CO/3809/2016; CO/3281/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

BETWEEN:

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

Claimants

-and-

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Defendant

-and-

(1) GRAHAME PIGNEY AND OTHERS
(2) AB, KK, PR AND CHILDREN

Interested Parties

-and-

GEORGE BIRNIE AND OTHERS

Intervener

DETAILED GROUNDS OF RESISTANCE
ON BEHALF OF THE SECRETARY OF STATE

Introduction

1. On 23 June 2016, in the European Union ("**EU**") Referendum ("**the referendum**"), the electorate of the United Kingdom voted by a clear majority to leave the EU. Prior to the referendum, the Government's policy was unequivocal that the outcome of the referendum would be respected. Parliament passed the EU Referendum Act 2015 ("**the 2015 Act**") on this clear understanding. The current Prime Minister has confirmed that the Government intends to give effect to the outcome of the referendum by bringing about the exit of the UK from the EU. That is a proper, constitutional and lawful step to take in the light of the referendum result.

2. Article 50 of the Treaty on European Union ("**TEU**") sets out the procedure by which a Member State which has decided to withdraw from the EU may achieve that result. That decision having

been taken (Article 50(1)), the next stage in the process is for the state to notify the European Council of its intention to withdraw. The Government has stated that it does not intend to notify the European Council pursuant to Article 50(2) before the end of 2016. It is open to the Government to give notification, and to conduct the subsequent negotiations, in exercise of prerogative powers to conclude and withdraw from international treaties, against the backdrop of the referendum.

3. The Defendant ("**the Secretary of State**") therefore resists the central contention of the Claimants, Interested Parties, and Interveners that it would be unlawful for the Government to give notification under Article 50(2) without an Act of Parliament specifically authorising such notification (Grounds of Claim of Ms Miller ("**the Lead Claimant**"), §1).

4. The principal argument relied upon by the Lead Claimant is that a notification given without prior authorisation of an Act of Parliament would not be in accordance with the constitutional requirements of the UK, under Article 50(1), because it "*would frustrate .. the rights and duties enacted by Parliament in the European Communities Act 1972*" ("**ECA**") and "*would be inconsistent with the object and purpose of that Act, namely to give effect to the rights and duties consequent on membership of the [EU]*". In those circumstances, it is said, "*an Article 50 notification could only lawfully be given if expressly authorised by an Act of Parliament*" (Grounds, §2).

5. The Secretary of State submits that that argument is wrong for the following reasons. In summary:

   (1) So far as it is claimed that a notification under Article 50(2) pursuant to the prerogative would contravene Article 50 itself, contrary to EU law, that is unfounded. Such a notification would be an administrative act on the international law plane about which complaint cannot be made by any individual claimant in the domestic courts.

   (2) The claim conflates the process of notification (Article 50(2)) with the decision to be notified (Article 50(1)), namely the UK's decision to leave the EU, as articulated in the referendum result. In the circumstances of the present case, it would be constitutionally proper to give effect to the referendum result by the use of prerogative powers. It was clearly understood that the Government would give effect to the result of the referendum for which the 2015 Act provided, and that was the basis on which the electorate voted in the referendum.

(3) The decision to withdraw from the EU is not justiciable. Like the decision to join the EEC (as it then was), it is a matter of the highest policy reserved to the Crown. Equally, the appropriate point at which the UK should begin the procedure required by Article 50(2) to give effect to that decision (that is, the notification) is a matter of high, if not the highest, policy; a polycentric decision based upon a multitude of domestic and foreign policy and political concerns for which the expertise of Ministers and their officials are particularly well suited and the Courts ill-suited.

(4) The relief sought in the claim - the effect of which would be to compel the Secretary of State to introduce legislation into Parliament to give effect to the outcome of the referendum - is constitutionally impermissible. The Court would be trespassing on proceedings in Parliament.

(5) To the extent that the claim is justiciable and within the proper bounds of the Court's role, the exercise by the Crown of its prerogative power in the circumstances of the present case is consistent with domestic constitutional law. It is not precluded by or inconsistent with the ECA or any other statute. Nor would the commencement of the process of withdrawal from the EU itself change any common law or statute or any customs of the realm. Any such changes are a matter for future negotiations, Parliamentary scrutiny, and implementation by legislation.

(6) The lawfulness of the use of the prerogative is not impacted by the devolution legislation. The conduct of foreign affairs is a reserved matter such that the devolved legislatures do not have competence over it. Whilst there are provisions in the devolution legislation which envisage the application of EU law, they add nothing to the Lead Claimant's case.

I. The relevance of Article 50

6. Article 50 TEU provides, materially:

"1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

7. The Lead Claimant's Grounds are ambiguous as to whether it is maintained that a notification given pursuant to Article 50(2) in exercise of the royal prerogative, rather than pursuant to Parliamentary authorisation, would be contrary to Article 50 itself. It is stated in the summary of the Lead Claimant's position (Grounds, §2(2)-(3)) that "*[a] notification is valid under Article 50(1) only if it is "in accordance with the Member State's "own constitutional requirements""*" and "*[a]n Article 50(2) notification would not be in accordance with the constitutional requirements of the United Kingdom if given under royal prerogative powers*". But it is nowhere repeated in the detailed arguments which follow that notification pursuant to the prerogative would not be in accordance with the UK's constitutional requirements and would therefore not conform to Article 50. The remainder of the Grounds relies only upon a purely common law argument that the prerogative cannot be exercised in this way as a result of material inconsistency with statute, an argument which is not dependent upon the terms (or even the existence) of Article 50. By contrast, AB, KK and PR (**"the AB Parties"**) do assert that EU law requires Parliamentary approval, albeit without providing any authority for that proposition.

8. Any contention that an Article 50(2) notification pursuant to the prerogative would contravene Article 50 itself would be unfounded. It is submitted that the correct position under Article 50 is as follows:

   (1) The stipulation as to a Member State's "*own constitutional requirements*" applies to the state's decision to withdraw from the EU: see Article 50(1). The giving of notification under Article 50(2) is the procedural means which is stipulated by the TEU for commencing the process of withdrawal upon which the Member State has decided. A Member State which has

decided to withdraw notifies the European Council of its intention under Article 50(2) (the timing of that notification being a matter for the state concerned).

(2) The giving of notification is an administrative step on the international law plane which, in accordance with the usual principles of international law, will be valid so far as other states are concerned notwithstanding any argument about compliance with requirements of the UK's internal legal order.

(3) Article 50(1) does not provide a basis for challenge under EU law of the process by which a Member State has arrived at a decision to withdraw from the EU. Rather, Article 50(1) – reflecting the pre-existing position under international law – recognises that this is an area in which a Member State may determine its own requirements, free from interference by EU law. That was the conclusion of the Court of Appeal in *R (Shindler) v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469, §§7-14, which is fatal to the reliance on EU law by the AB Parties.

(4) In any event, Article 50 regulates relations between states on the international plane and plainly does not confer directly effective rights upon individuals which could be relied upon in the domestic courts. Absent such rights, it would not be open to any individual claimant to complain of a failure by the UK to comply with the requirements of Article 50.

9. The point that notification under Article 50(2) is the procedural implementation of the decision to withdraw from the EU which is referred to in Article 50(1) serves to highlight the conflation in the Claim of the proposed notification process with the decision which is to be notified. The key decision is not the procedural step of notification under Article 50(2) but the decision contemplated by Article 50(1) that the UK should withdraw from the EU, as articulated in the outcome of the referendum.

10. It is open to the Lead Claimant to contend (subject to the arguments below) that the Government cannot validly decide that the UK should leave the EU, and thereby withdraw from the EU Treaties, without the processes of an Act of Parliament. That is in substance what is argued in the Grounds (albeit couched in terms of the Article 50(2) notification). However, the Government has made it clear that it respects the outcome of the statutory referendum and sees no legal basis to prevent it from giving effect to this by taking the procedural step under Article 50(2) to start the process of withdrawal.

II. It is not constitutionally improper or objectionable to rely upon prerogative powers to give effect to the outcome of the referendum

11. The key question raised by the Claim can be summarised as whether, in the very particular and unprecedented circumstances of the present case, it would be constitutionally improper for the Government to implement the outcome of the referendum by giving notification to the European Council under Article 50(2) without first being authorised to do so by Parliament in primary legislation.

12. The Secretary of State submits that it is clear that the UK's constitutional settlement does permit notification under Article 50(2) by the Government, without the need for Parliamentary authorisation. In summary:

    (1) The referendum was set up and provided for by Parliament in the 2015 Act. There is nothing in the 2015 Act to suggest that Parliament intended that the Government should only take the step of giving notification under Article 50, in faithful implementation of the result of the referendum, if given further primary legislative authority to do so. On the contrary, the clear understanding was that the Government would give effect to its outcome.[1] That was also the basis on which the electorate voted. The Lead Claimant's case involves the proposition that it would be constitutionally appropriate for the British people to vote to leave, and for the Government and/or Parliament then to decline to give effect to that vote.

    (2) The 2015 Act did not prescribe steps which the Government was required to take in the event of a leave vote (cf Grounds, §9). That was not because Parliament or the electorate believed that the outcome of the referendum would not be given effect to: the Government had been very clear in this respect. The characterisation of the referendum as merely "*advisory*" is incomplete and inappropriate when using that term (as the Claimant does) to imply lack of Parliamentary permission to give effect to the result or some Parliamentary requirement to return by primary legislation before beginning that process in the event of a vote to leave.

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[1] That was the obvious premise on which the referendum was undertaken. And, if there was any doubt about that, it was expressly and plainly stated - for example: "*As the Prime Minister has made very clear, if the British people vote to leave, then we will leave. Should that happen, the Government would need to enter into the processes provided for under our international obligations, including those under Article 50 of the Treaty on European Union.*" (HL Hansard, 23 November 2015, Minister of State, Foreign and Commonwealth Office, Baroness Anelay of St Johns).

(3) In those circumstances, the Government is at least entitled to decide that the UK should withdraw from the EU, in accordance with the outcome of the referendum, and to give effect to that decision in the manner prescribed by Article 50 itself, by giving notification under Article 50(2). Having validly decided that the UK should withdraw from the EU, the Government will give effect to that decision by giving notification to the European Council pursuant to Article 50(2). It cannot be prevented from doing so by the absence of primary legislation authorising that step.

(4) That analysis does not prejudice Parliament's central role in the process of the UK withdrawing from the EU. Parliament will have a role in ensuring that the Government achieves the best outcome for the UK through negotiations pursuant to Article 50(2). Parliament will implement the terms of any withdrawal agreement in domestic law through primary legislation as necessary.

(5) That analysis is entirely consistent with standard constitutional practice when it comes to entering into, and withdrawing from, Treaties. This is a matter for the Government, rather than for Parliament, and is not justiciable in the courts.

(6) That standard constitutional practice plainly holds good for the EU Treaties. The ECA itself did not restrict the executive's power to withdraw from what was then the EEC. Parliament made no provision to control the use of Article 50 when giving effect to the Treaty of Lisbon, which introduced Article 50, in the European Union (Amendment) Act 2008 ("**the 2008 Act**"). That Act, and the European Union Act 2011 (**"the EUA 2011"**), have constrained various aspects of the executive's prerogative powers to act under the EU Treaties but have not constrained the executive's power to decide to withdraw from the EU Treaties altogether or to give effect to such a decision by giving notification under Article 50.

III. *In limine* obstacles to the claim and the relief sought

a. The decision to withdraw from the EU is not justiciable

13. The making of and withdrawal from treaties are matters exclusively for the Crown in the exercise of its prerogative powers, and are not justiciable in the Courts: *Rustomjee v R* (1876) 2 QBD 69, 74 *per* Lord Coleridge CJ; *CCSU v Minister for the Civil Service* [1985] AC 374, 398 and 418 *per*

Lord Roskill; also *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, 553D *per* Lord Browne-Wilkinson. These are areas in which there are no judicial or manageable standards against which to judge the Crown: *Buttes Gas and Oil Co v Hammer* [1982] AC 888, 938 *per* Lord Wilberforce.

14. The decision to join the EEC (as it then was) was a non-justiciable act of the prerogative. Hence, in *Blackburn v Attorney General* [1971] 1 WLR 1037, Lord Denning MR stated (at 1040):

> *"The treaty-making power of this country rests not in the courts, but in the Crown; that is, Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treaty, even a treaty of such paramount importance as this proposed one, they act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts."*

See also *McWhirter v Attorney General* [1972] CMLR 882. The decision to withdraw from the EU Treaties can be no different: it is a matter of high policy reserved to the Crown.

15. Equally, the giving of notification under Article 50(2) of the UK's decision to withdraw from the EU is an act within the treaty prerogative of the Crown which takes place and has effect only on the international law plane. The appropriate point at which to issue the notification under Article 50 is a matter of high, if not the highest, policy; a polycentric decision based upon a multitude of domestic and foreign policy and political concerns for which the expertise of Ministers and their officials are particularly well suited and the Courts ill-suited.

16. There are cases in which a specific impact upon a specific individual may require the Court to examine more closely an area which would ordinarily be non-justiciable, but those situations cannot be "*abstract*": *Shergill v Khaira* [2014] UKSC 33; [2015] AC 359 at §43. Yet this challenge could hardly be more abstract. It is asserted that individual rights will be infringed or undermined by notification under Article 50 but no particular rights are relied upon by the Lead Claimant and there is presently no way of knowing precisely which, if any, rights or obligations will be removed, varied or added to by the process of withdrawing from the EU. The notification has not been issued; the eventual outcome will be dependent upon the effect of the negotiations in which the Government will engage. As a result, this case is one which falls squarely within the "*forbidden area*" explained in *Shergill* at §42 and exemplified by *CCSU*.

17. Contrary to §13(2) of the Grounds, *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* [1994] QB 552 does not establish that the issues raised in the present case are justiciable. The principal argument in *Rees-Mogg* was that the ratification of a Protocol to the Maastricht Treaty would contravene statutory restrictions which Parliament had expressly imposed upon the power of ratification of EEC treaties which enhanced the powers of the European Parliament (see the Court's conclusions on p. 565). The interpretation of the relevant statute was plainly a matter for the courts. No such statutory constraints are relied upon by the Lead Claimant in the present case (and indeed all relevant statutory provisions point in the other direction: see below). When considering a further submission, to the effect that ratification of the Maastricht Treaty would impermissibly alienate prerogative powers, the Court acknowledged that it was open to it to reject that submission on grounds of non-justiciability but it proceeded in the event to assume justiciability and reject the submission on its merits (570D-571A).

18. Nor does *Shindler* assist the Lead Claimant in this context (cf Grounds, §13(2)). The issue in that case was whether the franchise for the referendum, as laid down in the 2015 Act, contravened EU law. No issue of justiciability arose and no submission to that effect was made by the Defendant.

b. The relief sought is constitutionally impermissible

19. As set out in the Claim Form, the Lead Claimant seeks a "*declaration that it would be unlawful for the Defendant or the Prime Minister on behalf of Her Majesty's Government to issue a notification under Article 50 [TEU] to withdraw the United Kingdom from the European Union without an Act of Parliament authorising such notification.*" Mr Pigney seeks the same relief and Mr Dos Santos claims relief in materially the same terms.

20. Focus on the relief sought serves to highlight the territory into which these abstract claims have strayed. If relief were granted it would impermissibly impinge upon the territory of Parliament by compelling the Secretary of State to introduce legislation into Parliament, failing which he would be prevented from giving effect to the outcome of the statutory referendum.

21. It is well-established that the Court may not grant relief which trespasses on proceedings in Parliament. In litigation not dissimilar to the present claims, it was asserted in *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin) that the Government was obliged, because of a failure to comply with a legitimate expectation, to legislate to provide for a

referendum on the Lisbon Treaty. The Divisional Court held, at §49, that no such relief could be sought, in terms which squarely apply to these proceedings:

"In our judgment, it is clear that the introduction of a Bill into Parliament forms part of the proceedings within Parliament. It is governed by the Standing Orders of the House of Commons (see, in particular, standing order 57(1)). It is done by a Member of Parliament in his capacity as such, not in any capacity he may have as a Secretary of State or other member of the government. Prebble (cited above) supports the view that the introduction of legislation into Parliament forms part of the legislative process protected by Parliamentary privilege. To order the defendants to introduce a Bill into Parliament would therefore be to order them to do an act within Parliament in their capacity as Members of Parliament and would plainly be to trespass impermissibly on the province of Parliament. Nor can the point be met by the grant of a declaration, as sought by the claimant, instead of a mandatory order. A declaration tailored to give effect to the claimant's case would necessarily involve some indication by the court that the defendants were under a public law duty to introduce a Bill into Parliament to provide for a referendum. The practical effect of a declaration would be the same as a mandatory order even if, in accordance with long-standing convention, it relied on the executive to respect and give effect to the decision of the court without the need for compulsion."

22. The same conclusion was reached in *R (UNISON) v Secretary of State for Health* [2010] EWHC 2655 (Admin) at §§8-11 *per* Mitting J. In *R (Wheeler) v Office of the Prime Minister* [2014] EWHC 3815 (Admin); [2015] 1 CMLR 46, the claimant argued that the Government was compelled by primary legislation and by legitimate expectation to hold a vote in the House of Commons before notifying the European Council of its intention to opt in to the European Arrest Warrant Framework Decision. The Divisional Court again held, at §46, that such relief was impermissible:

"It is said that to provide relief on this basis is not an interference with the work of Parliament; it merely proscribes executive action in the absence of Parliamentary approval. In substance, however, the claim is that, unless the House of Commons organises its business in a particular way, and arranges for a vote in a particular form, the courts must intervene and either grant a declaration or issue an order prohibiting the government from taking certain steps unless and until there is such a vote. In my judgment, that would involve the courts impermissibly straying from the legal into the political realm."

23. It is submitted that the Court must also be mindful of avoiding any outcome which would prevent the Government from implementing the result of the referendum, which was provided for by an Act of Parliament.

IV. Use of the prerogative power is not precluded by, or inconsistent with the purposes of, statute

24. To the extent that the claim is justiciable and within the proper bounds of the Court's role, the Secretary of State submits that the exercise by the Crown of its prerogative power in the circumstances of the present case is consistent with domestic constitutional law.

a. No express restriction on use of prerogative powers

25. This is not a situation where Parliament has "occupied the field" such that the prerogative power to decide to withdraw from the EU Treaties, or to give notification pursuant to Article 50(2), has been abrogated or placed in abeyance. The Lead Claimant rightly does not suggest otherwise, although Mr Pigney appears to do so (without citing any provision of any Act of Parliament which is said to achieve that result).

26. It is, in fact, crystal clear that Parliament has not legislated so as to constrain the exercise of the prerogative in the current circumstances (and it has long been established that an express restriction would be required to remove the possibility of exercise of prerogative powers: *The Master and Fellows of Magdalen College* (1615) 11 Co Rep 66). The Secretary of State relies in particular upon the following:

(1) The absence of any express provision in the ECA itself to regulate any future decision to withdraw from the EEC Treaties.

(2) Section 12 of the European Parliamentary Elections Act 2002 required primary legislation to be passed before any treaty increasing the powers of the European Parliament could be ratified. (The same provision was made in section 6 of the European Parliamentary Elections Act 1978).

(3) The 2008 Act, which paved the way for UK ratification of the Lisbon Treaty, which introduced Article 50, imposed a number of Parliamentary controls over certain decisions made under the Treaties (see s. 6) but no Parliamentary control was imposed in relation to Article 50.

(4) The EUA 2011 contains a number of procedural requirements which apply in particular circumstances where prerogative powers might otherwise have been exercised to ratify amendments of the EU Treaties or to take steps under them. These requirements, *inter alia*, replaced s. 6 of the 2008 Act. For example, under s. 2, a treaty which amends the TEU or TFEU to confer a new competence on the EU may not be ratified unless the treaty is approved by an Act of Parliament and a referendum. Under s. 8, a Minister of the Crown may not vote in favour of or otherwise support a decision under Article 352 TFEU unless one of subsections (3) to (5) is complied with in relation to the draft decision. Under s. 9, certain notifications – under Article 3 of Protocol No. 21 to the TFEU and TEU on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice – cannot be given without Parliamentary approval. The EUA 2011 does not seek to regulate a decision to withdraw from the EU Treaties or to give notification under Article 50(2).

(5) In Part II of Constitutional Reform and Governance Act 2010, Parliament made provision for it to exercise influence over ratification of a treaty by the Crown (subject to certain exceptions). It did not seek to take over any prerogative power to withdraw from a treaty, still less to start a process of withdrawal.

(6) The 2015 Act, in which Parliament fully anticipated (and the electorate expected) that the Government would proceed to implement the outcome of the referendum, whatever that was.

27. In the absence of an express restriction on the Crown's powers to take action under the EU Treaties, the Courts will not imply any such restriction. That was the decision of the Divisional Court in the *Rees-Mogg* case. In an argument which is closely analogous to that pursued in the present case, the claimant in *Rees-Mogg* submitted that the Government was not entitled to ratify the Protocol on Social Policy annexed to the Maastricht Treaty using prerogative powers because s. 2(1) ECA would give the Protocol effect in domestic law, and only Parliament had the power to change domestic law.

28. The argument was rejected for a number of reasons, the first of which was that neither the ECA nor any other statute was capable of imposing an implied restriction upon the Crown's treaty-making power in relation to Community law. Lloyd LJ, giving the judgment of the Court, stated:

"We find ourselves unable to accept this far-reaching argument. When Parliament wishes to fetter the Crown's treaty-making power in relation to Community law, it does so in express terms, such as one finds in section 6 of the Act of 1978. Indeed, as was pointed out, if the Crown's treaty-making power were impliedly excluded by section 2(1) of the Act of 1972, section 6 of the Act of 1978 would not have been necessary. There is in any event insufficient ground to hold that Parliament has by implication curtailed or fettered the Crown's prerogative to alter or add to the E.E.C. Treaty."

b. *Shindler*

29. Contrary to §§50-54 of the Grounds, the Court of Appeal in *Shindler* did not decide that a decision to withdraw from the EU must be taken by Parliament, nor even anticipate that such a decision would be taken by Parliament. The passage relied upon by the Lead Claimant in §51 of the Grounds (in §19 of the judgment of Lord Dyson MR), which refers to a decision by Parliament to withdraw from the EU, was in response to a submission of the claimant in that case, recorded in §18, which included the proposition that "*Parliament does not need the mandate of a specific referendum to give it the power to pass legislation mandating the withdrawal of the UK from the EU*". There is no dispute that Parliament could pass legislation mandating, or simply authorising, the withdrawal of the UK from the EU. The issue in the present case is whether Parliament must do so in order for the outcome of the referendum to be given effect, or whether it is open to the executive to decide to do so. That issue did not arise and was not debated in *Shindler*.

c. No inconsistency with the ECA

30. Nor is it correct that a decision to withdraw from the EU, or implementing such a decision by commencing the process of withdrawal from the EU under Article 50 TEU, would be inconsistent with the terms or the object and purpose of the 1972 Act.

31. The purpose of the 1972 Act was to give effect to the accession of the UK to the European Communities, and to implement the UK's obligations under the Treaties as they have arisen from time to time. This was a standard incident of the UK's dualist system, which requires steps to be taken in domestic law in order to give domestic legal effect to international treaties. Accession was agreed by the then Government, exercising prerogative powers to conduct foreign relations. But the UK's obligations under the EEC Treaties, which included, critically, the application of EEC law in its domestic legal system, could only be achieved by the passage of domestic

legislation. Similarly, when new treaties have been adopted over the years (Single European Act, Maastricht, Nice, Lisbon etc.), the Government has agreed to the new treaties using prerogative powers and the ECA has subsequently been amended so as to the include the new treaties.[2]

32. But whilst that legislation, the ECA, might be said to assume that the UK remains a member of what is now the EU, there is no provision of the ECA which requires the UK to remain a member of the EU or indeed which purports to regulate in any way the exercise of the prerogative to agree to, or withdraw from, EU-related treaties. Restrictions on the prerogative were only enacted in later, separate legislation, and to limited effect (see above). As Elias LJ put it, in the rather different context of *Shindler*: "*The effect of section 2(1) [ECA] is to bind the UK to the rules of the club whilst it remains a member*" (§58).

33. A decision to withdraw from the EU or to commence the process of withdrawal does not conflict with s. 2(1) ECA, which gives effect to the UK's obligations under EU law, whatever they may happen to be at any particular point in time:

> *"2. General implementation of Treaties.*
>
> *(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies."*

34. The Lead Claimant submits that s. 2(1) ECA does not contemplate a situation in which there are no continuing EU rights at all because the UK has withdrawn from the EU (Grounds, §47). That situation would not conflict with the terms of s. 2(1); there would simply be no rights etc. on which s. 2(1) would bite. But in any event, a decision to withdraw from the EU or to commence the process of withdrawal does not bring about a situation in which the UK has no obligation to comply with EU law: only the actual withdrawal does so. It remains a matter for negotiation with the EU and other Member States what the terms of the withdrawal will be, what the relationship

[2] A few examples are s. 1 of the European Communities (Amendment) Act 1993; s. 1 of the European Economic Area Act 1993; s. 1 of the European Union (Accessions) Act 1994; s. 1 of the European Communities (Amendment) Act 1998.

with the EU will be following withdrawal, and what rights and obligations will flow from that relationship, the outcome of which negotiation cannot be known at this stage. Any amendments to the ECA which are subsequently required would be effected by an Act of Parliament. The rights relied upon by the AB Parties are an example of those which will require consideration in the light of the negotiation. (For the same reason, the present case does not fall within the statement in *The Case of Proclamations* (1610) 12 Co Rep 74 that "*the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm*" (cf Grounds, 17(2)). The commencement of the process of withdrawal from the EU does not itself change any common law or statute or any customs of the realm. Any such changes are a matter for future negotiations, Parliamentary scrutiny, and implementation by legislation.)

35. The legal process of withdrawal from the EU will follow a similar pattern as accession to the EEC. Negotiations will take place in exercise of the prerogative, and primary legislation will be passed in domestic law to give effect to their outcome as appropriate. Again, this is a standard incident of the UK's dualist approach to international law and of the way in which international legal obligations within the province of the Crown, and domestic statutory obligations within the province of Parliament, are reconciled.

36. Treaty-making and withdrawal from treaties is not generally subject to Parliamentary control. The Crown does withdraw from international treaties, which it has implemented through or under primary legislation to give effect to rights and obligations in domestic law, without any suggestion that Parliament was first required to approve the renunciation of the treaty under prerogative powers. An example is double taxation treaties, which must be domestically implemented through secondary legislation to have effect upon the rights and liabilities of taxpayers, and which are periodically renegotiated by the Crown. Such renegotiations require termination of the existing treaty and the enactment of replacement secondary legislation.[3] Parliament does not authorise the termination of an existing treaty, notwithstanding the effect that a change in the international rules is intended to produce on the rights and liabilities of taxpayers. Still less does it authorise the Crown to commence negotiations on changes to existing treaties.

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[3] See, for example, the termination and replacement of the Arrangement between the UK and Malta for the Avoidance of Double Taxation 1974 (implemented by the Double Taxation Relief (Taxes on Income) (Malta) Order 1975 (SI 1975/426)) with the 1995 Agreement scheduled to the Double Taxation Relief (Taxes on Income) (Malta) Order 1995 (SI 1995/763); and the termination and replacement of the Convention between the UK and South Africa for the Avoidance of Double Taxation 1969 (implemented by the Double Taxation Relief (Taxes on Income) (South Africa) Order 1969 (SI 1969/864)) with 2002 Convention scheduled to Double Taxation Relief (Taxes on Income) (South Africa) Order 2002 (SI 2002/3138).

Its role is to scrutinise the secondary legislation implementing a new treaty once it has been agreed by the Crown.

37. Further, the Crown has repeatedly acted on the international plane, pursuant to the EU Treaties, to agree to new EU legislation which will have the effect of altering rights and obligations in our domestic legal system. Those actions are now subject to limited statutory restrictions, notably in the EUA 2011, but absent such restrictions it is no obstacle to the Crown exercising prerogative powers to act *vis-à-vis* the EU that such actions may lead (or even must lead) to changes in rights and obligations which are currently given effect in domestic law. That was the *ratio* of *Rees-Mogg*: the ECA does not impliedly restrict the prerogative power to agree to new provisions of EU law which add to or amend existing rights.

38. It follows that the Claimant's contention that the Government proposes to act inconsistently with the ECA runs contrary to the terms of the ECA itself, to authority and to longstanding constitutional practice.

d. The *Fire Brigades Union* and *Laker Airways* cases

39. That the ECA does not place any relevant restriction upon the exercise of prerogative powers to conclude treaties with other Member States of the EU is also the principal answer to the Lead Claimant's reliance upon *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 and *Laker Airways v Department of Trade* [1977] 1 QB 643 (Grounds, §§19-33). These cases are said to establish a general proposition, applicable in the present case, that prerogative powers may not be exercised in a manner which contradicts the policy of a statute (even if not its express terms).

40. The *ratio* of *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 is that the Crown may not use prerogative powers to achieve a particular effect where Parliament has prescribed a detailed scheme for the achievement of that effect. In that case, the Secretary of State used the prerogative to introduce an *ex gratia* compensation scheme rather than bringing into force the detailed scheme set out in legislation, stating in terms that the legislation would not be enacted. Lord Browne-Wilkinson held that by "*introducing the tariff scheme he debars himself from exercising the statutory power for the purposes and on the basis which*

Parliament intended" (p.554G). Lord Nicholls held that the Secretary of State had "*disabled himself from properly discharging his statutory duty in the way Parliament intended*" (p.578F).

41. There is no equivalent legislative scheme in the present case which the Government would be undermining by proceeding under the prerogative. The ECA does not regulate whether or not the UK should be a member of the EU and does not restrict prerogative powers to act in relation to the EU. Indeed, consideration of the broader statutory framework in the present case, including the EUA 2011 and the 2015 Act, confirms that there is no constitutional conflict between statute and the prerogative (see §26 above).

42. The details of the relevant statutory scheme are also key to understanding *Laker Airways*. Parliament had prescribed a detailed – and, as respects the role of the Secretary of State, limited – scheme which the Secretary of State sought to undercut by a revocation of Skytrain's designation under an international treaty. The detailed statutory scheme was held to have "*fettered*" the prerogative power (pp.718G, 719E, 722F-G *per* Roskill LJ and p.728B *per* Lawton LJ). Having regard to the statutory scheme as a whole, no such fetter exists in the present case.

V. Additional Points Raised

a. Constitutional Statutes and the Principle of Legality

43. The designation of the 1972 Act as a constitutional statute adds nothing in these circumstances. The designation was set out by Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151 to restrict the ordinary application of the doctrine of implied repeal. No issue as to implied repeal arises here. Parliament will consider repeal or amendment of the 1972 Act when the UK's membership of the EU comes to an end. The Article 50 notification process does not impinge on that role.

44. Similarly, the reliance of parties on the principle of legality and the case law on that principle does not assist. The principle of legality is a principle of statutory interpretation: that Parliament is presumed not to have legislated contrary to fundamental rights unless it is clear that it intended to do so (see *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539, 587-589; *AKJ v Commissioner of Police for the Metropolis* [2013] EWCA Civ 1342; [2014] 1 WLR 285, §28). It has no purchase on the exercise of prerogative treaty powers.

45. Nor does the reliance of the AB Parties on the Human Rights Act 1998 alter the analysis. No explanation is given as to what Convention rights are relevantly engaged; how it is said that the mere commencement of withdrawal (or a decision to withdraw) could interfere with any such rights; why any interference would not be justified by the implementation of the referendum outcome; or why the Convention would require Parliamentary involvement at all. Indeed, given the application of the Human Rights Act to primary legislation, the logic of the AB Parties' case is that even primary legislation could not secure withdrawal.

b. Other Legislation Implementing European Law

46. It is not necessarily the case that all of the provisions cited by the Lead Claimant (or every provision of primary legislation which was passed to implement EU law) could serve no purpose upon exit from the EU. Whether or not they should do so is a matter of policy and will be related to the outcome of the negotiations to be conducted pursuant to Article 50(3).

47. Primary legislation may require amendment or repeal upon the exit of the UK from the EU. The most appropriate way of achieving that will be a matter for Parliament.

c. The Devolution Legislation

48. Mr Pigney raises the impact of the devolution legislation. The conduct of foreign relations is a matter expressly reserved such that the devolved legislatures have no competence over it.

    (1) In Scotland, see paragraph 7(1) of Schedule 5 to the Scotland Act 1998: "*International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters*".

    (2) In materially the same terms for Northern Ireland, see paragraph 3 of Schedule 2 to the Northern Ireland Act 1998.

(3) In Wales, foreign relations is a not a matter positively allocated to the Welsh Assembly under section 108 and Schedule 7 to the Government of Wales Act 2006.

49. Insofar as the suggestion is only that there are provisions in the devolution legislation which envisage the application of EU law, that is undoubtedly correct but adds nothing to the arguments already addressed. That legislation assumes that the UK is a member of the EU but does not require it to be so and does not become unworkable as a result of the commencement of the process of withdrawal. It underlines that Parliament will have an important role in considering amendments to legislation during the process of withdrawal, but says nothing about the international relations function of the Crown under Article 50 TEU.

50. It is also suggested that withdrawal from the EU will breach Article XVIII of the Act of Union 1707 ("*no alteration be made in laws which concern private right, except for evident utility of the subjects within Scotland*"). This is unarguable. The Court of Session has repeatedly held that the Courts have no jurisdiction to consider the question of 'evident utility': *Maccormick v Lord Advocate* 1953 SC 396; *Gibson v Lord Advocate* 1975 SC 136. Furthermore, EU provisions create public rights rather than private rights: *Gibson*.

d. International Obligations

51. The AB Parties assert that Parliamentary approval must be provided for notification under Article 50 in order to comply with the UK's international law obligations, in particular under the UN Convention on the Rights of the Child. It is sufficient to note that nowhere do the AB Parties explain (a) where in the UN Convention (or any other instrument) any particular role is ascribed to Parliament; (b) why the best interests of children can only adequately be considered by Parliament; or (c) how such a duty, if established, would have any legal effect in domestic law.

Conclusion

52. The Claim, and other associated arguments which will be considered by the Divisional Court, purport on their face to concern only a point of constitutional principle about the respective roles of Parliament and the Crown in the process for giving notification under Article 50(2) TEU.

For the reasons given above, the Secretary of State

submits that it would be entirely appropriate under the UK's unwritten constitution for the Government to proceed to implement the outcome of the referendum using prerogative powers and without the need for further Parliamentary authorisation. Therefore, the claim should be dismissed.

JAMES EADIE QC

JASON COPPEL QC

TOM CROSS

CHRISTOPHER KNIGHT

2 September 2016