert Phillimore in the *The Parlement Belge* (1879) 4 PD 129 (**V24/294**) at p.154.
[30] See per Lord Mance in *Pham* (**V6/50**) at §82, supra.

31. Further, since fundamental EU law rights such as rights of free movement are contained in, and underpin, the structure of constitutional statutes, it would be contrary to the principle of legality for them to be removed by exercise of prerogative power, without statutory authority.

32. The Appellant's case depends on persuading this Court to accept one of two propositions as to the nature of EU rights, both of which are flawed:

    a. that EU law rights arise on the international plane and so are not, or at least not only, domestic law statutory rights (Appellant's Written Case at §50); or

    b. that on each occasion when Parliament legislated to pass the European Communities Act 1972 (**V1/1**), the Single European Act 2008 **(V1/3**), the European Union Act 2011 (**V1/6**), the Scotland Act 1998 (**V12/124**) and the Scotland Act 2016 **[482]**, Northern Ireland Act 1998 (**V13/125**) and Government of Wales Act 2006 (**V13/132**), Parliament assumed that the carefully chosen constitutional scheme of delegation between the EU and the UK as between the various self-standing democratic legislatures of the UK could be altered or even removed by a minister of the Crown at any time, and without further statutory authority.

33. The Appellant's first proposition was correctly dismissed by the Divisional Court as "divorced from reality" (§66).

34. The second is equally unrealistic, given the content and character of the rights enjoyed under the EU statutes and the devolution statutes, and the role that EU law plays in the devolution settlements. Parliament passed all these statutes on the assumption that EU law is a stable and permanent feature of UK law and, therefore, of the balance of competences between the devolved governments and Westminster. Given the profound sensitivity of these constitutional relationships between the constituent nations of the UK, it is inconceivable that the foreign relations prerogative power can be exercised so as to undo essential elements of these statutory constitutional settlements and to remove the fundamental rights enjoyed under them.

(b) The nature and content of EU law rights

35. The Appellant rightly accepts (in his Written Case at §§48-49 and 62) that the result of triggering Article 50 will be the loss of rights currently enjoyed by UK citizens (both in the UK and in other

EU states)[31], and that these rights cannot be replaced or replicated by the UK Parliament. However, he seeks to suggest that he can nevertheless extinguish these rights in the exercise of ministerial power, in particular because some of the rights in question are only enjoyed abroad (and – it is implied – are thereby enjoyed as a result of bilateral agreement rather than EU law as implemented in the United Kingdom); or are in some way insignificant or are merely the rights that derive from "membership of the club".

36. That mischaracterises the position. First, EU law rights are statutory rights[32]. As Lord Denning recognised in *McWhirter* at §6 (**V5/46**) and Lord Oliver explained in the *Tin Council* case at 550B-D (**V5/43**), international law alone does not act as a source of rights recognised in domestic courts. If there were any doubt about statute being the only source of EU law rights in domestic law, it was put 'beyond speculation' by s18 EUA 2011 (**V1/6**)[33]. It is because EU law rights and remedies are part of domestic law, that they can be enforced in domestic courts and (as appropriate) in the CJEU, against public and private actors across the EU[34].

37. Secondly, the rights that the UK Government proposes to remove are substantial, enforceable and penetrate all aspects of UK citizens' lives. They are not mere "rules of the club". The Annex to this Written Case provides examples of a number of fundamental constitutional rights in EU law, and other EU rights recognised in domestic law, which will be lost upon withdrawal from the EU. As explained in the Annex, upon withdrawal from the Treaties, many such rights will be incapable of being replicated in domestic law, even if Parliament wished to do so[35].

38. It follows that, since the foreign relations prerogative cannot be used to dispense with domestic law, it cannot be used to dispense with the panoply of rights under EU law and the domestic legal structures which underpin their enforcement.

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[31] It is common ground between the Appellant and the First and Second Respondents – that an Article 50 notification either cannot or will not be reversed once given. On that basis the Pigney Respondents agree that the Court should proceed on the basis that an Article 50 notification will proleptically extinguish EU law rights. The House of Lords Select Committee on the Constitution Report of 13 September 2016 (**V18/209**) at §§12-13 described it as a "prudent presumption" that the triggering of Article 50 is an action that the UK cannot unilaterally reverse.

[32] *Thoburn* **(V2/16)** *per* Laws LJ at §1, *Pham* (**V6/50**) *per* Lord Mance at §82.

[33] See the Hansard statement of Lord Howell cited in footnote 27 above.

[34] See various examples set out in the Annex, including in relation to free movement rights, employment rights, and competition law infringements.

[35] The Pigney Respondents explain in their witness statements how they exercise those rights and why their EU citizenship matters to them: see footnote 1 above.

(c) The fundamental constitutional character of EU law rights

39. Many EU law rights have a fundamental constitutional character, because of the circumstances in which they were adopted and because of the significance which they have acquired over time in informing the shape of our law and the expectations of the subjects of that law and the constitutional actors under it.

40. Parliament's decision in 1972 to enter the EEC informs the content of common law, the interpretation and application of statutes and the nature, extent and enforcement of the rights of all legal persons subject to UK law, 'horizontally', as well as in their relations with the State.

41. The ECA 1972 (**V1/1**) was passed in full awareness that the community was a "new legal order" which conferred rights directly on the nationals of member states "which [became] part of their legal heritage" (*Van Gend en Loos* [1963] ECR 1 (**V2/24**) at p12). By treating individuals as "subjects" with directly effective rights rather than just creating relations between states, the treaties establishing the EU are "not like other treaties"[36]. The constitutional character of EU law rights was reinforced after the adoption of Article 20 TFEU, which established the status of citizenship for "[e]very person holding the nationality of a Member State" and provided that "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties." (See further the Annex to this Written Case).

(d) The fundamental constitutional character of EU law in the devolution settlement between the nations of the UK

42. EU law is also an essential aspect of the division and delimitation of competences in the devolution settlements[37].

43. The devolution arrangements put in place by those statutes are built on the presumption that the underpinning features of the devolution settlement, including the relationship of the UK and the devolved administrations with the EU legal system, will continue to exist unless and until *the Westminster Parliament* alters them:

    a. In *AXA General Insurance v Lord Advocate* [2011] UKSC 46; [2012] 1 AC 868 (**V4/31**) at §§45-46, Lord Hope referred to devolution as "an exercise of its law-making power by

[36] Professor Vaughan Lowe QC: "The Law of Treaties; or Should this book exist?" in *Research Handbook on the Law of Treaties* (Tams & ors ed) (Elgar 2014) at pp 6-8 (**V16/175**).
[37] See especially Lord Advocate's Written Case at §§35-40; Counsel-General at §§ 6-12, 19, 30-52 and Agnew at §§ 33-62, 65-77 and 105-114.

the United Kingdom Parliament at Westminster" and "a process of delegation" with the Scotland Act using "carefully chosen language" and the Scottish Parliament "taking its place under our constitutional arrangements as a self-standing democratically elected legislature";

b. In *Robinson v Secretary of State for Northern Ireland and others* [2002] UKHL 32; [2002] NI 390 (**V9/81**), Lord Bingham held at §11 that the Northern Ireland Act was "in effect a constitution", which therefore had to be '"read in context" (at §18), this context including the establishment of a representative assembly with cross-community support which would be the "prime source of authority" in the devolutionary structure (per Lord Hoffmann at §25) and which would implement the Belfast peace agreement which attempted to put an end to "decades of bloodshed and centuries of antagonism".

c. In *Re Agricultural Sector (Wales) Bill* [2014] 1 WLR 2622 at §42 (**V20/246**), the Supreme Court recognised the direction of travel as widening and deepening empowerment of the devolved legislatures established under the structure of the Government of Wales Act 2006, as a result of the referendum held on 3 March 2011.

(e) The consequences of the fundamental constitutional nature of EU law rights for the foreign relations prerogative

44. The constitutional nature of ECA 1972, and the devolution legislation[38] is not a judicial value judgment as to their moral worth, but a recognition of the foundational importance they have acquired over time in informing the shape of our law, the understanding of constitutional actors, and citizens' long-standing expectations of how law operates[39].

45. The particular significance and force of these statutes, and the rights and obligations to which they give effect, means that they cannot be overridden by general or ambiguous words lest "the full implications of their meaning may have passed unnoticed in the democratic process". Although the constraints upon doing so are ultimately political not legal "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost" (per Lord Hoffmann in *R v Home Secretary ex parte Simms* [2000] 2 AC 115 (**V9/79**) at p. 131F).

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[38] Recognised in *Thoburn v Sunderland City Council* [2003] QB 151 at §§60-67 (**V2/22**) and *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324 at §§207-208 (**V2/16**).

[39] See Sales P, '*Rights and Fundamental Rights in English* Law': Cambridge Law Journal 75(1), March 2016 p. 98 (**V33/461**).

46. The principle of legality is a powerful constitutional norm. As the Divisional Court observed (at §83): "Where background constitutional principles are strong, there is a presumption that Parliament intended to legislate in conformity with them, and not to undermine them".

47. In submissions before the Divisional Court, the Appellant suggested that the principle of legality applied only where Parliament removed fundamental rights, and had no purchase on the removal of rights by exercise of prerogative power.[40] That submission would, if accepted, make a nonsense of the concept of constitutional rights. If a right has sufficient constitutional value that even a later Parliament would have to use express words to remove it, to ensure that it "squarely confronts" the political consequences of doing so, it is absurd to suggest that a minister can remove the very same rights at any time, without any Parliamentary authority or scrutiny at all. It would be contrary to the principle of legality for the court to find that the foreign relations prerogative can extend to extinguishing fundamental rights and obligations that are given effect by constitutional statutes, in the absence of express permissive statutory language to that effect.

(3) PARLIAMENT HAS NOT PRESERVED IN THE EXECUTIVE THE PREROGATIVE POWER TO REMOVE THE UK FROM THE EU, OR TO ALTER THE CONTENT OF EU RIGHTS IN 'TREATIES FROM TIME TO TIME'

(a) Overview

48. The Appellant's suggestion that s.2(1) ECA 1972 preserves a space for the exercise of a prerogative power to trigger the end of UK membership of the EU does not bear scrutiny.

49. It is contrary to the statutory purpose of ECA 1972, as implied from the long title and description of s.2 ECA 1972, and also contrary to the language and structure of s.2 itself. It is also contrary to the 'reinforcement' provisions set out in the European Union Act 2011. The further suggestions advanced by the Appellant to support it are, on examination, flawed.

(b) Statutory purpose of the ECA 1972

50. The purpose of ECA 1972 was to establish UK membership of the EU and to provide for the implementation of EU law in national law.

[40] The Appellant's Written Case for this court is silent on this issue.

51. That purpose is clear from the long title of the Act and the side heading of s. 2. The long title shows that the purpose of the Act is to *enlarge* the EU by making the UK a member. Section 2 is described in its side heading as being concerned with the "general implementation" of the Treaties. These are both permissible aids to interpretation (see, *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591 647F **V20/249**, and to like effect, *Ealing London Borough Council v Race Relations Board* [1972] 2 WLR 71 at 361 and *In Re Phelps* [1980] Ch 275 at 281C).[41]

52. It is true that the power to notify the Council of a decision to leave the EU arises under Article 50 TEU. But the fact that Article 50 permits a member state to decide to leave the EU in accordance with its constitutional traditions says nothing about what those conditions are, or which constitutional actor is empowered to make them within its own constitutional order. The fact that ECA 1972 gives effect in domestic law to the current version of the EU Treaties, including Article 50, does not equate to Parliament empowering the executive to trigger Article 50 without Parliamentary authority.

53. The language of the long title and side heading of s.2 ECA 1972 indicate that Parliament intended the UK to be a member of the EU, and that all the rights, obligations etc. granted under EU law should be effective. The Act cannot be read as Parliament conferring a power on the executive under Article 50 TEU to decide to leave the EU without statutory authority. That therefore cannot be done without Parliament first passing legislation to authorise it. On the basis of the existing statutory scheme, to trigger Article 50 would contract the EU, remove the UK as a member and trigger the end of implementation of the Treaties, including all the rights

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[41] See, e.g. *Ealing London Borough Council v Race Relations Board* [1972] 2 WLR 71 at 361 *per* Lord Simon of Glaisdale *"...the courts have five principal avenues of approach to the ascertainment of the legislative intention: (1) examination of the social background, as specifically proved if not within common knowledge, in order to identify the social or juristic defect which is the likely subject of remedy; (2) a conspectus of the entire relevant body of the law for the same purpose; (3) particular regard to the long title of the statute to be interpreted (and, where available, the preamble), in which the general legislative objectives will be stated; (4) scrutiny of the actual words to be interpreted, in the light of the established canons of interpretation; (5) examination of the other provisions of the statute in question (or of other statutes in pari materia) for the illumination which they throw on the particular words which are the subject of interpretation."*
On the use notes and headings as aids to construction, see *In Re Phelps* [1980] Ch 275 at 281C *per* Buckley LJ *"Schedule 2 to the Intestates' Estates Act 1952 is enacted for the purpose of enabling the surviving husband or wife to acquire the matrimonial home - see section 5 of the Act; that is to say, for the purpose of enabling the husband or wife to achieve that end at his or her own option. This is, I think, emphasised by the fact that the marginal note to the section and the cross-heading to the Schedule both refer to "rights of surviving spouse as respects the matrimonial home.""*

and obligations referred to in s.2 of the Act. All of these actions would be inconsistent with the language and purpose of the legislation governing UK membership of the EU.[42]

(c) Section 2(1) and 2(2) ECA 1972 do not provide a 'conduit' through which the executive can empty the Treaties of content by exercising a power under them to resile from them

54. The Appellant also relies upon a technical argument that s2(1) ECA 1972 is a passive 'conduit' which leaves an unfettered discretion to the executive to negotiate the content of EU law and also to determine whether it will continue to apply in the domestic sphere. It describes such a statute as 'ambulatory.' The Appellant does not rely on any judicial authority for that principle, but refers to a series of online blogs advancing that argument by Professor Finnis.[43]

55. One answer to Professor Finnis' analysis is that set out in the Miller and Dos Santos submissions[44], but there are further reasons why it is wrong. The novel concept of an 'ambulatory' statute may operate in two different ways:

    a. Legislation may give effect to rights under such international agreements as the executive may enter into from time to time; or

    b. It may give effect to a specified international agreement, but the precise contents of the rights flowing from that defined treaty may evolve from time to time.

56. Depending on its statutory structure and language, a domestic implementing statute could in theory be ambulatory in either, both or neither of these senses.

57. However, the only possible reading of the language of s2 ECA 1972 is that the rights given effect by it are 'ambulatory' only in the second sense (and even then, subject to the provisions of s3 EUA 2011). The Appellant's submission that s.2(1) ECA 1972 allows (or presupposes) that the executive may revoke the Treaties without Parliamentary authority is inconsistent with the language of the Act:

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[42] On frustrating Parliament's intention see *Laker Airways v Department of Trade* [1977] QB 643 (**V1/12**).
[43] John Finnis, 'Terminating Treaty-based UK Rights', UK Constitutional Law Association blog, 26 October 2016, John Finnis, 'Terminating Treaty-based UK Rights: A Supplementary Note', UK Constitutional Law Association blog, 2 November 2016 and John Finnis, 'Intent of Parliament Unsoundly Constructed', Judicial Power Project blog, 4 November 2016 (**V29/371, 372 and 373**)
[44] Miller at §29(5) and Dos Santos at §30(4).

a. S.1(2) provides a definitive list of 'the Treaties', which may only be varied by statutory amendment or by Order in Council made under s2(2) ECA 1972 (and now subject to Part I of the EUA 2011).

b. S. 2(1) gives effect to:

> "such rights [and] powers ... created by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties ..."

That is different from a provision giving effect to:

> "such Treaties from time to time provided for, and the rights, powers, remedies and procedures under them".

58. On the language actually used in the statute, the *Treaties* under which rights may be conferred are defined by the terms of the statute itself and are fixed. It is only the rights and powers etc. provided under these Treaties which may vary from time to time, by operation of the EU legal process. But those powers may not be exercised by a minister so as to extinguish the existence of the Treaties whose continued existence the statute assumes. To do so would be contrary to Parliament's intention expressed through the statute and a misuse of any prerogative power which (for these purposes) may be assumed to remain.

(d) The nature of the executive's role when participating in the Council of Ministers

59. A core assumption underpinning the Appellant's case in relation to the interpretation of ECA 1972 (and its alleged preservation of the prerogative power to accede to amend or withdraw from the EU Treaties) is that Ministers exercise prerogative powers when they engage in the "process of negotiation, agreement and/or voting on new Treaties and EU secondary legislation at the international level". On the Appellant's case, the result is that ECA 1972 contemplates the exercise of the prerogative to vary domestic law, by altering the EU law rights of UK citizens under the Treaties (A's case §§8-9; 59-60). As a result, he suggests, use of the foreign relations prerogative to withdraw from the Treaties would differ only in 'scale' not character from other government action under EU treaties.

60. The Appellant's submission is based on a false premise, namely that when ministers exercise legislative powers as members of the Council of the EU, they are exercising pure prerogative powers. On the contrary, they are exercising powers under the Treaty framework to which Parliament adopted and gave effect by s. 2(1) EA 1972.

61. The Appellant is right to say that the government ministers have a role in the EU legislative process (through the Council of Ministers)[45], but wrong to characterise ministerial participation in these processes purely as an exercise of the prerogative. Ministers participate in Council decision-making as part of a free-standing EU institution created under, and whose powers are limited by, the Treaties. The primary origin of the power in question is therefore the Treaties themselves. UK ministers participate in the Council in consequence of Parliament's decision to implement the Treaties. If Parliament had not passed ECA 1972, the Treaties could not have been ratified and UK ministers would have had no role in the Council.

62. It follows that a minister acting as part of the Council is not exercising a pre-existing prerogative to "negotiate ... at an international level" without Parliamentary authority, but rather a Treaty power to participate in the EU legal order to which Parliament decided the UK will belong by passing the ECA 1972. Changes to domestic law as a result of Council decisions and associated EU legislative arrangements are part of domestic law only because they are given effect through the ECA 1972 and the 'rule of recognition' identified by Lord Mance in *Pham,* and not because the government has exercised a foreign relations prerogative so as to change domestic law. It is Parliament's decision to make the UK a member of the EU, not the exercise of a prerogative power, which causes those changes to domestic law.

63. The Appellant has accordingly mischaracterised the species and extent of power exercised by ministers under the Treaty framework: it is not a freestanding prerogative power and it does not extend to the ratification of new Treaties without the authority of Parliament nor the repudiation of the treaty framework itself.

(e) The European Union Act 2011 reinforces the need for statutory authority for Treaty change

64. If there can have been any doubt that statutory authority was required to change EU law before the EUA 2011 (**V1/6)** was passed, there can be none afterwards.

65. Part 1 of the EUA 2011 expressly states that:

    a. an Act of Parliament *and* a referendum are required before any decision to is taken to ratify an extension of the Treaty powers, or before a Minister of the Crown approves any Council decision to approve extension of competences of the EU (ss. 2, 4, 6 EUA 2011);

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45 See §50 A's Written Case.

b. an Act of Parliament is required before any treaty is ratified which amends or replaces the TEU or the TFEU even if such treaty merely diminishes or alters rather than enlarging the competences of the EU (ss. 2 and 7 EUA 2011).

66. It is not credible to suggest that legislation which expressly required statutory authority, and the authority of a referendum, to 'turn up' the effect of EU law by expanding the scope of the Treaties or EU competence and also required statutory authority before 'turning down' or otherwise adjusting the effect of EU Treaties or EU competence (by replacing them with a new Treaty) could nonetheless have intended that Ministers be authorised to 'turn off' the entire EU legal order and to remove EU law rights from UK citizens with no Parliamentary authority at all.

(f) The consistent constitutional practice of seeking Parliamentary approval before *any* ratification of an EU Treaty pre-dates and does not depend upon the European Parliamentary Elections Act 2008

67. The Appellant's suggestion at (§§24-5 Appellant's Written Case) that Parliament has only been given a vote before adoption of each subsequent EU treaty because of the requirements of s. 6 European Parliament Elections Act 1978 ('**EPEA 1978**') **V12/112**) does not stand up to a historical inquiry:

a. As the Miller Respondent points out in her Written Case, the Treaty of Rome was signed, the Act was passed and the Treaty then ratified (§7) (and the Court of Appeal in *McWhirter* (**V5/46**) assumed it could only be ratified after Parliamentary authority was granted). The same chronology has been followed on each occasion since.

b. All EU Treaties passed since the 1972 are included in the definition of "the Treaties" only by virtue of amendments to the definition of such treaties in s. 1(2) ECA 1972.

c. EU Treaties have been adopted either under Order in Council or by statute without any reference being made to the EPEA 1978. For example, the 2008 European Union (Amendment) Act (**V1/3**) makes no mention of the EPEA 1978 at all, either in the introduction or elsewhere. The Explanatory Note, on the other hand, says that "This Act is intended to enable the United Kingdom to ratify the Treaty of Lisbon." [46] It is implausible to suggest that Parliament legislated because it was required to do so by the EPEA but failed to mention it at any point on the face of the statute.

[46] §3. There is likewise no mention of EPEA in the European Communities (Amendment) Act 1993.

(g) Conclusion on presumed Parliamentary intention

68. In summary, the long title, language and structure of ECA 1972 offer no support for the proposition that government ministers are authorised by statute to 'switch off' the entire EU legal order as it applies to the subjects of UK law with no further statutory authority. The Appellant's submission based on Professor Finnis's argument that s. 2(1) itself creates or preserves authority for ministers to act in the European arena which extends as far as deciding to eradicate the entire framework of European law, established under the Treaties, is contrary to both the language and purpose of ECA and must therefore fail.

69. The Appellant has no power to act in a way which eviscerates the concept of rights created by or under the Treaties listed in s. 1(2) of the Act by revoking the very Treaties under which all such rights are created, as they apply to the UK.

(4) THE ISSUE OF ABROGATION DOES NOT ARISE

70. The Appellant suggests that the Court should enquire whether ECA 1972 impliedly abrogates the prerogative (at §§64-65 of his Written Case). For the reasons advanced above, an historical enquiry into the operation of the foreign policy prerogative offers no indication that such a power has ever extended to a prerogative power to vary domestic law, to extinguish fundamental constitutional rights, or to cut across the constitutional settlement as between the nations of the UK.

71. Consequently, the question of whether any or all of these statutes 'abrogate' such prerogative powers simply does not arise.

72. In any event, even if there were some prerogative power to enter or withdraw from EU Treaties before ECA 1972 was passed, the proper approach to whether any such power had been abrogated "by necessary implication" is a broad purposive one[47].

73. The Court should ask itself whether the relevant legislation "deals with something" which was previously within the scope of the prerogative (so that the prerogative is to that extent ousted) or whether the executive proposes to act in a manner that is "inconsistent with statutory provisions". As the court stated in *R (Morgan Grenfell) v Special Commissioners of Income Tax*

[47] Per Lord Dunedin in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (**V1/10**) at p. 526 see also Lord Sumner at p. 561.

[2002] UKHL 21; [2003] 1 AC 563 (**V2/17**) "a necessary implication is one which necessarily follows from the express provisions of the statute, construed in context" (emphasis added).

74. But the very purpose of ECA 1972 is inconsistent with the action the Appellant proposes to take, so it cannot be used to 'imply' a power for him to do so. The Pigney Respondents adopt the Divisional Court's reasoning concerning ECA 1972 (judgment §§97-100). The Appellant's submission would render ss. 2(1), 2(2) and 3(1) meaningless. Even if the scope of the prerogative were to be viewed through the lens of 'abrogation', it could not co-exist with the language of ECA 1972 or the EUA 2011.

75. Consequently, even if in theory the prerogative power extended to withdrawing the UK from the EU, which is not the case for the reasons set out above, the statutory wording and purpose of ECA 1972 would have removed that power from the executive.

(5) CONCLUSION

76. This Appeal is founded on an unsupportable assertion as to the scope and operation of the foreign relations prerogative power, and the supposed power of the executive to exercise that power so as to alter domestic law. On the basis of that erroneous assertion the Appellant submits that a government minister has untrammelled prerogative power to do away with the entire corpus of European law rights currently enjoyed under UK law, and render a whole suite of constitutional statutes meaningless, without any Parliamentary authority in the form of a statute. On the Appellant's case, the burden lies with the Respondents to establish that such a power has been expressly or impliedly abrogated by Parliament.

77. The Appellant's approach is wrong in principle. The Appellant has not established that the residual prerogative powers of the executive may be used to vary the law, as applied throughout the land, and remove existing rights enjoyed by individuals within the jurisdiction.

78. The Appellant's Written Case as to the asserted scope of the prerogative fails the *"historical inquiry"*[48] demanded by Lord Bingham in *Bancoult (No 2)* (**V6/54**) because it is unsupported by authority. There is no basis for the Court to find that the government retains any prerogative power to extinguish existing rights or dispense with existing statutory frameworks, in the field of foreign affairs or otherwise.

[48] See §8 above.

79. The constitutional ramifications of the Appellant's argument are significant and the potential practical consequences are far-reaching. It would involve a substantial redrawing of the boundaries between the executive and Parliament.

80. The sovereignty of Parliament in relation to the law, and its logical counterpart the constraint of the prerogative, have been recognised by the Courts as the foundation of the constitution since the Glorious Revolution. It was this recognition that led the Divisional Court correctly to hold that the Appellant had no power to decide to leave the EU. That decision is one for Parliament.

81. The Court is accordingly invited to dismiss the appeal.

HELEN MOUNTFIELD QC

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TIM JOHNSTON

DAVID GREGORY

JACK WILLIAMS

JOHN HALFORD, BINDMANS

29 November 2016

ANNEX TO THE PIGNEY RESPONDENTS' WRITTEN CASE:

FUNDAMENTAL AND NON-REPLICABLE EU CITIZENSHIP RIGHTS

INTRODUCTION

1. This annex:

   a. illustrates certain EU law rights properly characterised as fundamental rights;

   b. explains the non-replicability of EU rights in domestic law; and

   c. addresses the simplified taxonomy of EU rights identified by the Divisional Court at §§57-61 of its judgment.

FUNDAMENTAL EU LAW RIGHTS

2. Article 20 TFEU (**V13/137**) establishes citizenship for "[e]very person holding the nationality of a Member State". Article 20(2) TFEU states that "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties." The preambles to Directive 2004/38/EC ("**the Citizens' Directive**", **V14/150**) describe citizenship as the "fundamental status"[49] of nationals of member states. The following are examples of core rights of EU citizens enjoyed by virtue of that status:

   a. A wide range of human rights under the EU Charter of Fundamental Rights ("**the Charter**", **V14/149**), for example, the "right to be forgotten" and associated privacy rights under Articles 7 and 8, which have effect on the domestic plane. The Charter (which has the same status as the Treaties[50]) contains rights not enjoyed under ECHR law,[51] or not afforded, under the ECHR, the same remedial protection in domestic law as under the Charter;[52]

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[49] This is also reflected in the settled case law of the CJEU, e.g. *Grzelczyk*, C-184/99, EU:C:2001:458 **(V11/99)**, §31, and *Ruiz Zambrano*, C-34/09, EU:C:2011:124 (**V11/104**), §41 and the case-law cited.

[50] Article 6(1) TEU **(V14/151)**.

[51] In addition to specific data protection rights under Article 8, see: Article 1 (human dignity); Article 11(2) (the importance of media pluralism); Article 13 (freedom of the arts and sciences); Article 15 (freedom to choose an occupation and engage in work); Article 16 (freedom to conduct a business); Article 18; Article 21 (prohibition of discrimination which applies as a free-standing right compared to Article 14 ECHR (cf. Protocol 12 of the ECHR which the UK has not ratified); and Article 24 (rights of the child).

[52] For example: (1) domestic legislation which conflicts with a fundamental right can be disapplied by domestic courts (see: *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33); (2) claiming damages for a breach of EU rights can be easier than claiming compensation for a breach of the Human Rights Act; and (3) certain rights can be enforced against private individuals (even when not exercising state functions), including of fundamental rights (see C-144/04 *Mangold*, and C-555/07 *Kucukdeveci*)

b. Rights to move and reside freely, with family members, within the territory of the member states without a visa (Articles 20(1)(a), 21, and 45 TFEU (**V13/137**), Article 3(2) TEU (**V14/151**), Article 45(1) of the Charter (**V14/149)** and the Citizens' Directive (**V14/150**));[53]

c. The right to study,[54] seek employment, work, exercise the right of establishment or provide services in any Member State,[55] including the right not to be subject to discriminatory taxation;

d. The right to vote or stand as a candidate in local and European elections in the host state (Articles 20(1)(b) and 22 TFEU and Article 39(1) of the Charter);[56]

e. The right to diplomatic and consular protection from the authorities of any Member State in third countries (Articles 20(1)(c) and 23 TFEU (**V13/137**) and Article 46 of the Charter (**V14/149**));

f. Rights to non-discrimination (Articles 17, 18 and 45 TFEU (**V13/137**)) which apply horizontally;[57]

g. The right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language (Articles 20(1)(d) and 24 TFEU (**V13/137**));

h. The right to equal pay under Article 157 TFEU which applies horizontally: C-43/75 *Defrenne v Sabena* [1976] ECR 455 (**V32/444**); and

i. The right to receive non-discriminatory healthcare that is free at the point of use, paid for by the NHS, using the European Health Insurance Card (see, e.g., Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, and associated EU legislation).[58]

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[53] See Graham Pigney WS (Appx 21) § 5 and 7 and Robert Pigney WS (Appx 22); §s 4 and 6 Cartwright WS (Appx 24§ 4).
[54] See Chowdhury WS (Appx 25) § 4 McFerran WS (Appx 26) § 11.
[55] See Graham Pigney WS (Appx 21) § 6
[56] Robert Pigney WS (Appx 22), § 5
[57] See Graham Pigney WS(Appx 21) § 6
[58] See Formaggia WS (Appx 23), § 8; Chowdhury WS (Appx 22), § 6

NON-REPLICABILITY OF EU LAW RIGHTS

Overview

3. Even where the content of an EU right is in principle capable of being replicated on a 'look alike' basis in domestic law by Parliament, it would not be the same as a right protected by EU law, in particular because it would lack the same source, protections and enforceability that it possesses as an EU right.

4. Moreover, for a large number of rights Parliament could not (even if it so wished) replicate the content of the right. This includes:

    a. EU rights with geographical scope limited to the Member States;
    b. EU rights which cannot be provided without the co-operation of other Member States and EU institutions;[59] and
    c. EU rights enjoyed by UK citizens whilst in the UK, but which are provided by and enforceable against other Member States.

Diminished procedural protection for 'mirror' rights

Loss of right to a remedy in the Court of Justice

5. The Divisional Court in § 59 recognises that even where the UK re-enacted EU law rights there would be 'some differences', and refers to Article 267 TFEU (**V13/137**) - the right to seek and obtain a reference to the Court of Justice (CJEU). While in lower courts the court has a discretion whether to make a reference, in courts of final instance, unless the matter is *acte clair*, a reference is obligatory. The loss of this remedy is far from trivial.

6. For example, Article 102 TFEU (**V33/450**) prohibits abusive practices by dominant undertakings that may affect trade between member states. Section 18 of the Competition Act 1998 (**V32/434**) enacts mirror domestic competition law, prohibiting abuse of dominance "*if it may affect trade within the United Kingdom*." Section 60 of the Competition Act requires

[59] The Lord Advocate from § 44 – 49 of his Written Case provides examples of how withdrawal from the EU will '*cass, annul or disable*' the body of non-replicable legislation. He refers, in particular, to legislation which requires co-operation with other Member States; decision-making by EU institutions; funding from EU funds; and membership with other EU agencies. This Annex explores the impacts of these effects on certain EU rights.

that, so far as possible, questions arising in relation to competition within the UK are dealt with consistently with the treatment of corresponding questions arising in EU law in relation to competition in the EU. Where domestic law adopts, for purely internal situations, the same approach as EU law, an Article 267 **(V13/137)** reference can be made.[60] Accordingly, notwithstanding that section 18 does not implement EU law, a domestic court may currently make a reference to the CJEU to clarify the correct application of EU (and therefore domestic) competition law. On leaving the EU, the right to make such a reference will be lost and a litigant may be placed at a significant disadvantage: if a matter of competition law is unclear and there is no previous ruling on the issue from the Court of Justice, a litigant will no longer have the ability to have the matter clarified by a reference to the Court of Justice. This may include questions that have a decisive bearing on the outcome of litigation, in relation to liability (e.g. the scope of the concept of 'abuse'), or quantum.

7. The same applies to other EU law rights, e.g. the Working Time Directive, discussed by the Divisional Court at §58.[61] Recent clarifications provided by the CJEU in relation to that right include that a worker is entitled, on retirement, to an allowance in lieu of paid annual leave not taken because he was prevented from working by sickness[62] and that, where there is no fixed place of work, travel time should be included in the concept of working time.[63] Although Parliament could choose to maintain in force provisions transposing those rights into domestic law, again participants to litigation will be unable to have the scope of the rights clarified and would be dependent on the happenstance of whether the Court of Justice had previously ruled on the matter. To that extent, the EU right is not capable of domestic replication.

Loss of rights to challenge the legality of legislation

8. The different basis for legislation at EU and UK level creates different rights to challenge legislation. A domestic statute cannot be challenged on the basis of the procedure by which it was enacted.[64] By contrast, EU legislation can be annulled if it is *ultra vires* the Treaties or fails

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[60] Case C-542/14 *SIA 'VM Remonts'* EU:C:2016:578 §17

[61] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time

[62] Case C-341/15 *Hans Maschek v Magistratsdirektion der Stadt Wien* EU:C:2016:576

[63] Case C-266/14 *Federación de Servicios Privados del sindicato Comisiones obreras v Tyco Integrated Security* EU:C:2015:578

[64] *Edinburgh and Dalkeith Railway Co. v. Wauchope* (1842) 8 Cl. & F. 710 ; 1 Bell 252, 278-279 and *Pickin v British Railways Board* [1974] AC 765 (**V32/438**)

to adhere to the proper constitutional process.[65] EU legislation can be subject to judicial review before the EU courts and annulled if (for example) it infringes the principle of proportionality66 or equality;[67] reveals a manifest error of assessment;[68] or if the legislature fail to give reasons for the legislation.[69] Legal and natural persons who are directly or individually concerned can challenge legislation directly under Article 263 TEU (**V33/452**) based on a lack of vires, or on a reference under Article 267 (**V13/137**).[70] Success in such a challenge renders the law invalid for the entire European Union. The advantages of this for a claimant who, say, does business in multiple Member States is obvious. Many such legal challenges have been initiated in the UK courts.

9. Between them, Articles 263 and 267 provide a range of remedies that are currently open to UK citizens and companies, and which will be lost upon leaving the EU.

Loss of directly effective and enforceable rights

10. Rights contained in EU legal instruments, including the Treaties, the Charter of Fundamental Rights in the EU, Regulations and Directives[71] , which are sufficiently clear, precise and unconditional, have direct effect and may be directly enforced by individuals in national courts. Such rights can be enforced:

    a. as directly applicable rights where there is no requirement for such rights to be implemented domestically (such as certain rights set out in the treaties; Charter of Fundamental Rights; general principles of EU law and in EU Regulations);
    b. by requiring inconsistent national legislation to be read down or dis-applied to the extent of the incompatibility; or
    c. to give effect to complete EU rights where domestic implementation of an EU right has failed adequately to transpose it.

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[65] As happened in Case C-263/14 *Parliament v Council* EU:C:2016:435
[66] Article 5(1) Treaty on the European Union; Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* EU:C:2014:238 **(V32/448)** at §46 and Case C-310/04 Spain v Council EU:C:2006:521 at §97
[67] Case C-313/04 *Franz Egenberger* EU:C:2006:454; [2006] ECR I-6331, § 33
[68] Case C-427/12 *Commission v Council and Parliament,* EU:C:2014:170
[69] Case 24/62 *Germany v Commission* [1963] ECR 63
[70] Case C-376/98 Germany v Parliament and Council EU:C:2000:544 **(V32/446)**.
[71] In general Directive rights only have vertical direct effect (which can be relied on against only against the state or emanations of the state). There are exceptions.

11. Some directly effective rights can be enforced against state entities (vertical enforcement) and against private parties (horizontal enforcement). For example, the right to equal treatment on grounds of nationality (Article 45 TFEU, **V13/137**);[72] to recover damages for breaches of competition law (Article 101 and 102 TFEU, **V33/150**)[73] and the right to equal pay between men and women (Article 157 TFEU, **V13/137**)[74] are all capable of horizontal enforcement.

12. The ability of direct effect (in combination with the principle of supremacy) to compensate for legislative failure (either where the UK legislature has legislated contrary to EU rights or general principles or has failed to implement EU rights) is incapable of being replicated by the UK legislature alone upon leaving the EU. There can be no entrenchment of 'supreme' directly effective rights in UK law, so it will be impossible for Parliament to reproduce the same level of protection for EU rights in a purely domestic situation upon leaving the EU.

Loss of protection of three-tiered rights

13. Certain domestic implementing legislation implements EU legislation which is itself implementing other measures. Examples include:

    a. Domestic implementation of an EU Regulation imposing sanctions, where those sanctions are in turn the implementation by the EU of a UN Security Council Resolution; and

    b. The UK's Environmental Information Regulations 2004/3391, which implement Directive 2003/4/EC on public access to environmental information, which in turn implements the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

14. As to sanctions, in joined cases C-402/05 P and C-415/05 P *Kadi* EU:C:2008:461 the subject of an EU sanction who at the relevant time had no ability to challenge his listing at the UN[75] had the option to challenge his listing before the General Court of the EU by bringing an action to annul the EU Regulation under Article 263 TFEU, as well as by challenging domestic legislation

[72] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* EU:C:2000:296.
[73] Joined Cases C-295/04 to C-298/04 *Manfredi* EU:C:2006:461 [60]-[61].
[74] C-43/75 – *Defrenne v SABENA* EU:C:1976:56 (**V32/444**).
[75] Though one has now been introduced through the UN Ombudsperson.

imposing penalties.[76] The constitutional protections of the challenge at EU level will be lost and cannot be replicated on leaving the EU.

15. As to environmental protection, under the Aarhus Convention, at the international level, there is a compliance committee which can examine compliance issues, reach findings and make recommendations. Members of the public may make communications to the compliance committee concerning a signatory's compliance with the Convention, but (unlike judgments of the CJEU), the Committee's decisions are not binding in national law. At the EU level, the Directive contains provisions, in particular, protecting access to environmental information and environmental justice, which Member States are required to implement. Again, that binding protection for Aarhus Convention rights will be lost on leaving the EU.

EU rights limited in scope to the single market will be lost

16. The scope of EU rights is in many cases limited in scope to the EU internal market (i.e. Member States). Upon leaving the EU, the applicability of those rights is lost. It becomes impossible to replicate, outside the EU, the right as it existed prior to withdrawal in subsequent legislation.

17. For example, as set out above Article 102 TFEU (**V33/450**) prohibits abuse of a dominant position within the internal market (or in a substantial part of it) in so far as it may affect trade between Member States. One category of such an abuse is set out at Article 102(c): applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage:

18. Currently, a German undertaking dominant in the supply of widgets would *prima facie* be abusing its dominant position in a manner affecting trade between Member States if it were to wholesale its product to Belgian customers at price X, and to UK customers at price X+10%, without any objective justification for the discrepancy. The UK customer currently may protect itself from that behaviour by enforcing Article 102 TFEU in the UK courts, seeking damages. Upon the UK leaving the EU the same conduct by the dominant German supplier will no longer be unlawful because the discriminatory conduct would not *affect trade between Member*

[76] An example of this last approach is *R. (on the application of OJSC Rosneft Oil Co) v HM Treasury* [2014] EWHC 4002 (Admin) (refusal of interim relief) and [2015] EWHC 248 (Admin) (referral of challenge to Court of Justice).

States. Article 102 does not preclude dominant EU companies from selling their products at inflated prices to customers in non-EU states. The dominant German company could sell its widgets to UK customers at any price, and the UK customer would no longer have any right to object to such discriminatory pricing either in a UK court, or a German Court, since the UK would no longer be a Member State and there would be no *prima facie* breach of Article 102 TFEU. An important protection against abusive conduct, which is currently directly enforceable by UK companies in UK courts, would be lost.

Rights provided in combination with EU institutions and Member States will be lost

19. The Divisional Court's discussion in relation to category (iii) (non-replicable rights) focused to rights flowing from membership of the 'EU Club', such as the right to stand and to vote for membership of the EU Parliament. However, the category of rights currently enjoyed under EU law, and which cannot be replicated by Parliament upon withdrawal from the EU, even on a 'look-alike' basis, goes beyond mere 'rules of the club'. This category includes, in particular, EU law rights that depend on actions by the EU Institutions or other Member States.

20. Supervision by the Commission to ensure that Member States are implementing EU rights is an integral aspect of many areas of EU law. It is not confined to the general duty to oversee the application of Union law set out in Article 17(1) TEU (**V13/137**), nor to the right of seeking to persuade the Commission to take regulatory action (Divisional Court judgment at §61). The supervisory role of the Commission is enmeshed into many areas of regulatory law. Examples of this include:

    a. Article 108(3) TFEU (**V33/451**) which requires the Commission to be notified in advance of any Member State granting State Aid in order that the Commission can ensure that the aid is compatible with the internal market. These provisions protect businesses from the anti-competitive advantage recipients of State Aid receive;

    b. The requirement under the Technical Standards Directive (**V33/455**) to notify the Commission of technical regulations so as to ensure that they do not go beyond the fair requirements of EU law;

c. Articles 7 and 16 of the Telecoms Framework Directive,[77] which preclude a national telecoms regulator from imposing regulatory obligations on communication service providers with significant market power before notifying the draft measure to the Commission and other national regulation authorities, and complying with a one-month standstill period to enable the Commission to ensure the measure is compatible with EU law (Article 7(3)). This ensures that providers are not subject to disproportionate regulatory burdens; and

d. Derogation from the E-Commerce Directive[78] which prevents Member States from restricting the freedom of providers of information society services (like websites) established in one Member State to provide their services via the internet to customers in other Member States. Member States may derogate from these provisions but only after having notified the Commission, which can take steps if the derogation is incompatible with EU law.

21. Each of these measures creates procedural constraints on the authorities of Member States to restrict the exercise of fundamental freedoms of providers of goods or services, or otherwise interfere with the functioning of the internal market. They provide enforceable rights to service providers, which can be relied on in national courts. None of these measures can be replicated by Parliament following withdrawal from the EU.

22. Moreover, there is a wide range of substantive rights which depend on the co-operation of more than one Member State and are so are not replicable by Parliament acting unilaterally when the UK has left the EU, but which are very different in nature from rights flowing from membership of the EU club (such as the right to stand for Parliament).

23. For example, Regulation (EC) No 883/2004 on the coordination of social security systems aims to ensure that people who exercise their freedom of movement rights have their social security rights protected, including sickness benefits, unemployment benefits and old-age benefits.[79] Among its basic principles are (i) that individuals pay premiums in one country, (ii)

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[77] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)

[78] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("**Directive on electronic commerce**")

[79] See Robert Pigney WS (Appx 22),§7

that previous periods of insurance, work or residence in other countries will be taken into account in the calculation of their benefits in another country in respect of certain state benefits, and (iii) that if they are entitled to a cash benefit in a country, they can collect this benefit even if they do not live in that country. These arrangements only work on the basis that one Member State's institution will reimburse that of another which has paid benefits on its behalf (Articles 35, 41, 65(8))[80], and that the institutions will co-operate under Article 76.

24. Another example is the Dublin III Regulation (**V33/454**)[81] determining which state is responsible for the processing of applications for asylum seekers. This too requires co-operation and co-ordination between Member States in order to fulfil the aims of the regulation: see for example the co-operation requirements in relation to ensuring family re-unification and the best interests of children in Article 6 (Guarantees for Minors).

25. The Mutual Recognition of Qualifications Directive[82] sets out rules for mobility of professionals between member states. There is a system of general and, where training systems are harmonized, automatic recognition of qualifications granted by other Member States. Again co-operation is a necessary component of securing these right and collaboration and mutual assistance are provided for in Article 56.

26. Under the Medicinal Products Regulation,[83] the European Medicines Agency can grant marketing authorisation to certain products valid across the Union. The UK cannot reproduce such authorisation alone.[84] The regime requires co-operation between the Agency and Member States in developing pharmacovigilance systems to achieve high standards of public health protection (Article 28).

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[80] Reimbursement arrangements are set out in detail by Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems

[81] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

[82] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications

[83] Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency

[84] See other examples of EU agencies in § 47 of the Lord Advocate's Written Case

27. The co-operation required in order to secure rights is also not limited to co-operation between the public authorities of Member States. The Roaming Regulation[85] secures lower charges for mobile phone customers in one Member State when they use their mobile phones in another Member State. It does so by placing obligations on wholesale and retail service providers, thereby restricting their freedom to contract. Pursuant to Article 3, wholesalers are required to meet requests for access and are restricted as to the charges they can levy. The regulation cannot limit the wholesale prices that providers outside the Union can charge. The benefit of this regulation is enjoyed by any UK resident taking their phone to another Member State (or by any EU resident visiting the UK), and is one which cannot be reproduced by the UK Parliament acting unilaterally.

Category ii 'Free movement' rights which benefit UK nationals even when they remain in the UK

28. Category (ii) of the Divisional Court's taxonomy refers to rights enjoyed by British citizens and companies in relation to their activities in other Member States. The discussion recognises that it is generally[86] unlawful for the UK to place impediments in the exercise of those rights.[87] However it goes further than that: many such free movement rights enforceable against other Member States are enjoyed by UK resident persons and companies whilst in the UK, and indeed are enforceable against the UK. For example:

    a. The Brussels Regulation *aka* the Judgments Regulation **(V33/453)**[88] – the general rule for jurisdiction under the Regulation is that people domiciled in a Member State may only be sued there. This is an important protection against suit in a foreign country. Leaving the EU would have the knock-on consequence of withdrawing the UK from the Lugano Convention 2007 to which the EU is the signatory, meaning that UK citizens would no longer have this protection and could be sued in another EU Member State if its internal jurisdictional rules permitted that.

[85] Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (recast).
[86] Subject to permitted derogations.
[87] The UK Parliament cannot, for example, legislate, and the Government cannot act, to frustrate the exercise of these rights by stopping UK citizens either enjoying or accessing their rights across the EU by, say, stopping UK citizens leaving the country, or criminalising the exercise of certain EU rights/benefits (as such the distinction the DC Decision made between "category (ii)" and "category (iii)" rights falls away).
[88] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

b. Quantitative restrictions on trade – a Member State, pursuant to Articles 34-36 TFEU **(V33/449),** cannot impose quantitative restrictions (or measures of equivalent effect) on the free movement of goods. This means that France cannot impose a quota on how many widgets may be exported from France to the UK. If it were to do so, and in the process cause loss to a UK company, the company would have a right to claim damages against the French authorities. Moreover, if a public authority in the UK were to impose controls on the use of a product having the effect of limiting the importation of products from another EU member state, that may also be challenged under Article 34 TFEU. Upon leaving the EU, the same British company would have no such right or remedy.

c. '*Surinder Singh*' rights – these provide rights to workers who have married or formed a civil partnership with a non-EU citizen whilst working in another Member State and then return to the UK. It is an aspect of free movement law which was originally enjoyed in the other Member State – it was the Citizens' Directive **(V14/150)** which gave the UK national the right to live with their spouse/partner whilst living overseas. However that right continues to be enjoyed domestically on return to the UK.

29. It follows from this that UK citizens and residents benefit from EU rights whilst in the UK, which are enforceable both against other Member States and UK authorities, just as other EU nationals can enforce free movement rights against the UK or against their own member states.[89]

CONCLUSION

30. There is an array of EU rights which not only would not be preserved following withdrawal from the EU, but which could not be unilaterally replicated in UK law, even if Parliament wished to do so.

[89] C-397/98 *Metallgesellschaft Ltd v Inland Revenue Commissioners* EU:C:2001:134; *R. (on the application of Ordanduu GmbH) v Phonepayplus Ltd* [2015] EWHC 50 (Admin)