IN THE HIGH COURT OF JUSTICE **CO/3809/2016 & CO/3281/2016**
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

B E T W E E N :

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

Claimants

-and-

THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Defendant

-and-

(1) AB AND A CHILD AND OTHERS
(2) GRAHAME PIGNEY AND OTHERS

Interested Parties

-and-

XXXXXXXXX AND OTHERS

Interveners

SKELETON ARGUMENT ON BEHALF OF
THE SECOND GROUP OF INTERESTED PARTIES ("The People's Challenge IPs")

For hearing, 13 & 17 October 2016

(A) INTRODUCTION & SUMMARY

1. The question raised by this judicial review is whether a government minister can trigger the process of withdrawing the United Kingdom (**"UK")** from the European Union (**"EU**") without being authorised to do so by an Act of Parliament. This calls for the Court to determine what the constitution of the UK requires before the UK may "decide" to leave the EU and then "notify" that decision, in accordance with Article 50 of the Treaty on European Union ("**TEU**").

2. No party argues that the result of the referendum on 23 June 2016 was itself a "decision" that the UK should withdraw from the EU, which would satisfy those "constitutional requirements".[1] Nor does any party suggest that the judiciary can or should decide whether the UK should

[1] The Secretary of State's position is that the Government is entitled to decide that the UK should withdraw from the EU, having regard to the outcome of the referendum: see Detailed Grounds, §12(3).

withdraw from the EU. The contested issue is whether constitutional authority to make that decision rests with our elected Parliament, or with government ministers in exercise of residual Crown prerogative powers. It is this fundamental constitutional question as to where power lies which the Court is asked to resolve.

3. This litigation is *not* about:

    a. whether or not the UK should decide to withdraw from the EU; or

    b. how or when notification of any such decision should be given to the European Council.

4. Those decisions are for Parliament (which can afford proper respect to the views of the electorate expressed in the statutory referendum and the interests of minorities, including those unable to vote). This challenge is concerned with who makes the "decision" that the UK shall withdraw from the EU, not with who ultimately notifies that decision to the European Council. The notification itself is likely to be a matter for the executive, acting on Parliamentary authority conferred by statute, and having regard to the terms of Parliament's decision.

5. Nor is the Court being asked to interfere with Parliamentary procedure. The question for the Court is whether a Parliamentary decision, in the form of primary legislation, is constitutionally necessary before a minister can trigger the process of withdrawing the UK from the EU by notifying the European Council pursuant to Article 50(2) TEU.

6. The People's Challenge IPs support, and adopt, the submissions made by the Lead Claimant ("**LC**") in her skeleton argument dated 14 September 2016 ("**LC Skel**"). This skeleton argument adopts the following structure:

    a. **Ground 1**: **the existence of the prerogative (see Section E below)**. The People's Challenge IPs submit that the Royal Prerogative is a residual power, which has been implicitly abrogated by domestic statutory provisions in this field. Consequently, the executive does not have prerogative power to "decide" that the UK should withdraw from the EU; nor (it follows) may ministers lawfully "notify" the European Council of any such decision without Parliament's statutory authority to do so.

    b. **Ground 2: the extent of the prerogative (see Section F below).** Alternatively if, contrary to Ground 1, any prerogative power subsists in this field, that power does not extend to

modifying, abrogating or removing fundamental rights, in particular citizenship rights. Consequently, the executive cannot "decide" that the UK should withdraw from the EU without Parliament's statutory authority to do so.

c. **Ground 3: the exercise of the prerogative (see section G below).** Alternatively, if, contrary to Grounds 1 and 2, prerogative power subsists and can be exercised in a manner that will abrogate or remove fundamental rights deriving from the UK's membership of the EU, it would be an abuse of that prerogative power for the Secretary of State to decide that the UK will leave the EU and/or to notify that decision to the European Council under Article 50 without Parliament's statutory authorisation to do so.

7. These grounds are not cumulative: the claim must succeed if the Court accepts that any one is correct in law.

The People's Challenge IPs

8. The People's Challenge IPs are a number of UK and EU citizens who have taken a strong interest in the issue of the UK's membership of the EU. They have publicly raised funds from around 2,000 others through "crowdfunding", in order to enable them to participate in this litigation as interested parties.

9. They represent a spectrum of ordinary citizens living in England, Gibraltar, Northern Ireland, Scotland and Wales, as well as British expats located in France. They would all be directly affected by the withdrawal of the UK from the EU. Their witness statements explain the consequences that triggering Article 50 TEU will have for them and the broad range of rights and interests they currently enjoy as EU citizens. They support the claim brought by the LC.

(B) THE NATURE AND JUSTICIABILITY OF THE PREROGATIVE

10. The Royal Prerogative is "*a relic of a past age*"[2] and derives from ancient rights and privileges enjoyed by the sovereign; as Dicey put it: "*the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown*".[3]

[2] *Per* Lord Reid in *Burmah Oil CO (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 at p.101.

[3] Lord Bingham in *R(Bancoult) v SSFCA* ("*Bancoult No 2")* [2008] UKHL 61; [2009] 1 AC 453 at [69], citing *An Introduction to the Study of the Law of the Constitution*, 8th ed. (1915), p. 420.

11. As a residual power, the prerogative cannot today be enlarged: *per* Diplock LJ in *British Broadcasting Corporation v Johns* [1965] Ch 32:

> *"It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints on citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension."*

12. The prerogative forms a "*part of the common law*"[4] and so it is for the courts to decide whether or not a particular prerogative power exists; if so, the extent of that power;[5] and whether any such prerogative power has been exercised in a lawful manner, in accordance with ordinary principles of judicial review.[6]

13. The People's Challenge IPs accordingly adopt the LC's submission that the issues under consideration are justiciable questions of law: see LC Skel at §§5(5) and 50, and the case law cited at paragraph 12 above.[7]

14. Moreover, there has long been parliamentary and public commentary on the need to ensure executive accountability to Parliament by limiting the existence and exercise of prerogative powers, particularly in respect of important decisions affecting citizens' fundamental rights.[8] The same sentiment has been endorsed across the political spectrum, including indeed by the Defendant himself.[9]

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[4] Lord Scarman in *Council of Civil Service Unions v Minister for the Civil Service* ("CCSU") [1985] AC 374 at p. 407C; see, also Lord Diplock at pp. 407 – 419.

[5] *CCSU* p. 408 *"...the courts will inquire into whether a particular prerogative exists or not, and, if it does exist, into its extent"*; and *Case of Proclamations* (1611) 2 Co Rep 74 at p. 76 *per* Sir Edward Coke "*the King hath no prerogative but that which the law of the land allows him".*

[6] *CCSU* p. 410: *"...I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review." (emphasis in original). Per* Lord Roskill at p. 417: *"the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries."* See also *Bancoult No 2 per* Lord Hoffmann at §35 and Lord Rodger at §105.

[7] See also *R(CND) v Prime Minister* [2002] EWHC 2777 Admin.

[8] See, for example, the Green Papers *Governance of Britain* (CM 7170, July 2007); at pp. 15, 16 and 19 and *The Governance of Britain – War Powers and Treaties: Living Executive Powers* (CM 7239, October 2007).

[9] David Davis MP (Hansard, 22 June 1999, Col. 930 – 931): *"… There are three primary aspects of government where parliamentary scrutiny and control are either absent or inadequate. They are: first, the exercise of unfettered Executive power, largely under Crown prerogative... , it strikes me as extraordinary that Parliament has no say not only in the decisions, but in who makes them …. Executive decisions by the Government should be subject to the scrutiny and approval of Parliament in many other areas. Much of them arise under Crown prerogative--which, in truth, in modern Britain is a euphemism for the prerogative of the Prime Minister."*

(C) ARTICLE 50 AND ITS CONSEQUENCES

15. As to the meaning and effect of Article 50 TEU, the People's Challenge IPs adopt the submissions at LC Skel §§10 – 11 and 42(2) – 42(3).

16. Article 50 provides that for the UK to leave the EU it must, in accordance with its constitutional requirements, both "*decide*" to withdraw from the EU (Article 50(1)) and "*notify*" that decision to the European Council (Article 50(2)). It is clear from the terms of the European Referendum Act 2015 that the referendum was consultative and the result did not itself constitute a decision to withdraw from the EU in domestic law terms.[10] This appears to be common ground.[11] On this point, the People's Challenge IPs adopt the submissions in the Dos Santos skeleton, §§37-44.

17. Once a decision to leave the EU has been taken by the constitutionally competent branch of government (i.e. Parliament), and has been notified to the European Council, Article 50(3) imposes a two-year time limit for negotiations from the date of notification (unless the UK and all other 27 EU member states unanimously agree to an extension of that time period). Membership of the Union otherwise ceases automatically after two years, irrespective of whether any agreement has been reached about ongoing relations.

18. Article 50 contains no express provision for a Member State to "change its mind" after it has notified a decision to leave, i.e. there is no provision for withdrawing the notification given under Article 50(2). Withdrawal would also arguably be inconsistent with the express requirement in Article 50(3) that the two year negotiation period can only be extended by the unanimous agreement of the other 27 Member States.[12] Different views have been expressed as to whether a Member State can unilaterally withdraw a notification to leave the EU without the unanimous consent of all other Member States, but there is a substantial body of opinion that

[10] This was well known to Parliament before the Bill was enacted. In a House of Commons Library Briefing Paper (No. 07212, 3 June 2015) it is said, at p. 25: *"[The Bill] does not contain any requirement for the UK Government to implement the results of the referendum, nor set a time limit by which a vote to leave the EU should be implemented. Instead, this is a type of referendum known as pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the Government in its policy decisions... The UK does not have constitutional provisions which would require the results of a referendum to be implemented."* It is telling that this assumes that the implementation of the referendum would need legislation.

[11] See the Secretary of State's Detailed Grounds, §12(2)-(3), although §5(2) of the Detailed Grounds is ambiguous, referring to the decision to leave the UK being "articulated" in the referendum result.

[12] As a matter of international law, Article 50 is *lex specialis* (expressly addressing the issue of withdrawal from EU law) and as such operates to displace customary international law and the Vienna Convention on the Law of Treaties. This means that no right to unilaterally withdraw a notification can be read into Article 50 as a matter of international law.

such unilateral withdrawal would not be possible.[13] In any event, the Defendant has declined an explicit invitation to express the Government's view on that question.[14] It is ultimately a matter of EU law on which there is no authority, and on which the Court of Justice of the European Union (**"CJEU"**) would be the final arbiter were a definitive answer needed.

19. Accordingly, there is a real risk that notification of a decision to leave under Article 50 will inevitably trigger the automatic withdrawal of the UK from the EU or, at best, put the matter beyond the control of the UK's own constitutional actors and subject to the unanimous consent of 27 other states.[15]

20. In the circumstances, the Court should proceed on the assumption that the UK's exit from the EU is in practice irreversible once Article 50 has been triggered.[16]

21. The Secretary of State argues that it is for him or another minister, not for Parliament, to decide to start this process, even though once it has started neither this nor any subsequent Parliament would be in a position to stop it. The People's Challenge IPs submit, as set out below, that this is contrary to the notion of Parliamentary sovereignty and the principle of legality.

(D) THE NATURE OF THE EUROPEAN TREATIES AND THEIR PLACE IN UK LAW

22. The treaties establishing the European Community (now, the TEU and the Treaty on the Functioning of the European Union ("**TFEU**") (together, **"the European Treaties"**)) are "*not like other treaties*".[17] They do not just create relations between states. The UK's membership of the European Community (as it was) created a "*new legal order*" and profoundly altered the UK's

[13] The House of Lords Select Committee on the Constitution's report, *"The invoking of Article 50"* (of 13 September 2016), concluded that participants at their seminar were "*divided on this point*." (§§ 12-13). See also *Article 50 TEU: Withdrawal of a Member State from the EU*, a Briefing Note prepared by the European Parliamentary Research Service (February 2016), which suggests that the process is not reversible.

[14] At §17 of their 8 July 2016 pre-action letter (exhibited to the witness statement of John Halford), the People's Challenge IP's asked the Government to clarify its position on the (non-)reversibility of Article 50; the Defendant did not respond to this question.

[15] It cannot be readily assumed that the other 27 Member States will unanimously agree either to an extension of the two year period, or for the UK to withdraw its withdrawal notification. See, for example, the letter from European Council President Donald Tusk to the remaining 27 Member States on 13 September 2016.

[16] The House of Lords Select Committee on the Constitution's report "The invoking of Article 50" (of 13 September 2016), concluded: "In the light of the uncertainty that exists on this point, and given that the uncertainty would only ever be resolved after Article 50 had already been triggered, we consider that it would be prudent for Parliament to work on the assumption that the triggering of Article 50 is an action that the UK cannot unilaterally reversed".

[17] See Professor Vaughan Lowe QC, *"The law of treaties; or, should this book exist?"* in *Research Handbook on the law of treaties* (Tams et al. ed.) (Elgar, 2014) at pp. 6 – 8.

constitution. The "ordinary" position is that rights arising under international treaties become enforceable in the UK when they are enumerated in a statute. The scope and nature of those rights is primarily a question for the UK courts. However, the UK's membership of the EU has brought a body of directly effective rights and obligations, from an external source, into UK law. That required the recognition of another legislative body (in particular the European Parliament) and the judgments of the CJEU (which plays the leading role in determining the scope and application of those rights). Membership of the EU required the UK voluntarily to restrain certain aspects of its sovereignty, subject to the qualification that ultimately Parliament remains sovereign, in the sense that it could decide to withdraw from that voluntary restraint. This is well established as a matter of EU law:

a. In C-26/62 *Van Gend en Loos* [1963] ECR 1, the CJEU said:

> *"The community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of Member States, [EU] law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."* (emphasis added).

b. In joined cases C-46/93 and C-48/93 *Brasserie du Pecheur & Factortame* [1996] ECR I-1029 Advocate General Tessauro said (at §39):

> *"...the obligations of the Member States and Community institutions are directed above all, in the system which the Community system has sought and sets out to be, to the creation of rights of individuals. This is the picture drawn by the authors of the Treaty and consolidated by the Community legislature."* (emphasis added).

23. The subordination of UK law to European law (within its proper spheres) was enshrined in statute. The Defendant is wrong to suggest that the UK may leave the "*new legal order*" of the EU on the basis of executive action alone.

24. The European Communities Act 1972 ("**ECA 1972**") received Royal Assent on 17 October 1972 and the UK became a member of the EEC (as it then was) on 1 January 1973.

25. The purpose of the ECA 1972 is set out in its long title:

> *"to make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar*" (emphasis added)[18]

26. No one suggests that the enlargement of the EU legal order to include the UK cannot be undone: that would be contrary to the well-established legal principle that no Parliament can bind its successor.[19] However, since the UK Parliament legislated to "enlarge" the EU (as it now is) "to include the UK" by transposing the rights conferred by EU law into UK law, it is for Parliament to decide to legislate so as to contract the EU legal order by removing the UK from it and to undo that transposition.

27. It is notable that the courts have previously assumed that an Act of Parliament would be necessary before the UK could repudiate the EU Treaties (emphasis added throughout):

    a. In *Blackburn v AG* [1971] 1 WLR 1037 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 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] 3 All ER 325 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 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*

[18] See the 1971 White Paper, *The United Kingdom and the European Communities* (No. 4716).

[19] *Ellen Street Estates Ltd v Minister for Health* [1934] KB 590, *per* Maugham LJ at p. 597.

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."

d. Lord Mance in the Supreme Court in *Pham v Secretary of State for the Home Department* [2015] UKSC 19, in considering that the conferral of rights as an EU citizen was the consequence of the passage of the 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."

28. The point now under consideration was not expressly argued in any of those cases, but it is instructive that the courts have assumed that Parliament, rather than the executive, would have to authorise withdrawal from the EU Treaties. The People's Challenge IPs submit that the courts were right to reach that conclusion, for the reasons that follow.

(E) GROUND 1: EXISTENCE - THE PREROGATIVE HAS BEEN ABROGATED BY STATUTORY PROVISIONS

Introduction

29. The proposed use of prerogative power to trigger Article 50 would be unlawful because the prerogative has been implicitly ousted/abrogated by specific statutes which:

a. confer rights arising from and under the EU Treaties on UK citizens; and/or

b. expressly require a continuing statutory basis for directly applicable or directly effective EU law; and/or

c. depend upon, or assume, the UK's continued membership of the EU.

The principle

30. Since the Royal Prerogative is a "residual" common law power, which can be curtailed by Parliamentary action, it may not be exercised in a field that Parliament has "occupied" by

enacting legislation. Whether Parliament has occupied a field is a matter for the court to decide. A field may be occupied either by the express words of the statute, or as Lord Parmoor held in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at pp. 576-577 ("***De Keyser's***"), "*by necessary implication*."

31. The Defendant is therefore wrong to assert that *"an express restriction would be required to remove the possibility of exercise of prerogative powers*" (Detailed Grounds of Resistance, §26). The question is whether any purported exercise of prerogative power would frustrate the will of Parliament – that is to say its purpose as determined by the Court – in passing a particular piece of legislation. Parliament's purpose in passing legislation may be inferred from the language, statutory purpose and structure of the legislation in question.

32. As Lord Browne-Wilkinson observed in *R v SSHD ex parte Fire Brigades Union* [1995] 2 AC 513 at p. 522:

> "*it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute … The constitutional history of this country is the history of the powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body. The prerogative powers of the Crown remain in existence to the extent that parliament has not expressly or by implication extinguished them" (emphasis added).*

33. See also *Home Department ex p Northumbria Police Authority* [1989] QB 26 ("***ex p Northumbria Police***") *per* Purchas LJ at page 52, that the executive may not act in a manner that is "*inconsistent with statutory provisions*".

34. The Court should adopt a broad purposive approach when determining whether prerogative power has been ousted by implication: it should ask whether the relevant legislation "*deals with something*"[20] that 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*"[21] (which would not be a "valid" exercise of any such power).

The application of the principle

[20] *Per* Lord Dunedin in *De Keyser's* at p. 526 see also Lord Sumner at p. 561.

[21] *Per* Purchas LJ, §33 *supra*.

35. There is no express statutory prohibition on the exercise of the prerogative power to trigger withdrawal from the EU; but there are a number of pieces of primary legislation by which Parliament has occupied the field of giving (or withholding) effect from the EU Treaties in UK law, and has thereby abrogated any residual prerogative power to do so "*by necessary implication*".

UK statutes

ECA 1972

36. The People's Challenge IPs adopt LC Skel §§ 12–19, 42, 44–45 and 47(1), and paragraphs 25-26 above as to the object and purpose of the ECA 1972. A notification given under Article 50 without legislative authority would "*frustrate or substantially undermine the terms of the [ECA 1972].*" The same reasoning applies in respect of the following further statutory provisions.

The European Union Act 2011 ("EUA 2011")

37. Section 18 of the EUA 2011 provides that EU law, defined as "*the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the ECA 1972*", is "*recognised and available in law in the UK*" by virtue of the ECA 1972. Thus, through section 18 EUA 2011, Parliament has preserved the UK's place in the legal order of the EU as enlarged by the ECA 1972 and the consequent "availability" in UK law of the rights, remedies and procedures etc. conferred by EU law. Parliament has thereby occupied this field, and Parliamentary authority is required before the UK's place within the legal order of the EU, and the availability of EU rights in UK law, may be repudiated.

38. It is implicit in the language of section 18 EUA 2011 that the authority competent to determine the extent to which the "rights, remedies, procedures" etc. arising under EU law continue to have effect in domestic law is Parliament (as the courts had in any event assumed, see: *Blackburn, Macarthys v Smith, Shindler and Pham* referred to at §27 above). Moreover, by Part 1 of the EUA 2011 Parliament has explicitly restricted the prerogative power that would otherwise exist for the executive to enter into European treaties on behalf of the UK, and has laid down specific preconditions for doing so: Part I precludes the executive from ratifying any treaty which amends or replaces the EU Treaties as defined by the ECA 1972 without there first being a referendum and an Act of Parliament permitting it to do so.

39. It follows that the purported exercise of prerogative power to withdraw the UK from the European Treaties would cut across Parliament's intention as expressed in the EUA 2011, in particular because:

    a. it would mean that the rights, remedies and procedures etc. arising out of EU law would automatically cease to be *"recognised and available in law in the United Kingdom"* at the end of the two year period following notification under Article 50(2), notwithstanding the intent of section 18 EUA 2011 that such rights etc. shall be recognised and available in domestic law by virtue of the ECA 1972; and

    b. it would be contrary to the intention expressed in Part I of the EUA 2011 that Parliament (in combination with the electorate), and not the executive, should decide critical questions as to the extent of any ongoing or future relationship between the UK and the EU.

40. The intention behind Part I of the EUA 2011 was made clear by the then Foreign Secretary, Rt. Hon. William Hague MP, when introducing the EUA 2011 for a second reading as a Bill on 7 December 2010:[22]

> *"The Bill makes a very important and radical change to how decisions on the EU are made in this country. It is the most important change since we joined what was then called the European Economic Community. <u>It marks a fundamental shift in power from Ministers of the Crown to Parliament and the voters themselves on the most important decisions of all</u>..."* (emphasis added)

41. Given the intention of the EUA 2011 to mark *"a fundamental shift in power from Ministers of the Crown to Parliament and … voters"*, it is not open to the executive to arrogate to itself the power to decide whether to act in a way that will inevitably mean that the rights, obligations, remedies etc. conferred by the existing EU treaties will cease to be recognised and available in domestic law. That is a decision that may only be taken by Parliament.

The Devolution Settlements

42. The UK's "constitutional arrangements" include the Scotland Act 1998, the Northern Ireland Act 1998, and the Government of Wales Act 2006, which govern the arrangements between the constituent parts of the UK[23] ("**the devolution statutes**"). The devolution statutes provide for

[22] Hansard, HC volume 520, Col. 193.

[23] See, e.g. s. 63A of the Scotland Act 1998: "*The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.*"

the devolved governments (concurrently with the UK government) to observe, transpose and implement EU law, and preclude the devolved governments from legislating or acting in a manner contrary to EU law. Many areas of devolved competence are shaped by the UK's EU's obligations, e.g. in relation to fishing, agricultural policy, environmental protection, the administration of EU structural funds, and public procurement.

43. For example:

    a. The devolved legislatures do not have legislative competence to enact legislation which *"is incompatible ... with EU law"* (s. 29(2)(d) Scotland Act 1998; s. 80 Government of Wales Act 2006; s. 6(2)(d) Northern Ireland Act 1998)*;*

    b. The devolved executives have no power to act in a manner that is "*incompatible with EU law*" (s. 57(2) Scotland Act 1998; s. 80 Government of Wales Act 2006; s. 24(1) Northern Ireland Act 1998);

    c. The devolution statutes provide for preliminary references to the CJEU by the Supreme Court, when considering the legislative competence of the devolved legislatures (s. 34 Scotland Act 1998; s. 113 Government of Wales Act 2006; s. 12 Northern Ireland Act 1998);

    d. The devolution statutes define "*EU law*", without reference to the ECA 1972, as all those *"rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, and ... all those remedies and procedures from time to time provided for by or under [those/the] EU Treaties"* (s. 126(9) Scotland Act 1998; s. 158(1) Government of Wales Act 2006; s. 98 Northern Ireland Act 1998).

44. Further, the Belfast Agreement of 10 April 1998 (the so-called "**Good Friday Agreement"**) is premised on the UK's (and Republic of Ireland's) continued membership of the EU.[24] The third preamble to the Annex entitled *"Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland"* speaks of *"the wish to develop still further close co-operation between [the] countries as friendly neighbours and as partners in the European Union"* (emphasis added). Implicit in the Belfast Agreement is the idea of EU citizenship across the island of Ireland (plus all that implies, e.g. free movement of people

[24] See the agreement reached at multi-party talks on Northern Ireland set out in *The Agreement: Text of the Agreement reached in the Multi-Party Negotiations on Northern Ireland* (10 April 1998), Command Paper 3883.

and goods between Northern Ireland and Ireland). The Good Friday Agreement is itself given statutory footing and recognition in the Northern Ireland Act 1998: see sections 3, 13, 20, 30, 42, 52A, 52C, 53, 54, 55, 56, 64, 69, Schedule 2, and Schedule 4.

45. In summary, the devolution settlement across the UK is predicated on, indeed expressly defined by, the application of EU law. The arrangements rely on EU law to define the powers of the devolved legislatures and matters reserved to Westminster and to ensure that EU law is given effect by those legislatures, thereby protecting the EU rights of citizens of the devolved nations and in particular preventing the devolved legislatures from acting in a manner which limits the rights of citizens of the devolved nations conferred by EU law. In the case of Northern Ireland (at least), the political settlement, which governs not just the powers of the Northern Ireland Assembly but the overall governance of Northern Ireland and the relationship between the UK Government, Northern Ireland and the Irish Republic in relation to those matters, is predicated on the UK's continuing EU membership.

46. In passing the devolution statutes, Parliament has relied on, and referred to, the implementation of, and continuing compliance with, EU law as a permanent feature of the internal constitutional arrangements between Westminster and the devolved legislatures and governments. Only Parliament can change those arrangements.[25] Given the role of EU law in those legislative arrangements, the use of the prerogative to withdraw the UK from the EU is precluded by necessary implication.

The meaning of "by necessary implication" in the context of constitutional statutes

47. The ECA 1972, EUA 2011, and the devolution statutes are "constitutional statutes": see the case law cited in LC Skel §20, and *BH v Lord Advocate* [2012] UKSC 24 *per* Lord Hope at §30. They have each fundamentally (and, in the case of the devolution statutes at least, permanently) altered the constitutional framework and order within the UK. They create directly effective rights, freedoms, privileges, and remedies, and alter the relationship between citizens and the state, as well as between citizens, Parliament and the EU. On this, the People's Challenge IPs adopt the submissions in LC Skel §§19-21, 42(7) and 47(2).

[25] And in doing so could normally be expected to comply with the Sewel Convention, reflected in the Memorandum of Understanding between the UK Government and the Scottish Government and now in section 28(8) of the Scotland Act 1998 – namely that the UK Parliament will not normally (as under section 28(7) of the Scotland Act 1998 it may) legislate on matters affecting the breadth of the devolved institutions' powers, without the consent of the Scottish Parliament.

48. It is not necessary for the Court to find that these statutes have any special constitutional status in order to find that they oust prerogative power by necessary implication inferred from their object and terms. Nonetheless, the Court should be particularly slow to find that the Royal Prerogative may be relied upon in a manner that will cut across primary legislation that has been recognised as having particular "constitutional" significance and status.

49. Further, the courts have suggested a degree of entrenchment against repealing constitutional statutes,[26] so that even any future Parliament wishing to override such legislation must, to give effect to such an intention, explicitly state that the earlier, constitutional, statute is being overridden. That is also relevant to determining whether a later executive use of the prerogative can lawfully be used in a manner that undermines or derogates from those constitutional statutes. A statute which, because of its particular constitutional character, cannot be overridden even by Parliament except by express words must, on the same logic, be incapable of being overridden by the prerogative power alone.

50. Finally on this point, there is no textual or constitutional basis for suggesting that, by having passed the EU Referendum Act 2015 authorising the holding of a referendum on this subject, Parliament in some way bound itself, or a later Parliament, to "waive" its right to determine how to give effect to the views expressed by the electorate in that referendum, or altered the constitutional status of these earlier statutes (see LC Skel §§6-9 and Dos Santos Skel at §§37-43).

The Acts of Union

51. There is, moreover, a specific restriction in the Acts of Union[27] concerning modifications to private law in Scotland. Article XVIII of the Union with Scotland Act 1706 harmonised trade laws in Scotland and England but otherwise put in place protection for the separate Scottish legal system following the creation of a unified Parliament.[28] Article XVIII provides as follows (emphasis added):

> *"That the Laws concerning regulation of Trade Customs and such Excises to which Scotland is by virtue of this Treaty to be liable be the same in Scotland from and after the Union as in England and that all other Laws in use within the Kingdom of Scotland do after the Union and notwithstanding thereof remain in the same force as before (except such as are contrary to or inconsistent with this Treaty) but alterable by the Parliament of Great Britain*

[26] e.g. Laws LJ in *Thoburn v Sunderland City Council* [2003] Q.B. 151, §§ 56-57.

[27] i.e. the Union with Scotland Act 1706 and the Union with England Act 1707. These are also "constitutional statutes".

[28] See *Imperial Tobacco Ltd v Lord Advocate* 2012 SC 297 at [156] *per* Lord Reed.

with this difference betwixt the Laws concerning publick right Policy and Civil Government and those which concern private right that the Laws which concern publick right Policy and Civil Government may be made the same throughout the whole United Kingdom <u>But that no alteration be made in Laws which concern private right Except for evident Utility of the Subjects within Scotland.</u>"

52. The effect of Article XVIII is that, following the union between England and Scotland, the law of Scotland is only alterable by Parliament, subject to a distinction between public law and private law, namely that any alteration to Scots private law may be made only where Parliament determines that such alteration is for the evident utility of the people of Scotland.

53. The UK's withdrawal from the EU would result in a series of modifications to private law in Scotland, for example in relation to employment rights and consumer rights derived directly from EU law. Under the terms of Article XVIII of the Act of Union, such alterations to Scots private law can only be made by Parliament and must be for the evident utility of the people of Scotland. The use of the prerogative to trigger the UK's withdrawal from the EU, with the inevitable consequences that follow from that, would modify Scots private law, without any decision by Parliament (including those MPs elected by the people of Scotland) that such alteration is indeed for the evident utility of the Scottish people, as required by Article XVIII of the Act of Union.

54. That circumvention of Parliament's specified role in relation to the laws of Scotland is a matter of particular concern given that the result of the EU referendum in Scotland, and subsequent statements by the Scottish Government and Members of the Scottish Parliament and Scottish MPs at Westminster, strongly indicate that the majority of Scots, and their elected representatives, do not consider that withdrawal of Scotland from the EU would be in their interests or for their "evident utility". The very purpose of Article XVIII of the Act of Union is to protect Scotland's distinct legal identity and to ensure that any alteration to Scots private law is made by Parliament for the benefit of the people of Scotland (i.e. not simply in order to harmonise the position in Scotland with the position in England). EU law, and the individual rights and obligations that flow from it, are now an established part of Scots law: consistently with Article XVIII, it is Parliament that must decide whether to remove those rights and obligations from the law of Scotland.

55. In his Detailed Grounds the Secretary of State responds that the Court of Session has held that the Courts have no jurisdiction to consider the question of "evident utility", referring to

MacCormick v Lord Advocate 1953 SC 396 and *Gibson v Lord Advocate* 1975 SC 136. This misses the point.[29] This is not a challenge to the merits of an Act of Parliament on the basis that it is not for the evident utility of the people of Scotland. The point in this case is that there has been no decision by Parliament that the UK should withdraw from the EU, or consideration of the impact of that decision for the private law rights and obligations of the people of Scotland.

56. Had there been a decision by Parliament that the UK should leave the EU, the case law cited by the Defendant might be authority for the proposition that such a decision by Parliament cannot be challenged on the basis of inconsistency with Article XVIII of the Act of Union, since the question of the utility of legislative measures is not a matter for the Courts. The complaint here is not that Parliament has wrongly determined that leaving the EU is in the interests of the people of Scotland. It is that the Defendant maintains that no Act of Parliament is required at all, meaning that there will be no opportunity for Parliament to consider the question of "evident utility" before Scots law is irreversibly altered. This is contrary to the requirements of Article XVIII of the Act of Union.[30]

Bill of Rights 1689

57. Further or alternatively, the Bill of Rights 1689[31] ("**the Bill of Rights**") expressly prohibits the use of the prerogative in circumstances where its exercise would "*suspend*" or "*dispense*" statutory law. 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..."*

[29] *MacCormick* and *Gibson* concerned matters of "public right" rather than "private right". In *MacCormick* the Court reserved its opinion with regard to the provisions of the Acts of Union relating to laws "which concern private right" (at p. 412), a position Lord Keith also adopted in *Gibson*. That position was also adopted by the Outer House of the Court of Session in *Scottish Parliamentary Corporate Body v Sovereign Indigenous Peoples of Scotland* 2016 SLT 761.

[30] See also *Lord Gray's Motion* [2002] 1 AC 124 at p. 139*, per* Lord Hope and *R (Jackson and others) v Attorney General* [2006] 1 AC 262 at [106] *per* Lord Hope, summarising the case law on attempted challenges to legislation under the Acts of Union and the unresolved question as to the arguability of that approach.

[31] The Bill of Rights too has been held to be a "constitutional statute": see *R(Buckinghamshire CC) v Secretary of State for Transport* [2014] 1 WLR 324 at [207].

58. Clauses 1 and 2 of the Bill of Rights respectively read:

> *"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."*

59. Provisions in each of the constitutional statutes mentioned above would, in one way or other, be "*suspended*" or "*dispensed*" of, without the consent of Parliament, if the Defendant were able to trigger the UK's withdrawal from the EU without Parliamentary authorisation.

60. The ECA 1972 and EUA 2011 would become devoid of content: there would be no *"rights, powers, liabilities, obligations and restrictions"* (section 2, ECA 1972) arising under the European Treaties capable of being "*recognised and available in law in the United Kingdom"* (section 18, EUA 2011). The ECA 1972 would be rendered nugatory, because the ECA 1972 and EUA 2011 would cease to have anything to give effect to and the rights, remedies and procedures under EU law which Parliament had decided to make "available" would effectively be "*suspended*" and ultimately dispensed with.

61. In the same way, the restrictions and requirements imposed by the devolution statutes by reference to EU law, including the prohibition on the devolved legislatures acting contrary to rights protected by EU law, would be "dispensed" of, without the UK Parliament agreeing that this should be so.

62. That outcome offends against the constitutional settlement of the UK, in particular the Bill of Rights.

(F) GROUND 2 – EXTENT: THE PREROGATIVE DOES NOT EXTEND TO MODIFYING, ABROGATING OR REMOVING FUNDAMENTAL CITIZENSHIP RIGHTS

Introduction: the Royal Prerogative and rights

63. Even if, contrary to Ground 1 above, a prerogative power to decide that the UK should leave the EU theoretically subsists, the prerogative in relation to international treaties does not extend to permitting the executive, without direct Parliamentary authorisation, to alter the law so as to

deprive individuals of rights conferred by Parliament, the common law, or the customs of the realm. Such a deprivation of rights can only be achieved by an Act of Parliament.

64. It follows that prerogative power, if it subsists in this field, may not be used to modify or remove the rights of UK citizens, in particular fundamental rights derived from citizenship, and directly enforceable private law rights derived from the European Treaties.

65. The People's Challenge IPs adopt LC Skel §§ 5(2), 31-35 and 42(1), 46, 47(3) – 47(4), and 48 – 49 to this effect. See too Lord Oliver in *Rayner (Mincing Lane) Ltd v DOT* [1990] 2 AC 418 at 500B-C:

> *"...the Royal Prerogative, whilst 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"*

66. The enquiry is one of substance not form. As Lawton LJ said in *Laker Airways v Department of Trade* [1977] QB 643, at 728A-B:

> *"the Secretary of State cannot use the Queen's prerogative powers in this sphere in such a way as to take away the rights of citizens... By withdrawing designation this is what in reality, if not in form, he is doing. A licence to operate a scheduled route is useless without designation."*

67. Lawton LJ's enquiry as to *"the reality, if not the form"* of whether a particular exercise of prerogative power is to remove rights from citizens by emptying them of effective content, even if preserving their theoretical existence, exposes the flaw in the Defendant's submission (Detailed Grounds of Resistance at §34 that "the situation [of executive withdrawal from EU] would not conflict with the terms of s2(1) [ECA]; there would simply be no rights etc. on which s2.(1) would bite" (emphasis added).

68. The rule that the prerogative may not be relied upon to deprive citizens of their rights is an aspect of the principle of legality. Such rights may be removed only by express *statutory* language. See, for example, *ex p Witham* [1998] QB 575 at p 581;[32] *ex p Simms* [2000] 2 AC 115 at [131];[33] and *HM Treasury v Ahmed* [2010] 2 AC 534 at [61], [75] and [111].

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[32] *Per* Laws LJ: *"...the notion of constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate."*

[33] *Per* Lord Hoffmann: *"[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."*

69. Where rights have been conferred under statute, and would be removed or diminished by a decision to leave the EU (which, pursuant to Article 50, is self-executing), the principle of legality prevents those rights from being restricted or removed. What it requires is that any such restriction or removal of statutory rights must be done by Parliament "*squarely confronting what it is doing*" by the use of express words, and accepting "*the political cost*". It cannot be done by the executive, purporting to exercise its untrammelled executive power.

Affected EU Citizenship rights

70. All rights under EU law conferred by Parliament under s. 2(1) ECA 1972, and currently enjoyed by UK citizens, will automatically cease once the two year period under Article 50 (or longer unanimously agreed period) has expired. If the Defendant is correct, that he could make the decision to leave the EU using prerogative powers, then those rights – which include all of the rights and privileges of EU citizenship and other fundamental rights enjoyed as a result of the UK's membership of the EU – will cease to apply, without any Parliamentary words of authority, still less "express language".[34]

71. Since even Parliament itself could only abrogate such rights with express words, it would be contrary to the principle of legality for the executive to decide, without legislative authority, that these rights, given effect in domestic law both by legislation and by the direct operation of EU law, will cease to exist.

72. Article 20 TFEU 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") describe citizenship as the "*fundamental status*" of nationals of member states.[35] The following are examples of rights enjoyed by EU citizens, which citizens of the UK will lose upon the UK leaving the EU:

[34] Those rights, derived from EU law, will not be protected as a matter of international law under doctrines relating to "acquired rights". See, for example, written evidence of Professor Douglas-Scott (AQR0001) and Professor Lowe QC (AQR0002) for the House of Lords Select Committee on the European Union in September 2016, and the transcript of the oral evidence given on 13 September 2016.

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

a. The right 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, Article 3(2) TEU, Article 45(1) of the Charter and the Citizens' Directive);

b. The right to seek employment, work, exercise the right of establishment or provide services in any member state;

c. 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);

d. The right to diplomatic and consular protection from the authorities of any Member State in third countries (Articles 20(1)(c) and 23 TFEU and Article 46 of the Charter);

e. The right to non-discrimination (Articles 17, 18 and 45 TFEU);

f. 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);

g. The right to equal pay under Article 157 TFEU;

h. The right to receive 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); and

i. A wide range of human rights under the EU Charter of Fundamental Rights ("**the Charter**"),[36] for example, the "right to be forgotten" and associated privacy rights under Articles 7 and 8.[37] The Charter contains rights that are not enjoyed under ECHR law, or not afforded the same remedial protection as under the Charter.

[36] The Charter applies not only when Member States are "implementing" EU law, but also whenever a state is acting "within the material scope of EU law" (*Rugby Football Union v Consolidated Information Services Ltd* [2012] 1 WLR 3333 *per* Lord Kerr at [28]), as well as where the issue is whether a Member State was derogating from EU law (see, for example, *R(Zagorski) v Secretary of State for Business, Innovation and Skills* [2011] HRLR 6 *per* Lloyd-Jones J at [71], and *R(Sandiford) v Secretary of State* [2013] 1 WLR 2938 at [26]).

[37] See Case C-131/12 *Google Spain SL and Google Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Conzalez* ECLI:EU:C:2014:317. See *Google v Vidal Hall* [2015] EWCA Civ 311; [2015] 3 WLR 409 for an example of EU law being directly applied to expand rights and remedies for breach of data protection rights.

73. These citizenship rights are fundamental constitutional rights, both as a matter of EU law and UK law:

    a. As a matter of EU law, (a) citizenship is well-established as a "fundamental status" from which many constitutional rights and freedoms flow,[38] and (b) the Charter has the same value as the Treaties.[39]

    b. As a matter of domestic law, Lord Mance in *Pham* cited Dicey for the proposition that citizenship conferred by Parliament cannot be removed save by a subsequent Act of Parliament; at paragraph 97 he stated:

> *"The present appeal concerns a status which is as fundamental at common law as it is in European and international law, that is the status of citizenship. Blackstone (Commentaries on the Laws of England Book I, p 137) states the proposition as follows: "A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ ne exeat regnum, and prohibit any of his subjects from going into foreign parts without licence. ... But no power on earth, except the authority of parliament, can send any subject of England out of the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law..."*

74. Blackstone and the other constitutional authorities cited by Lord Mance in *Pham* were considering the extinction of the right of citizenship of the UK. However, since Parliament under s. 2 ECA 1972 and s. 18 EUA 2011 has conferred and confirmed the domestic effect of the EU provisions cited above, citizenship of the EU is now a facet of that UK citizenship, and the rights enjoyed by virtue of EU citizenship are a statutory incident of UK citizenship. These rights and freedoms are fundamental and wide-ranging. Just as the prerogative may not be relied upon to remove UK citizenship, so it may not be relied upon to narrow or confine the scope of UK citizenship by stripping out the EU citizenship rights that exist within it. It is therefore necessary, pursuant to the principle of legality, for Parliament to authorise a member of the executive to remove these rights.

75. The UN estimates that there are 1.2 million British expatriates resident in the EU. The diminution of the current free movement rights of UK citizens – that will flow from the triggering of Article

[38] See, for example, C-85/96 *Martinez Sala* EU:C:1998:217; C-184/99 *Grzelczyk* EU:C:2001:458; C-413/99 *Baumbast* EU:C:2002:493; C-135/08 *Rottmann* EU:C:2010:104.

[39] Article 6(1) TEU

50 – will have particular consequences for them.[40] As Professor Vaughan Lowe QC explained to the House of Lords Select Committee on the European Union, some changes are inevitable, though the extent of them is unknowable at the point when a decision is taken to leave the EU.[41]

(G) GROUND 3 – EXERCISE: THE ABUSIVE EXERCISE OF ANY SUBSISTING PREROGATIVE POWER

Introduction

76. Even if (contrary to the above) the prerogative power exists and theoretically extends to the removal/abrogation of citizens' rights, it would be an abuse of prerogative power for ministers to make the decision that the UK will leave the EU, and notify such a decision, without express parliamentary authorisation to do so.

77. It is for the Court to determine the limits of the exercise of the prerogative and when it has been exercised in an improper fashion: see Lord Denning MR in *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 705-707. He said that since "*the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive*." Lord Denning continued, at pp. 706 – 707, and explained that where there was a statutory means available for achieving a particular aim, the Secretary of State could not invoke the prerogative to "*do it of his own head…without a word to anyone...*". Although "*The law does not interfere with the proper exercise of discretion by the executive in those circumstances, [...] it can set limits by defining the boundary of the activity and it can interfere if the discretion is exercised improperly or mistakenly".*

Pre-empting Parliament: the effect of triggering Article 50

78. The People's Challenge IPs adopt the LC's reasoning at LC Skel §5(1) and (3) on this issue.

79. In particular, the prerogative should not be relied upon in order to thwart the purpose and objects of the constitutional framework put in place by the ECA 1972, the EUA 2011 and the

[40] Those rights include the rights to: buy property; set up a business; live in an EU Member State without having to apply for long-term resident status or citizenship; take any job; have their professional qualifications recognised (in most cases); not to be deported without proper reason; and to vote in certain local elections.

[41] Transcript of evidence taken on 13 September 2016, p. 14.

devolution statutes; nor should it be used to avoid the public scrutiny of such a decision, which would be a necessary feature of Parliamentary debate. The inevitable effect of using the prerogative to trigger Article 50 would be to circumvent these constitutional safeguards.

80. The Defendant's Detailed Grounds of Resistance seek to rely on the *subsequent* role of Parliament in implementing whatever treaties and/or agreements are negotiated by the Government into national law, or repealing the ECA 1972 and other statutes. On that basis it is said that the proper role of Parliament will be preserved.[42]

81. That submission is wrong, for the following reasons.

82. *First*, the decision to leave the EU (and trigger Article 50) is a *de facto* legislative step. As set out above, the legal consequences of notifying under Article 50 are automatic at the end of two years (or later if unanimously agreed by all Member States). As a result, the ECA 1972 and the EUA 2011, as well as certain provisions of the devolution statutes, will become dead letters "*in reality if not in form*" following the UK's notification of its intention to leave the EU. The proposed use of the prerogative would accordingly deprive UK citizens of their rights and "*frustrate the will of Parliament expressed in a statute*."

83. *Second*, the Defendant's argument puts form over substance.[43] The Defendant suggests that the role of Parliament should be reduced to repealing or amending Acts that have been stripped of their meaning by the executive. In reality, Parliament's subsequent roles in either repealing/amended the Acts, or approving the ratification of any treaties which emerge from the negotiations, are entirely formal. As a matter of substance, Parliament will be unable to retain the Acts on the statute book, and it will be too late for Parliament to change its mind or refuse to ratify any withdrawal treaty with the EU and expect to return to the *status quo ante,* because Article 50 sets in motion a series of events which are outside of Parliament's control (see paragraphs 18-20 above).

84. *Third*, on the Defendant's account, Parliament's hands are effectively tied by an act of the executive such as to undermine Parliamentary legislative supremacy (which entails being able to

[42] See by way of example §§12(4)-(6) and 36-7 of the Detailed Grounds of Resistance.

[43] It is well-established that public law disputes should be decided by substance rather than formalism or semantics. See, for example, Lord Steyn in *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at p.585: To similar effect, see Lord Woolf CJ in *R(Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at [17], and Lord Steyn in *R(Burkett and another) v Hammersmith and Fulham London Borough Council* [2002] 3 All ER 97 at [31].

make and unmake any law). Parliamentary sovereignty is a fundamental principle of the common law (see e.g. *Thoburn v Sunderland City Council* [2003] QB 151, [56]-[57]*, R (Jackson and others) v Attorney General* [2006] 1 AC 262).[44] It is also trite that an earlier Parliament cannot legally bind a later Parliament. If the Defendant's account were correct then, on account of a mere executive act in triggering Article 50 unauthorised by Parliament, this or any future Parliament would be prevented from legislating to hold a second, binding referendum or deciding to retain the ECA 1972, EUA 2011, and the devolution statutes in their current form. If, following debate, Parliament authorises the executive to trigger Article 50, it will have decided that the UK should leave the EU and will have waived its ability to take those steps.

85. *Fourth*, the Defendant has not pointed to any authority for the principle that the prerogative may be relied upon to undermine the will of Parliament as expressed in primary legislation. He instead points to a single practical example of its exercise in the manner proposed: the revocation and renegotiation of double taxation treaties.[45] The People's Challenge IPs adopt the LC's response – LC Skel §47(5). Further, the fact that the sole example the Defendant is able to suggest relates to secondary legislation passed by negative resolution (i.e. without debate) highlights the constitutional novelty of his submission.

86. The Defendant also relies on an apparently *"clear"* understanding that "*the Government's policy was unequivocal that the outcome of the referendum would be respected"*.[46] This is addressed at LC Skel §§9 and 43. The referendum does not authorise the Defendant to use prerogative powers to pre-empt the decision of Parliament whether or not to maintain the statutory scheme enacted by the ECA 1972, EUA 2011, other statutes which depend upon EU membership and the devolution statutes and international agreements. Nor is it a proper basis for the suggestion that Parliament has already decided this matter for the purposes of Article 50. "Government policy" to take a particular course cannot subvert parliamentary sovereignty by conferring authority on the government that it would otherwise lack.

87. In summary, even if any prerogative power to derogate from the EU Treaties exists after the passage of the ECA 1972 and the EUA 2011, and even if it could in theory be exercised in the manner suggested by the Defendant, it would be an abuse of the prerogative power and so unlawful for him to rely on it in order to take the "*decision*" to leave the EU without reference to

[44] See also *AXA General Insurance Ltd, Petitioners* [2011] UKSC 46; [2012] 1 AC 868.

[45] See, §§36ff. of the Detailed Grounds of Resistance.

[46] Detailed Grounds of Resistance, §§1 and 5(2).

Parliament. It would reduce Parliament's role to engaging in the procedural formalities which would flow from the UK leaving, or having already left, the EU.

(H) CONCLUSION

88. For the reasons set out above, the People's Challenge IPs invite the Court to declare that the UK's constitutional arrangements mean that only Parliament can lawfully "*decide*" to leave the EU for the purposes of Article 50 TEU; and that the Defendant may only "*notify*" such a decision to the European Council under Article 50(2) TEU once he has been properly authorised to do so by an Act of Parliament.

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21 September 2016

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) DEIR TOZETTI DOS SANTOS
Claimants

and

THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION
Defendant

and

(1) AB AND A CHILD AND OTHERS
(2) GRAHAME PIGNEY AND OTHERS
Interested Parties

and

XXXXXXXX AND OTHERS
Intervener

SKELETON ARGUMENT ON BEHALF OF THE SECOND GROUP OF INTERESTED PARTIES ("The People's Challenge IPs")

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