IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2016/0196**

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

B E T W E EN :-

R on the application of
(1) GINA MILLER
(2) DEIR TOZETTI DOS SANTOS

Respondents

– and –

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Appellant

– and –

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

Interested Parties

– and –

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

Interveners

WRITTEN CASE FOR MR GEORGE BIRNIE & OTHERS (THE 'EXPAT INTERVENERS')

Structure of Submissions

(A) INTRODUCTION

1. This Written Case is filed on behalf of the first-named group of Interveners, who intervened in the proceedings before the Divisional Court (for convenience, the "**Expat Interveners**", as they were described in Orders of the Divisional Court).

2. This intervention is made in support of the First and Second Respondents, Mrs Miller and Mr Santos. The Court is respectfully invited to dismiss the Secretary of State's appeal and uphold the order of the Divisional Court dated 7 November 2016 (the "**Order**"), by which it was declared that:

> "*The Secretary of State does not have power under the Crown's prerogative to give notice pursuant to Article 50 of the Treaty on European Union for the United Kingdom to withdraw from the European Union.*"

3. The Expat Interveners' submission is that the Order should be upheld for the reasons set out in the Judgment of the Divisional Court dated 3 November 2016 (the "**Judgment**"), alternatively, for the further and/or additional reasons below, which the Expat Interveners will develop in oral submissions, if so permitted.

4. Save to the extent they are put differently either in this Written Case or in oral submissions, the Expat Interveners respectfully adopt the submissions of Mrs Miller and Mr Santos as to the basis upon which the Order should be upheld on appeal.[1]

5. The Expat Interveners make the following further and/or alternative submissions. These are confined to the topics (a) upon which they addressed the Divisional Court below, and (b) identified in their application to the Supreme Court pursuant to SCR r.26(1), dated 10 November 2014.

(B) KEY SUBMISSIONS

6. The essential submissions can be shortly stated and are set out below. The submissions at **(1)**, **(2)**, **(3)** and **(4)** below are each, if accepted, entirely dispositive of

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[1] Written Case for the First Respondent (Mrs Miller) dated 24 November 2016; Written Case for the Second Respondent (Mr Dos Santos) dated 24 November 2016.

this appeal. Submission **(5)** is essentially in reply.[2] Submission **(6)** below would be dispositive in the event it were found that the Secretary of State has prerogative power to give notification under Article 50(2) of any lawfully made decision to leave the EU.

(1) Conferral of (sovereign) legislative competence by Parliament (§14-§23)

(a) By the European Communities Act 1972, not only did Parliament[3] grant EU law rights in domestic law, but it also conferred part of its own (sovereign) legislative competence upon (what are now) the EU Institutions.[4] Legislative competence was only Parliament's to exercise and only Parliament's to confer.

(b) Parliament's conferral of its own sovereign power to make legislation cannot lawfully be undone in exercise of prerogative powers, being contrary to the doctrine of Parliamentary sovereignty.[5]

(c) That this result arises from the unique nature of the EU legal order should assuage concerns that appear to suffuse the Secretary of State's Written Case as to the suggested wider applicability of the declaration of the Divisional Court.

(2) Informed interpretation of the 1972 Act (§24-§31)

(a) Parliament should be taken to have intended by the 1972 Act (i) to give effect to the UK becoming subject to a unique and permanent legal order, (ii) voluntarily to limit its own sovereignty and to confer part of its own sovereign legislative competence (as in (1) above), and (iii) that the foregoing was a constitutional settlement which could not be undone by exercise of any prerogative power to withdraw from the Treaties without Parliamentary approval.

(b) The correct interpretation of the word "*rights...* [etc.] *from time to time created or arising under the Treaties*" in s.2(1) 1972 Act cannot mean the absence of the same by reason of the UK withdrawing from the Treaties in exercise of

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2 Submission **(5) below** is primarily in answer to the Secretary of State's purported reliance upon the European Union Referendum Act 2015 and its legislative history

3 The Crown in Parliament is referred by the shorthand 'Parliament' in this Written Case.

4 As now enshrined in Title II TFEU, but as recognised by the Court of Appeal in *Blackburn* (cited below) and by the CJEU in *Costa v ENEL* and *van Gend & Loss* (both cited below).

5 As described by in the Judgment at §18-36, and by Mrs Miller in her Witten Case, at §20-33.

prerogative powers on the international plane without Parliamentary approval.[6] The legislative history of the 1972 Act also supports this interpretation.

(3) Article 50 notification and EU law rights enjoyed overseas (§32-§36)

(a) The rights particularly relied upon by the Expat Interveners (and up to 1-2 million in their position) include 'category (ii) rights', as defined by the Divisional Court.[7]

(b) Viewed through the prism of conferral of legislative competence (above), Parliament has authorised the conferral of effective EU law rights upon British citizens on foreign soil.

(c) For the reasons set out in the Judgment, giving of notification under Article 50 TEU will have the inevitable consequence that those rights will be destroyed. This cannot be done in lawful exercise of prerogative powers.

(4) The European Union Act 2011 (the "2011 Act") (§37-§43)

(a) Even if the 1972 Act did not abrogate any prerogative power to withdraw from the EU, the 2011 Act did so. It expressly requires an Act of Parliament for any variation of competences under the Treaties, whether *increasing* or *decreasing*.

(b) On the proper interpretation of the 2011 Act, Parliament cannot have intended that no such Act was required in respect of wholesale withdrawal.

(5) The European Union Referendum Act 2015 (the "2015 Act") (§44-§50)

(a) The 2015 Act made no provision giving effect to the referendum result. Clear words would have been used. It pointedly omitted words such as, for example,

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6 Noting that a multilateral agreement to withdraw would, for the purposes of s.1(2) 1972 Act, have been a 'Treaty' requiring approval by resolution of each House of Parliament under s.1(3).

7 As classified by the Divisional Court in its Judgment at §60, thus: "*...those enjoyed by British citizens and companies in relation to their activities in other Member States, as provided for by EU law, for example pursuant to rights of free movement of persons and of capital and rights of freedom of establishment...*".

those used in the Northern Ireland Act 1998. The referendum was (only) "*part of the constitutional requirements*" for the purposes of Article 50(2).[8]

(b) The Secretary of State's case that the 2015 Act was passed on the 'understanding' that the result would be implemented, and that Parliament '*left the field unoccupied*' purposefully, assumes what it seeks to prove. It is factually unjustified and the constellation of statements relied upon fails to provide any sound basis to contend it has the prerogative power contended for.

(6) Decision to leave the EU and basis of any such decision (§51-§60)

(a) Even if there is a prerogative power to give notification of a 'decision' to leave the EU under Article 50(2), no such decision to leave the EU, for which there are public law indicia, has yet been validly or lawfully taken, and accordingly any such power has not yet arisen.

(b) The Secretary of State argued below that the decision was taken (on an unknown date, by unidentified individuals, upon unspecified considerations, applying an unspecified level of scrutiny) to follow the referendum result. It is now (baldly) asserted that the decision has been taken to accept the outcome.[9]

(c) Such a decision would have been flawed as *ex hypothesi* excluding from account relevant considerations including the fundamental rights of British citizens overseas (and others) ineligible to vote, who are profoundly affected.

(C) THE EXPAT INTERVENERS

7. The Expat Interveners have a distinct interest in the matters in issue. Each of them, in exercise of rights of Citizens of the Union pursuant to Art. 20 TFEU, reside or have acquired interests in another Member State of the EU.

8. The UK's future relationship with the EU (in particular, the extent to which the Expat Interveners may be able to continue to exercise rights of Union citizenship) touches

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8 *Shindler v Chancellor of The Duchy of Lancaster & anor* [2016] EWCA Civ 469, Dyson MR §[13].

9 Written Case for the Secretary of State, §62(d) and (to the same effect) §80.

upon almost every aspect of their lives[10] – e.g. evidence of ongoing cancer treatment before the Divisional Court.

9. The Expat Interveners are concerned to ensure that any decision to leave the EU and give notice under Art. 50 is taken lawfully, in accordance with constitutional requirements and with such regard for the rights of those affected as the law may require.[11]

10. The Expat Interveners are each members of a voluntary association, *Fair Deal for Expats*, which is registered as a non-profit association in France;[12] its membership now extends to individuals in 18 EU Member States, whose combined British-born population exceeds 1 million. The estimated total British disapora in the 27 other Member States of the EU is between 1 and 2 million.[13]

(D) THE EXPAT INTERVENERS' CASE

11. The Expat Interveners' submissions proceed from the observations of the Divisional Court (at §2), which were common ground below, that:[14]

(a) It is a fundamental rule of UK constitutional law that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. By legislation Parliament can change the law of the land in any way it chooses.

(b) There is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen. The ECA 1972, which confers precedence on EU law, is the sole example of this.

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10 An illustrative list of affected rights is set out in the **Annex** hereto.

11 The Expat Interveners do not shrink from saying that they would prefer the UK not to leave the EU, but that was not a question before the Divisional Court, and does not fall to be determined on appeal.

12 Registered under the French Non-Profit Organizations Law of 1901 (number W472001988); for further details, see witness statement of Mr. John Shaw, filed in proceedings below.

13 Figures from (a) February 2016 Cabinet Office policy paper entitled *The Process for Withdrawing from the European Union* (Cmd. 9216) in which it is estimated that 2 million UK Citizens are living, working or travelling in the 27 other Member States of the EU; and, for convenience only (b) Briefing Paper MW364, published by *Migration Watch UK*, which draws on multiple sources and estimates that 1.2 million British born nationals reside in other EU Member States. Both are exhibited to the Statement of Mr Shaw.

14 Judgment of the Divisional Court, §20.

12. For convenience, references in this case to the doctrine of Parliamentary sovereignty are references to these cardinal principles.

13. As recorded in the Judgment, it was common ground below that notice under Article 50(2) TEU cannot be withdrawn once given, and that Article 50 does not allow for conditional notice to be given.[15] The Secretary of State asks the Court to proceed on the same basis.[16] The Expat Interveners respectfully make the same request. But their case in any event is that the Government would lack prerogative power to give Article 50 notice whether or not it could lawfully be revoked, or given conditionally.[17]

(1) Conferral of (sovereign) legislative competence by Parliament

14. The Expat Interveners' primary case is that the effect of notice under Article 50 TEU in purported exercise of prerogative powers would frustrate or substantially undermine the 1972 Act by the destruction of rights arising under it. This is for the reasons set out in the Judgment[18] and for the further reasons in Mrs Miller's Written Case[19] and Mr Santos' Written Case,[20] which the Expat Interveners gratefully adopt.

15. Further, the 1972 Act made profound structural change to the constitutional settlement of the UK. By it, Parliament conferred significant competences, including part of its own (sovereign) legislative competence upon what are now the EU institutions.[21]

16. Legislation was required in order for the UK to join the EEC,[22] and the Expat Interveners adopt the submission of Mr Santos that is was one of the "*constitutional*

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15 Judgment of the Divisional Court, §10.

16 Written Case for the Secretary of State, §17.

17 For the reasons, without limitation, that are set out in Section D(1) of this Written Case.

18 Judgment of the Divisional Court, §77 to §93.

19 Written Case for Mrs Miller, §15-§18 and §44-§69 (on principles further set out at §20-§43).

20 Written Case for Mr Santos, §40-§46 (on principles further set out at §18-§30).

21 Divisional Court hearing transcript: day 2/p.32/ln. 17-23.

22 As to which the Expat Interveners rely upon (a) the finding of the Divisional Court at §42 of its Judgment, and (b) the submissions of Mrs Miller (at §7 of her Written Case), and, in particular, the detailed submissions of Mr Santos (at §32 of his Written Case) as to how and why it was necessary for the 1972 Act to be passed and the UK could not otherwise have acceded to the Treaties.

requirements" of the UK required by Article 2 of the Accession Treaty.[23] Further, it is clear that no *relevant* prerogative power was in fact exercised upon accession:

(a) both Houses of Parliament authorised the signing of the Accession Treaty, which was signed on 22 January 1971 (which included Article 2, below);[24]

(b) Article 2 of the Accession Treaty in turn required ratification "*in accordance with their respective constitutional requirements*";[25] and

(c) the 1972 Act was then enacted and given Royal Assent on 17 October 1972, with ratification on the following day, on 18 October 1972.

17. For the UK to become part of the Community legal order, Parliament was required to confer aspects of its sovereign legislative authority as follows:

(a) By s.2(1) of the 1972 Act, Parliament gave effect to *"...all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies provided for under the Treaties..."* and precedence to such rights over domestic law, including its own legislation.[26]

(b) In so doing, it conferred legislative competence upon (what have since become) the EU Institutions in respect of those rights, which, by reason of the doctrine of Parliamentary sovereignty, only it could confer.[27]

(c) In its present incarnation, Article 3 of the Treaty on the Functioning of the European Union (the "**TFEU**") sets out the areas in which the EU Institutions have exclusive competence.[28] In respect of these, Article 2 TFEU provides that:

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23 Written Case for Mr Santos, §32(6)

24 As to which, see legislative history appended to Mrs Miller's Written Case.

25 Treaty of Accession of Denmark, Ireland, Norway and the United Kingdom (1972).

26 As to which, the Expat Interveners adopt the submissions at of Mrs Miller at §2(1) and §5(3) to (5) of her Written Case, and those of Mr Santos at §31(1) of his Written Case.

27 Those rights continue to subsist only by virtue of the 1972 Act (or other Acts): s.18 of the 2011 Act.

28 Article 3.1 TFEU.

"*...only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.*"

(d) In respect of areas of shared competence (under Article 4 TFEU), Article 2 likewise provides that Members States may only exercise, for example, legislative competence to the extent the Union institutions have not.

(e) Further, by s.3 of the 1972 Act, Parliament also conferred jurisdiction upon the European Court to make decisions as to the interpretation of the Treaties of which judicial notice must be taken (including proceedings brought by the Commission in exercise of its powers to determining whether general principles of EU law, including the principle of effectiveness, have been observed).[29]

18. This conferral of sovereign authority was an accepted feature of the Community legal order well before enactment of the 1972 Act:

(a) By its judgment in *van Gend & Loos*[30] the European Court had accepted that the EEC Treaty was "*more than an agreement establishing obligations between contracting states... It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.*" Thus, the Community was understood to constitute a "*...new legal order of international law for the benefit of which states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.*"

(b) By its judgment in *Costa v ENEL* the European Court found that "*...transfer by the States from their domestic legal system to the Community legal system of rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights...*";[31]

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29 See, for example, *Commission v United Kingdom* (C-484/04) which concerned rights considered by the Divisional Court and in which DTI guidelines with regard to rest periods for the purposes of the Working Time Regulations 1998 (implementing Directive EC 93/104) were found to be misleading, incompatible with the objective of the Directive and contrary to the principle of effectiveness.

30 Case 26/62 *van Gend & Loos*, Grounds of Judgment at p.12.

31 *Costa v Ente Nazionale Per L'Energia Elettrica (ENEL)* [1964] C.M.L.R. 425, at 455.

(c) Likewise, the Court of Appeal had found in *Blackburn v AG* that "*...by signing the Treaty of Rome Her Majesty's Government will surrender in part the sovereignty of the Crown in Parliament and will surrender it forever*" and that this step would be "*irreversible*" and would result in shared sovereignty;[32]

19. The Crown has undoubtedly retained prerogative powers to conclude treaties on the international plane, which do not confer or remove legal rights in domestic law. The dualist nature of the UK constitution is a reflection and indeed a necessary incident of that principle, as recognised by the Divisional Court.[33]

20. But the inevitable consequence of giving notice under Article 50 is that the Treaties will cease to apply to the UK and the conferral by Parliament of legislative power upon the EU Institutions will thereby be taken away, contrary to Parliament's will.[34]

21. Thus the unique nature of the EU legal order explains why there never has been any relevant prerogative power of the type now asserted. The Secretary of State's assumption that there ever[35] existed any *relevant* such prerogative (that could be exercised without corresponding domestic legislation) is without foundation and cannot be reconciled with either the doctrine of Parliamentary sovereignty or the legislative history.

22. The Secretary of State's assurance that aspects of EU law will be maintained is no answer to this point.[36] Nor is the inapposite analogy drawn by the Secretary of State with the government's exercise of treaty making powers *simpliciter*.[37]

23. Contrary to what is contended,[38] when the government participates in legislative processes provided for by the Treaties, it does not act purely on the international plane

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32 *Blackburn v Attorney General* [1971] 1 WLR 1037, per Lord Denning MR at 1039C-E.

33 Judgment of the Divisional Court, §89; Mr Santos' Written Case, §13 which is adopted.

34 As the Divisional Court rightly found, national courts would also have no obligation to make, and individuals would not be able to seek, a reference to the CJEU: Judgment, §58 to §59.

35 For present purposes, since the Case of Proclamations and the Bill of Rights.

36 These are competences that Parliament cannot itself replace. The fact that at some later date there may be a negotiation by which EU law rights may be replaced is not an answer (see Divisional Court hearing transcript: day 2/p. 31/ln. 6 to p.32/ln. 16).

37 As suggested by Secretary of State in his Written Case, at §46 to §48, and as to which the submissions made by Mr Santos in his Written Case at §12 are adopted.

in the exercise of prerogative powers. Rather, it participates in a delegated aspect of the legislative functions of Parliament which have been conferred upon the EU Institutions, to be exercised in accordance with the Treaties.

(2) Informed interpretation of the 1972 Act

24. Any multilateral agreement by which withdrawal was achieved would have required approval by resolution of each House of Parliament under s.1(3), being a 'Treaty' for the purposes of s.1(2) of the 1972 Act. Parliament cannot therefore have intended the wording of the 1972 Act to accommodate circumstances where there were no rights of the kind referred to because the UK had withdrawn by this means.

25. Neither can s.2(1) be given the interpretation contended for by the Secretary of State on the basis it was intended that the Government could unilaterally withdraw from the Treaties: this would be contrary to the correct informed interpretation of the section.

26. In interpreting the 1972 Act it must be inferred that Parliament intended it to be given a fully informed, as opposed to a purely literal, interpretation: this requires that attention be paid to both (a) the state of the law before the Act containing it was passed, and (b) the history of the enacting of the Act.[39]

27. For the purposes of both, the relevant chronology is as follows:

(a) **15 July 1964:** Judgment of the ECJ in *Costa v ENEL* (see above) in which it was found that the limitation on sovereign rights was '*permanent*';

(b) **23 May 1969:** signature of the Vienna Convention on the Law of Treaties (the "**VCLT**").[40] Art. 56 provides for a presumption against unilateral withdrawal.

(c) **10 May 1971:** Judgment of the Court of Appeal in *Blackburn v AG* (see above) by which the Court of Appeal found the surrender of sovereignty to be "*irreversible*" and to result in shared sovereignty;

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38 As submitted to the Divisional Court below: day 2/p.33/ln. 4-23.

39 Bennion on Statutory Interpretation, 6th Ed, Code §201, pp.537-539.

40 Vienna Convention on the Law of Treaties (1969), ratification list and Article 56.

(d) **25 June 1971:** the VCLT was ratified by the UK;[41]

(e) **22 January 1972:** the UK signed the Accession Treaty;[42]

(f) **17 November 1972:** the 1972 Act was passed;

(g) **18 November 1972:** the Accession Treaty was ratified;[43]

(h) **27 January 1980:** the VCLT took effect, having reached 35 ratifications.[44]

28. It is plain from the foregoing that Parliament should be taken to have intended by the 1972 Act (i) to give effect to the UK becoming subject to a unique and permanent legal order, (ii) voluntarily to limit its own sovereignty and to confer part of its own sovereign legislative competence (as above), and (iii) that the foregoing was a constitutional settlement which could not be undone by exercise of any prerogative power on the international plane to withdraw without Parliamentary approval.

29. As to the latter proposition: not only does the 1972 Act fall to be construed in a manner consistent with Article 56 of the VCLT, which was signed and ratified before its enactment,[45] but the state of the law before the Act containing it was passed was such that it was highly doubtful that there was any right to withdraw unilaterally.

30. As the Divisional Court rightly recognised (at §87 of its Judgment):

> *"Parliament having taken the major step of switching on the direct effect of EU law in the national legal systems by passing the* [1972 Act] *as primary legislation, it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again".*

31. The Secretary of State's case that Parliament intended that s.2(1) of the 1972 Act (a) be merely a conduit by which "*rights...* [etc.] *from time to time created or arising under the Treaties*" referred to are incorporated into domestic law, and that (b) those

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41 VCLT, ratification list.

42 Treaty of Accession of Denmark, Ireland, Norway and the United Kingdom (1972).

43 VCLT, ratification list.

44 VCLT, ratification list.

45 *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, per Lord Diplock at 771.

words refer to "*rights and obligations created, altered and withdrawn from* as a *result of exercise of prerogative power*" is untenable accordingly.[46]

(3) Effect of Article 50 notification upon EU law rights enjoyed overseas

32. Many of the rights enjoyed by British citizens affected beyond these shores are fundamental rights. Legislation is required to take them away and they can only be overridden by express language or necessary implication therein.[47] Those rights include fundamental rights such as citizenship of the EU and rights guaranteed under the Charter of Fundamental Rights (the "**Charter**").[48]

33. Rights upon which the Expat Interveners are particularly reliant and which flow from the UK's membership to the European Union, are set out in the **Annex** to this Written Case. They were described as "Category (ii) rights" by the Divisional Court,[49] being rights that are enjoyed by British citizens and companies in relation to their activities in other Member States as provided for by EU law.

34. The effect of notification under Article 50 will be to extinguish those rights:[50]

    (a) Art. 50 does not state in express terms whether rights already exercised by citizens will be preserved in the event that the Treaties cease to apply;

    (b) There is no general principle of EU law specifically protecting acquired rights of individuals. It is unlikely that general principles of EU law could protect acquired rights within either UK courts or those of another Member State;[51]

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46 As to which, see Written Case for the Secretary of State, §46-§50 (and, in particular, §49).

47 *Ahmed and others v Her Majesty's Treasury (JUSTICE intervening) (Nos 1 and 2)* [2010] UKSC 2; [2010] 2 AC 534.

48 Charter of Fundamental Rights of the European Union, 2000/C 364/01.

49 Judgment of the Divisional Court, §61.

50 While it is possible that like or analogous rights will be negotiated by the UK government, there can be no guarantee as to this, and such rights would, in any event, be different rights that were not those conferred by Parliament in the manner set out herein.

51 S. Douglas-Scott, *What Happens to 'Acquired Rights' in the Event of a Brexit?*, U.K. Const. L. Blog (16th May 2016) (available at https://ukconstitutionallaw.org/). The Government has previously taken the view that there can be no guarantee that such rights will continue to exist (*The Process for Withdrawing from the European Union* (Cm 9216, February 2016).

(c) The VCLT, and in particular Art.70, provides no guarantee as to vested or acquired rights of individuals in the Expat Interveners' situation;[52]

(d) Customary international law is unclear as to the scope of acquired rights and is thought unlikely to play a significant role in the legal processes arising out of the UK's exiting of the EU.[53]

35. For the reasons set out in the Judgment of the Divisional Court,[54] and (to the extent they are further and/or alternative reasons) by Mrs Miller[55] and Mr Santos,[56] it is not open to the Government to extinguish those rights without Parliamentary authority to do so. Only Parliament itself can remove statutory rights which it had itself has created.

36. Finally, it is incorrect to suggest that the reference to EU laws "*to be given legal effect or used in the United Kingdom*" in s.2(1) 1972 Act means that the 1972 Act does not give effect to rights exercisable in or against other Member States.[57] On the contrary:

(a) As set out above, Parliament enacted the 1972 Act for the sole purpose that the UK would join the EEC, and thereby (by accession to the Treaties) become part of a unique legal order by which, reciprocally, such laws would be exercisable in or against other states.

(b) Viewed through the prism of conferral of legislative competence (above), by the 1972 Act Parliament has authorised the grant by what are now the EU Institutions of effective EU law rights upon British citizens on foreign soil.

(c) In the words of the Divisional Court, in reality "*Parliament knew and intended that enactment of the 1972 Act would provide the foundation for the acquisition*

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52 S. Douglas-Scott, *What Happens to 'Acquired Rights' in the Event of a Brexit?*, cited above.

53 Professor Vaughan Lowe QC, Written Evidence before the EU Justice Sub-Committee (AQR0002).

54 Judgment of the Divisional Court, §62-§65 and §92 to §94.

55 Written Case for Mrs Miller, §2, §15-§18.

56 Written Case for Mr Santos, §37 (in particular §37(5) and (6)) and §40-§42.

57 Written Case for the Secretary of State, §21(b).

by British citizens of rights under EU law which they could enforce in the courts of other Member States."[58]

(4) Effect of the 2011 Act

37. The Secretary of State asks the Court to infer from silence in the 2011 Act that the prerogative power, he says survived the enactment of the 1972 Act, was maintained. That is wrong. Even if a prerogative power to withdraw from the EU existed and was not abrogated by the 1972 Act, it was so abrogated by the 2011 Act.

38. The 2011 Act concerns the UK constitutional requirements for amendments to the TEU and TFEU. At EU level, such amendments are government by Article 48 TEU.

39. Whether such amendments are made under the ordinary revision procedure (the "**ORP**") under Article 48(2)-(5) TEU, or under the simplified revision procedures (the "**SRP**") under Article 48(6), the decision is required to be ratified or approved "*by all the Member States in accordance with their respective constitutional requirements.*"[59] Notably, the ORP may either *increase* or *decrease* competences conferred on the EU.

40. By sections 2(1)(b) and 3(1)(b) of the 2011 Act, which relate respectively to the ORP and the SRP, Parliament has provided that any relevant ratification or approval of the amendments may not take place until authorised by an Act of Parliament, no matter how small and insignificant the proposed amendment.

41. The Expat Interveners submit it is inconceivable that Parliament sought to take express control of even trivial amendments to the competences of the Union, whilst accepting that it did not have any say in whether, as far as those for whom it legislates are concerned, the application of those competences would be completely destroyed. As a matter of the express language and logic,[60] any prerogative power to do so was accordingly abrogated by necessary implication.

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58 Judgment of the Divisional Court, §66.

59 Article 48(4) TEU under the ORP and 48(6)(2) TEU under the SRP respectively.

60 Being the test set out by the Appellate Committee of the House of Lords in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299, at §45.

42. As to the informed interpretation of the 2011 Act,[61] the Expat Interveners make the following two further observations:

(a) First, the assumption that it was Parliament, rather than the Government, that had the power to authorise withdrawal from the EU first articulated in *Blackburn* persisted at least until 20 May 2016, that is, throughout the period of the passing of the Bill that gave rise to the 2011 Act, when the Court of Appeal handed down judgment in *Shindler*.[62]

(b) Secondly, there was nothing new about authorisation by Act of Parliament of changes made to the scope of EU law, as the legislative history of these various changes shows. Indeed, it would have been surprising to omit this well-understood requirement. What was new was the provision for referendums in addition to Acts in certain circumstances.

43. For these reasons, the Expat Interveners submit that, even if the prerogative power upon which the Appellant seeks to rely existed or survived the enactment of the 1972 Act, it was conclusively abrogated by Parliament in enacting the 2011 Act.

(5) Nature of the 2015 Act

44. The Secretary of State rightly accepted below[63] that he has no express statutory authority to give notification under Article 50 TEU. Rather, his case is that:

(a) the premise of the 2015 Act was the continued exercise of the Government's prerogative powers to give Article 50 notice as the first step in implementing a 'leave' vote ("*that was also the clear understanding of all concerned...*");[64] and

(b) the inference to be drawn from the statutory scheme[65] is that "*Parliament cannot be taken to have done anything other than leaving the field (here, at least withdrawal or commencing the process of withdrawal) unoccupied.*"[66]

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61 As to which, see §26 of this Written Case, above.

62 Cited above, per Lord Dyson MR, at §19.

63 As recorded in the Judgment of the Divisional Court, §105.

64 Written Case for the Secretary of State, §33 and §78(c).

45. The Expat Interveners adopt the submission of Mr Santos that referendums are advisory only unless enabling legislation provides otherwise[67] and of Mrs Miller that 2015 Act says nothing about the consequences of the referendum result.[68]

46. They make the further submission that had Parliament intended that the result was to be implemented, express language would have been used such as that found in the Northern Ireland Act 1998, for example, which requires steps to be taken to give effect to a referendum result which accommodate that subsequent negotiation would be needed to achieve the result.[69]

47. The omission of any such requirement militates against (rather than for) the inference the Secretary of State asks the Court to draw from silence that a prerogative power to notify without legislation was left intentionally.

48. Further, in answer to the Secretary of State's case, it is relevant to the interpretation[70] of the 2015 Act that (as the Divisional Court found[71]) it was passed against a background that included a clear briefing paper to parliamentarians explaining that the referendum would have advisory effect only.[72]

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65 It is contended that (a) the 2015 is to be relied upon, taken together with the 2008 Act and the 2011 Act, as an aid to the construction of the 1972 Act, and (b) that those acts should be interpreted in accordance with a presumption of consistency: Written Case for the Secretary of State, §76-77.

66 Written Case for the Secretary of State, §79(c).

67 Written Case for Mr Santos, §52

68 Mrs Miller's written case, §77 (it also submitted that the absence of provision for binding effect is in contrast to, for example, section 8 of the Parliamentary Voting System and Constituencies Act 2011).

69 Section 1 of the Northern Ireland Act 1998 requires that the Secretary of State lay before Parliament such proposals as are agreed between UK Government and the Government of the Republic of Ireland in the event of a referendum result in favour of Northern Ireland becoming part of a united Ireland.

70 As to which, see §26 of this Written Case, above.

71 Judgment of the Divisional Court, §107.

72 House of Commons Library Briefing Paper 07212 (3 June 2015), which described the referendum 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"*; note that this briefing paper is not relied upon by the Expat Interveners as evidence of the truth of its contents, rather, in answer to the Secretary of State's case as to the alleged 'understanding' of legislators and in support of the finding of the Divisional Court, at §107.

49. Finally, in *Schindler v Chancellor of The Duchy of Lancaster & another*,[73] the Court of Appeal accepted that the 2015 Act contains (only) "*part of the constitutional requirements of the UK as to how it may decide to withdraw from the EU*" (emphasis added) and in passing it Parliament determined that those requirements included a referendum (albeit "*[t]he 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*").[74]

50. The Secretary of State's case that the 2015 Act purposefully left the field unoccupied for implementation of the referendum result in exercise of prerogative powers is contrary to the true informed interpretation of that Act, accordingly.[75]

(6) Decision to leave the European Union

51. The First Interveners submit that no decision to leave the EU has yet been taken by the Secretary of State for which there are any recognisable public law indicia – less still one which would allow a proper analysis of its basis, content, *etc.*. Alternatively, any such decision that has been taken is likely, subject to the absence of adequate particulars, to have been unlawful on traditional public law grounds.

52. In preparation for the hearing before the Divisional Court, the First Interveners wrote to the Secretary of State requesting clarification as to whether a decision had been taken and, if so, particulars of that decision.[76] No substantive response was received.

53. For the first time in his Detailed Grounds of Resistance, the Secretary of State sought to rely on a constellation of public statements to imply that a decision to leave the EU had been taken pursuant to Article 50(1) TEU. It was not however clear below whether the Secretary of State's position was (a) that a decision had been taken prior to the referendum (perhaps dependent upon a sufficient, but unspecified, majority and/or turnout);[77] (b) that the referendum result itself "*articulated*" the decision;[78] (c)

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73 [2016] EWCA Civ 469; and UKSC 2016/0105.

74 *Shindler*, cited above, per Lord Dyson MR at §[13] and §[19].

75 Noting that the judgment in *Shindler* was handed down on 20 May 2016.

76 Letter dated 20 July 2016, at Exhibit JDS1, p.8.

77 The Government's policy, prior to the Referendum, was said to be "*unequivocal*" that the outcome of the referendum would be '*respected*'. This is said to have been "*expressly and plainly stated*" by Baroness Anelay of St Johns on the floor of the House of Lords on 23 November 2015, see: Detailed Grounds of Resistance, §12(1), fn.1.

that the Secretary of State has decided to withdraw since the referendum;[79] or (d) a combination of the above.[80]

54. Notably, none of the statements relied upon by the Secretary of State indicated whether the Government's position was that the referendum result would be given effect to by exercise of prerogative powers, or by bringing forward new legislation.

55. Before this Court, the Secretary of State has adopted the new and narrower position that "*[t]he decision to leave has already been taken, by the Government, accepting the outcome of the referendum.*"[81]

56. However, contrary to the requirement that sufficient notice of an administrative decision be given such that an affected person has an opportunity to bring a challenge thereto,[82] the Secretary of State has yet to state: (a) when it was taken, (b) by whom (other than by mere reference to "the Government"), (c) on what basis, or (d) what considerations were taken into account, if any, other than the referendum result. This is surprising for a decision of such constitutional, economic and social importance.

57. Speeches by government ministers, even when expressed in mandatory terms, cannot be treated as a formulated policy statement, or as a decision, for the purposes of public law,[83] nor can a manifesto commitment,[84] and policies must generally be published.[85]

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78 See Detailed Grounds of Resistance,§5(2).

79 See Detailed Grounds of Resistance,§12(3).

80 At the hearing before the Divisional Court, the Secretary of State, through the Attorney General, relied on: (a) a speech byDavid Cameron PM on 23 January 2013; (b) that the government made clear during the passage of the 2015 Act that it "*would act in accordance with the outcome of the referendum*"; (c) the referendum result; (d) a speech by David Cameron PM on 24 June 2016 that the referendum result would be respected and acted upon; (e) a speech by Theresa May in announcing her candidacy for leader of the Conservative Party in which she stated that she "*would also act on the result of the referendum*"; and (f) that since becoming Prime Minister, Theresa May and other ministers have "*made it clear repeatedly*" in statements that the government will deliver the departure of the UK from the EU: see Transcript p.59, line 21 to p.61, line 13.

81 Appellant's Written Case, §62(d); see also §80 to the same effect.

82 *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, 26.

83 *Bobb v Manning* [2006] UKPC 22, per Lord Bingham at paragraph 16.

84 A manifesto commitment cannot be relied upon, for example, as giving rise to a legitimate expectation as regards the delivery of the promise after elected even if addressed at specific categories of persons: *R v Department for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115.

85 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at §27 per Lord Dyson (Lord Hope, Lord Walker, Lady Hale, Lord Collins, Lord Kerr agreeing: §§170, 195, 218, 219, 238).

Yet the Secretary of State relies only on speeches and manifesto commitments and has not published the decision or its reasons.

58. The Expat Interveners accordingly submit that no decision to leave the EU in accordance the UK's constitutional requirements under Article 50(1) TEU for which there are public law indicia can be identified.

59. The inability to identify any such decision frustrates any public law challenge to it. Nevertheless, on the case put by the Secretary of State, the sole consideration taken into account would have been a majority vote to leave the EU in the referendum. Any decision taken on this sole basis would be unlawful.

60. The most obvious, but by no means the only,[86] ground would be the failure to give anxious scrutiny to and/or take account of the fundamental rights of affected persons, such as the Expat Interveners, and in particular those who had no right to vote in the referendum,[87] which, by deciding automatically to follow only the referendum result, the Government *ex hypothesi* excluded from consideration.

(E) SUMMARY

61. The Expat Interveners respectfully invite the Court to dismiss the appeal, and uphold the Order of the Divisional Court, for the reasons set out in the Written Case of Mrs Miller (at §84), set out in the Written Case of Mr Santos (at §56) and for the following further and/or alternative reasons (as required by PD6 SC, §6.3.6):

(1) By enacting the 1972 Act, Parliament surrendered aspects of its legislative sovereignty and conferred the same upon (what are now) the EU Institutions. Such conferral cannot be undone by purported exercise of prerogative powers on the international plane and without Parliamentary consent.

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86 It was suggested in another party's application for permission to intervene that the manner in which the Government has approached the decision has created a large degree of uncertainty in relation to individuals' family and private life, interference with which cannot thereby be said to be "*in accordance with the law*" under Article 8(2) ECHR, and may not comply with the procedural aspects of Article 8 to be involved *"in the decision-making process seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests"*: *W v UK* (1998) 10 EHRR 29.

87 Many in the position of the Expat Interveners, including Mrs Morton and Mr Pennington, whose witness statements are before the Court, were excluded from the franchise by s.2 of the 2015 Act. Likewise excluded were most nationals of non-Commonwealth EU states residing in the UK.

(2) On an informed interpretation, s.2(1) of the 1972 Act does not contemplate the absence of rights and obligations of the nature referred to therein by reason of the UK's withdrawal from the Treaties without Parliamentary consent.

(3) The effect of Article 50(2) notification is to destroy fundamental rights relied upon by the Expat Interveners outside of the jurisdiction.

(4) If the prerogative power now contended for was not abrogated by the 1972 Act, it was abrogated by the 2011 Act.

(5) In enacting the 2015 Act, Parliament did not intentionally '*leave the field unoccupied*' on the understanding that prerogative powers would be used to implement a 'leave' result in the referendum.

(6) No decision, for which there are public law indicia, has been taken for the purposes of Article 50(1) TFEU and any such decision would be flawed.

25 November 2016

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ANNEX

1. The Expat Interveners rely upon and enjoy rights of EU Citizenship under Art.20(1) TFEU, which are given further expression by Directive 2004/38/EC. Some of these rights do not find expression in the European Convention on Human Rights, and therefore derive exclusively from or under the Treaties.

2. The Expat Interveners (and the estimated 1-2 million British citizens in their position) rely, in particular, upon rights arising under Articles 3 and 4 and Chapters III, IV and V Directive 2004/38/EC, which include (without limitation) rights to:[88]

   (a) enter another Member State, as may family members (whether Union citizens or not) without requiring an exit or entry visa;[89]

   (b) live in another host Member State for up to 3 months without any conditions or formalities;[90]

   (c) live in another host Member State for a period of longer than 3 months subject to certain conditions, depending on their status in the host country;[91]

   (d) permanent residence if they have lived legally in another Member State for a continuous period of five years (this also applies to family members);[92]

3. The Expat Interveners' are also particularly reliant upon rights under the Charter of Fundamental Rights of the European Union, which include rights to:

   (a) access to vocational and continuing training[93] and free compulsory education;[94]

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88 These rights extend to family members, as defined in Article 2 of Directive 2004/38/EC, who are not nationals of a Member State, pursuant to the same provisions.

89 Directive 2004/38/EC, Article 5.

90 Directive 2004/38/EC, Article 6.

91 Directive 2004/38/EC, Article 7.

92 Directive 2004/38/EC, Article 16.

93 Article 14(1).

94 Article 14(2).

(b) engage in work and to pursue a freely chosen or accepted occupation, and to seek employment, to work, to exercise the right of establishment and to provide services in any Member State;[95]

(c) in case of third country nationals authorised to work in the territories of the Member States, to working conditions equivalent to those of Union citizens;[96]

(d) social security and social assistance, and to access preventative health care and medical treatment under conditions established by national law and practices;[97]

(e) move and reside freely within the territory of the Union.[98]

25 November 2016

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95 Articles 15(1) and 15(3).

96 Article 15(3).

97 Articles 34 and 35.

98 Article 45.

UKSC 2016/196

IN THE SUPREME COURT OF THE UNITED KINGDOM

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

B E T W E E N :-

R on the application of
(1) GINA MILLER
(2) DEIR TOZETTI DOS SANTOS

Respondents

– and –

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Appellant

– and–

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

Interested Parties

– and –

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

Interveners

WRITTEN CASE FOR GEORGE BIRNIE & OTHERS (THE 'EXPAT INTERVENERS')

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