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:

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

Respondents

-and-

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Appellant

-and-

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

Respondents and/or Interested Parties

-and-

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

Interveners

CASE FOR AB, KK, PR and CHILDREN ('the AB Parties')

INTRODUCTION

1) This Written Case is filed on behalf of the second group of Interested Parties (who for convenience were referred to before the Divisional Court as 'the AB Parties'). Their position is particularly important as they are the only group comprising EEA nationals and children before the court: see the AB Parties' Notice of Objection §§1-4.

2) The AB Parties are representative of a very large group of persons, some hundreds of thousands, residing in the UK who derive their rights to do so from EU law as applied and implemented in domestic law through s2 of the European Communities Act 1972 (ECA 1972) and other statutes, including s7 of the Immigration Act 1988 **[Auth V12/Tab 118]**, and through various implementing measures (in particular the Immigration (EEA) Regulations 2006) **[Auth V13/Tab 133]**.

3) They adopt, without repetition, the arguments as to the applicable principles advanced by the First and Second Respondents (referred to herein as 'the Claimants') in their Written Cases and respectfully invite the Court to dismiss the appeal for the reasons given by the Divisional Court and the Claimants, and for the additional reasons explained below.

4) In summary, the AB Parties submit that in the absence of prior express authority given by an Act of Parliament, the Appellant may not lawfully use the royal prerogative to give notification under Article 50(2) TEU which adversely impacts on the fundamental rights and the best interests of affected children, already protected in domestic law, and which results in the removal or curtailment of the rights of residence enjoyed by EEA nationals and their family members in the United Kingdom, and which exposes them at an ascertainable point in time (the point of withdrawal from the EU) to potential criminal liability and summary removal as persons present without leave under the Immigration Act 1971 **[Auth V12/Tab 110]**.

5) The AB Parties focus on two groups in particular:

(1) 'EEA nationals' resident in the UK (this term is used in domestic legislation to describe EU nationals other than British Citizens); their EU national family members, including children; and their non-EU national family members, including children, who derive their rights of residence under EU law on the basis of their relationship with the EEA national who is exercising Treaty rights (e.g. marital partners, quasi-marital partners, civil partners, children, and other or extended family members[1] who are in a relationship of dependency[2] with the EEA national or his/her partner).
(This covers families such as KK, PR and their child).

(2) British citizens, in particular British children but also others such as the disabled, whose continued presence in this country is entirely dependent on persons who themselves are only permitted to reside in the UK because of rights derived from EU law as implemented in domestic law.
(This covers British children, like Mrs B's British daughter, who depend on their non-EU national carers, such as '*Zambrano carers*', to make their Treaty right to reside in the UK *as an EU citizen* effective and meaningful).

6) Specific consideration of these two groups in the context of this appeal is important because although they are amongst the most directly affected their very real interest in the outcome of these proceedings has, hitherto, gone underemphasised. To focus

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[1] E.g. other relatives who are dependent such as elderly parents, uncles/aunts, or relatives who are in ill-health.

[2] Dependency is more favourably defined under EU law than it is under UK law. The relevant UK law is set out in the Immigration Rules (which, according to the SSHD, properly protect human rights) or is applied through Convention rights under the ECHR. Broadly speaking, under EU law as transposed into domestic law through the Immigration (EEA) Regulations 2006, the test of dependency is entirely factual, is not confined to financial dependency *per se* and does not impose a test of necessity. Anyone who does not benefit from this law has to satisfy the stricter tests under ECHR law, and the much more restrictive requirements under the Immigration Rules.

on these two groups helps to illustrate, in practice, the dramatic and unlawful effects of the Appellant's proposed course of action.

7) Following the result of the referendum on 23 June 2016 there was a 41% increase in racially or religiously aggravated crimes recorded by police in England and Wales. The figure taking into account unrecorded crime is likely to be even greater. Eastern European nationals, like KK, and their family members in particular felt the brunt of the rise in hate crime, which was, at least in part, directly linked to the result of the referendum. Reports of people of foreign descent being told to "go back to where you came from, we don't want you here" became prevalent. Many EEA nationals and members of ethnic minorities have been victims of verbal or physical abuse. It was out of real concern for their own safety that the AB Parties sought, and were granted, anonymity to join this case – without which they would not have done so. Rather than to allay the AB Parties' fear, the very public vilification of the Divisional Court judges by some national press and MPs has gone on to aggravate it further.

8) This context serves to underscore the importance of this case to those, like the AB Parties, who have both a direct and actual interest in this appeal and whose continued lawful residence in the United Kingdom falls to be determined either, as the Appellant contends, through the exercise of the prerogative or, as the Claimants supported by the AB Parties contend, in a constitutional and democratically accountable way through which their interests can properly be represented in Parliament.

<u>THE CIRCUMSTANCES OF THE AB PARTIES</u>

9) **Mrs B** is a national of Trinidad and Tobago. She has a British child (a daughter aged 16) living in the UK. The child is in full time education and Mrs B is her primary carer. In recognition of her derivative right of residence, derived from the need to make her child's right to reside in the UK as an EU Citizen effective, Mrs B has been granted a residence card in accordance with the CJEU's decision in *Zambrano v*

Office national de l'emploi (ONEm) Case C-34/09 [2012] QB 265, [2011] 2 CMLR 46 **[Auth V11/Tab 104]** and the consequential amendments to the Immigration (EEA) Regulations 2006, reg 15A **[Auth V13/Tab 133]**. Her entitlement to remain in the UK is therefore as a '*Zambrano* carer'.

10) *Zambrano* carers and the children whom they support are a particularly vulnerable group. There are a very significant number of such persons who are concerned as to their position. Mrs B is concerned about the continuation of her own derivative right of residence, and effective continuation of the right of residence that her British child enjoys under EU law. The Appellant has not assured them, or those like them, as to what their status will be, or is likely to be, both during the withdrawal negotiations and after those negotiations have ended; or that the negotiations will protect the best interests of affected children in this special category. Mrs B and her British child are concerned that their rights are to be deployed as bargaining chips (as to which see below).

11) Many of the children affected by a decision to withdraw from the EU will be British Citizens, and therefore also European Union citizens, and as such they are at risk of deprivation of the beneficial incidents of <u>each</u> of these citizenships, and loss of both EU and UK constitutional rights.

12) Moreover, the effect of any decision to withdraw from the EU will place some British children at risk of being forced into having to leave the country of their nationality and into 'exile' outside the territory of the Union: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs and Anr* [2001] QB 1067 at §61[3] **[Auth V6/Tab 55]**. If the *Zambrano* carers of British children are unable to rely on EU law to continue to remain in the UK, it is unclear on what basis, if any, they will be

[3] "I entertain considerable doubt whether the prerogative power extends so far as to permit the Queen in Council to exile her subjects from the territory where they belong. I have in mind those passages in Blackstone and Chitty, and the argument of Dr Plender, to which I have referred in paragraph 39. There is unexplored ground here: it would be one thing to send a Chagos belonger to another part of the Queen's dominions, and quite another to send him out of the Queen's dominions altogether. I would certainly hold this latter act could only be done by statute."

permitted to remain in the UK[4]. Before giving an irrevocable notice under Article 50(2) the Appellant must first make clear whether the government expects such persons to leave after the UK's withdrawal from the EU or whether they are to be provided with the right to remain on the same or substantially similar terms as they currently enjoy.

13) As to those who are not British children but who possess rights to remain, they are entitled to equal or substantially similar treatment to British children in terms of their right to development in conditions of stability and certainty as to their continuing immigration status: see for example Article 2 (on non-discrimination)[5], Article 3 (on best interests)[6] and Article 12 (on the duty to hear the child)[7] of the UN Convention on the Rights of the Child 1989 **[Auth V14/Tab 145]**.

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[4] Children need to be permitted to develop in stable and certain conditions, in which carers can plan ahead, including planning for educational progress. If they cannot have this certainty, some may be compelled to leave in the interests of acquiring the stability and certainty in another country.

[5] ***Article 2***
1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

[6] ***Article 3***
1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

[7] ***Article 12***
1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

14) On the Appellant's case, deprivation and loss of rights *will occur*, without an Act of Parliament and without any Parliamentary approval or other authority, in respect of a class of person (children and/or their carers) who were prevented, whether by reason of their child status and/or by reason of their EEA national status, from voting in the referendum.

15) **Mrs KK** is a Polish national. She is resident in the United Kingdom where she has been exercising her treaty rights as a worker since 2014. She is married to a third country national (PR) who joined her in the United Kingdom in 2015. In order to do so he gave up his employment and home. They have a Polish national child who was born in the UK in 2015.

16) KK is concerned about her entitlement to permanent residence in the United Kingdom once she has lived and worked here for five continuous years. Like others in her community she feels in a complete state of limbo. The Appellant has not assured her, or those like her, as to what their status will be, or is likely to be, both during and once the withdrawal negotiations have ended.

17) PR is also concerned about his wife's treaty rights, as his are parasitical on her right to reside. In order to be with his wife PR gave everything up in his own country and emigrated to the UK. The Appellant has not assured him, or those like him, as to what their status will be, or is likely to be, both during and once the withdrawal negotiations have ended.

18) Both KK and PR are concerned about the uncertainties in the continuation of the right to reside in respect of their Polish national child. Both are concerned as to the impact on the best interests and the right to development of their child.

19) As in the case of Mrs B, the Appellant has not assured them, or those like them, as to what their status will be, or is likely to be, both during and after the withdrawal negotiations. They have not even been assured that the negotiations will protect the best interests of affected children.

20) These concerns are felt across the spectrum of EEA nationals and their family members who have in significant numbers made the UK their home for purposes of employment, study or retirement.

21) For example, the sectors with the highest proportion of workers from other EU countries are accommodation and food services (13%) and manufacturing (10%). The sector with the lowest share of EU workers is public administration and defence (3%), while EU workers also form a relatively small proportion of the total workforce in education (5%) and health and social work (5%).[8]

22) There are around 130,000 people from the EU working in health and social care. As at September 2015 there were around 55,400 EU nationals working in NHS hospitals and community health services in England - representing 5% of the overall workforce. Around 5% of the total UK population are citizens of another EU country, and around 7% of the total UK workforce. The proportion varies by category of staff, with 9% of hospital doctors (10,136), and 6% of nurses (20,634), in England being EU nationals.[9]

23) Under the European Directive 2005/36/EC on the recognition of qualifications, health and social care professionals who qualified within the EEA automatically have their qualifications recognised by the relevant regulatory body in any EEA country. For example, doctors who qualified from recognised medical schools within the EEA have been able to register with the General Medical Council (GMC), allowing them to practise in the UK without additional checks on their competence and English language skills. These professions include nurses, midwifes, doctors (general practitioners and specialists), dental practitioners, pharmacists, architects and veterinary surgeons.

24) In 2013/14 there were 125,300 EU students at UK universities, and in that year £224 million was paid in fee loans to EU students on full-time courses in England - 3.7% of the total student loan bill.

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[8] House of Commons Library Briefing paper at page 36. Number 07213, 26 August 2016

25) In some sectors of the capital markets EU citizens account for as much as a quarter of all staff in the UK.[10]

26) An Act of Parliament will have the benefit of ensuring that all concerns relating to the aforesaid persons can be addressed and appropriate protections put in place and assurances given to Parliament during the necessary debates. The preservation or retention of fundamental rights which have been accorded to EEA nationals and their family members in domestic law cannot lawfully be played as bargaining chips in the Appellant's future negotiations with the remaining Member States.

THE AB PARTIES' SUBMISSIONS

27) Against this background, the AB Parties make the following additional submissions on whether the Appellant has a prerogative power to give the Article 50(2) notice:

(i) The Divisional Court ('DC') was correct for the reasons that it gave, to hold that the Secretary of State has no power to give an Art 50 notice

28) **First**, the DC correctly held that the Appellant cannot exercise the royal prerogative to give an Article 50(2) notice because, the terms of the ECA 1972 provides no such room and also the exercise of any the power would, in any event, be unlawful at common law as it would undermine the rights and obligations arising in national law from the existence of the ECA 1972 and various other statutes implementing rights and obligations arising under EU law. Whilst the Claimants are correct to refer to the European Parliamentary Elections Act 2002, the AB Parties additionally and specifically draw attention to s7 of the Immigration Act 1988. **[Auth V12/Tab 118]**

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[9] *Ibid* at page 139
[10] *Ibid* at page 42

29) The DC correctly ruled that the prerogative may not be used to modify such rights existing in national law, in the expectation that Parliament may perhaps later take corrective action to remedy any hardships that arise.

30) These matters are further developed in the Claimants' Written Cases, which the AB Parties respectfully adopt.

(ii) The impact of the Art 50(2) notice on rights of residence

31) **Second**, one major effect of giving an Article 50(2) notice without the express authority of an Act of Parliament *will be* that the fundamental rights of residence, flowing from the fact of citizenship of the EU and the exercise of free movement rights will be directly affected simply by the exercise of prerogative. Once the Article 50(2) notice is given, the effect will be to set in motion an irrevocable train of events which will inevitably mean that the affected groups whom the AB Parties represent *will* lose a large number of statutory entitlements and rights flowing from the domestic implementation of EU law. They will, on the day of withdrawal from the EU, cease to possess any of the rights of residence in the UK conferred upon them under EU law, whether as EEA nationals exercising their EU Citizenship and residence rights in the UK (as in the case of KK and her family) or, for example, as EU Citizens who are cared for by a non-EEA national (as in AB's case). As the DC held, the Appellant has no power to use the prerogative to bring about such effects.

32) The background to this is as follows.

33) One of the effects of the ECA 1972 was that, by enacting it, Parliament gave in national law rights of residence, as modified from time to time, to EEA nationals and their family members under the Treaties as defined in the ECA 1972, together with the further treaties entered into thereafter, and under EU secondary legislation (Regulations and Directives): see DC judgment § 47-48. In due course, these rights included the right of residence and right of free movement flowing from the fact of EU Citizenship itself, under Articles 20 and 21 Treaty on the Functioning of the European Union.

34) This was taken further by enacting section 7 of the Immigration Act 1988 **[Auth V12/Tab 118]** and domestic regulations, the current regulations being the Immigration (European Economic Area) Regulations 2006 SI 2006/1003 **[Auth V13/Tab 133]**.

35) This body of law has given effect in domestic law to the fundamental rights set out in the Charter of Fundamental Rights of the European Union ('the Charter') **[Auth V14/Tab 149]** where the subject matter falls within the scope of EU law (for example the best interests of the child, dealt with further below). Thus, for example, EEA nationals and their family members, including children, exercising rights of residence in the United Kingdom are beneficiaries of the Charter in national law.

36) As was common ground (see DC judgment § 51), the giving of notification under Article 50(2) of the TEU that the United Kingdom intends to withdraw from the EU will bring to an end, at the point of withdrawal, the rights of residence and the other fundamental rights enjoyed by EEA nationals and their family members exercising European Union rights in the United Kingdom.

37) It is the giving of the notice which triggers the legal effects under Article 50(3) which leads to the exit of the UK from the EU and from the relevant Treaties and results in the loss of a package of rights. Whether or not these rights, or something like them, are replicated in domestic law in the future, Parliament's right to make and unmake such laws will have been pre-empted and usurped (see DC judgment §§ 17, 51 and 64).

38) The prerogative may not be lawfully used to issue a notification under Article 50(2) which results in

    i. the removal or curtailment of the rights of residence enjoyed by EEA nationals and their family members in the United Kingdom without a prior Act of Parliament. When Parliament passed s7 of the Immigration Act 1988, which gave effect to rights of residence derived under section 2(2) ECA 1972, it did not intend that the rights of residence enjoyed by these EEA nationals exercising rights under the EU could be removed by

the exercise of prerogative powers. The removal of rights of residence of these EEA nationals may only be taken away by an Act of Parliament.

ii. the removal or curtailment of fundamental rights enjoyed by EEA nationals and their family members exercising rights derived under the EU in the United Kingdom (such as those set out in the Charter). Only clear and express statutory language or a prior Act of Parliament expressly removing or curtailing such fundamental rights will suffice. The exercise of the prerogative may not be used to destroy or undermine these fundamental rights;

39) The package of rights enjoyed by EEA nationals and their family members in the UK, includes, perhaps most significantly of all, *the right* for those who have lived continuously and lawfully in the UK for at least 5 years (60 months) to apply for permanent residence[11], followed by *the right* to apply for citizenship in the following year. By contrast, under domestic law a person who is granted limited leave to remain in the exercise of a subjective residual discretion under Art 8 ECHR must first complete 120 continuous months' limited leave to remain before being able to apply for settlement[12], and a further 12 months thereafter before being entitled to apply for citizenship.

40) Once the Article 50(1) trigger is pulled it will lead irreversibly to withdrawal from the EU, at an unspecified date or, at the latest, two years from the date of notice, resulting in

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[11] See Preambles (17) and (18) of Directive 2004/38/EC ('the Citizens Directive) **[Auth V14/Tab 150]** which underscore the importance of permanent residence to EU nationals who have moved to the UK and made it their home.

[12] A successful Art 8 ECHR applicant is issued with 30 months limited leave to remain. Unlike an application for a residence card, the Art 8 ECHR applications are fee charged and require the payment of an Immigration Health Surcharge. At every application stage, the applicant must demonstrate that his or her facts continue to render removal disproportionate under Art 8(2) ECHR with reference to the very different public interest considerations that currently exist under EU law. Upon the completion of ten year limited leave to remain, the application for Indefinite Leave to Remain will require the applicant to demonstrate more than conversational competency in the English language; the language requirement is not a requirement under EU law.

those EEA nationals living in the UK and their non-EU family members no longer being able to count on their qualifying years of residence to apply for permanent residence and thereafter British citizenship. In many cases, such persons will have made life-changing decisions and moved permanently to the UK with the ultimate intention of acquiring permanent residence. Mrs KK is such an example and like others she will not be able to rely on her two years' continuous residence in the UK to apply for permanent residence. On the giving of the Article 50(2) notice, she loses, irrevocably, the route by which she can qualify for settlement and thereafter naturalisation. Once withdrawal occurs, British citizen residents in the UK lose their Union citizenship, and EU nationals like Mrs KK lose their entitlement to apply, as Union citizens, for permanent residence in the UK, provided for by Directive 2004/38/EC and by the national law contained in the EEA Regulation 2006.

41) Parliament *might* take steps to restore some of these rights (see § 59 of the DC's judgment on this point). But that possibility does not make the use of the prerogative to undermine these rights lawful. Even if the UK did find other ways of giving this class some form of leave to remain that would not be the same. Moreover, it is not the current law. No reliance can be placed by the Court on such possibilities, and the DC was correct not to do so.

(iii) Unlawful exposure to criminal liability and summary removal

42) **Thirdly,** not only does the Appellant's proposed action (of giving the Article 50(2) notice without an Act of Parliament) threaten fundamental rights, including rights of residence, but it will destroy those rights by exposing this class of persons to criminal liability and the risk of prosecution under the Immigration Act 1971 **[Auth V12/Tab 110]**, in contravention of current statutory protections and without statutory authority, as a direct consequence of the notification under Article 50(2).

43) The entitlement of non-EU nationals to enter and remain in the UK is governed by the Immigration Act 1971. The 1971 Act has no application to EU nationals. EU

nationals are exempt from its terms: see s7 of the Immigration Act 1988 **[Auth V12/Tab 118]** which provides:

"(1) A person shall not under the principal Act [i.e. the 1971 Act] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable right or of any provision made under section 2(2) of the European Communities Act 1972."

44) The Immigration (EEA) Regulations 2006, which set out, in pursuance of EU law, the basis on which EEA nationals may enter and reside in the UK, are made under s2(2) ECA 1972.

45) The effect of the Article 50(2) notice will be that, at the point of the UK's withdrawal from the EU, the AB Parties (other than AB's child who is British) and all those who are in the same position will require leave to remain under the Immigration Act 1971: see Sch 2(1) to the 2006 Regulations[13] **[Auth V13/Tab 133]**. Such persons will be present in the UK with no enforceable EU law rights and without the statutory leave to enter and remain that they require under the Immigration Act 1971; they will thus be liable to potential summary removal as persons present without leave and to potential criminal prosecution under s24 (various immigration offences such as staying without leave) of the 1971 Act. Whilst the change may not be immediate it is predictable and foreseeable in the not too distant future.

46) The royal prerogative may not be lawfully used to issue a notice under Article 50(2) which results in the exposure of EEA nationals and their family members exercising EU rights in the UK to potential criminal liability and summary removal as persons present without leave under the Immigration Act 1971. The exercise of prerogative powers in this way is impermissible under constitutional law principles. See *R v*

[13] Sch 2 para 1 provides: "(1) In accordance with section 7 of the Immigration Act 1988(1), a person who is admitted to or acquires a right to reside in the United Kingdom under these Regulations shall not require leave to remain in the United Kingdom under the 1971 Act during any period in which he has a right to reside under these Regulations but such a person shall require leave to remain under the 1971 Act during any period in which he does not have such a right."

Jones (Margaret) and Ors [2007] 1 AC 136 at §§ 22, 62 **[Auth V8, Tab 69]** and *Bancoult* [2009] 1 AC 453 at § 44 **[Auth V6, Tab 54].** The giving of the Article 50(2) notice sets in train events which, on the present law, will unlawfully expose this class at a *definable* future point in time to potential criminal liability by reason of their presence in the United Kingdom without leave. The executive has no legal power, whether by the use of prerogative or otherwise, to create a new criminal offence[14], or to expose, whether directly or 'indirectly'[15], a class of persons to liability for an existing offence at an ascertainable future point in time to which they are not currently subject.[16]

47) The Appellant's submission in the DC that the commencement of the process of withdrawal from the EU by the giving of the Article 50(2) notice does not itself change the common law or statute or customs of the realm and that any such changes are a matter for future negotiations and implementation by legislation was, as the DC accepted, no answer to the serious concern of the *Zambrano* carers in the present cases that they will be committing an offence if they remain here without leave once the period under Article 50(3) expires. Parliament in its wisdom has elected to give them certain statutory protections. But the Appellant seeks to bring about a process which will repeal those statutory protections in the future. Such an exposure to criminal sanctions in the near future usurps Parliamentary entitlement to make and modify laws.

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[14] *Case of Proclamations* at pg.1353, *"..for I said, that the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament'.* **[Auth V1/Tab 9]**

[15] Lord Denning in *Laker Airways* [1977] 1 QB 643 at 707 A-C **[Auth V13/Tab 12]**

[16] This amounts to unlawfully imposing an additional obligation on this class of persons. See also **[Auth V9/Tab 87]** *The Zamora* [1916] 2 AC 77, at 90, cited by the Div Ct at para 29:
*"The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or **alter** the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or **alter** the law administered in Courts of Common Law or Equity..."* (emphasis added)

48) The right not to be prosecuted requires consideration by Parliament before and not after the giving of the Article 50(2) notification; this provides, in addition to the submissions advanced by the Claimants, yet another clear and compelling reason why there is required an Act of Parliament authorising notice before it can lawfully be given.

49) The Appellant in his Written Case asserts that in the field of foreign affairs the prerogative powers may be exercised even to the extent of exposing persons to criminal liability (at § 40). This submission fundamentally ignores the new constitutional legal order to which the ECJ drew attention in *Case C-26/62 Van Gend Loos* ECLI:EU:C:1963:1 p12 **[Auth V2/Tab 24]**. Furthermore, the two cases relied upon by the Appellant, namely *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 **[Auth V6/Tab 51]** and *R v Kent Justices, Ex parte Lye* [1967] 2 QB 153 **[Auth V8/Tab 70]**, are not in point - as observed by the DC at § 79 of its judgment. Parliament can pass any legislation so that a statutory regime may be left to be filled in by specific steps to be taken by the executive. In *Lye* the Crown by an Order in Council, extended the UK's territorial waters which did not exceed what was permitted under international law, namely the Geneva Convention on the Territorial Sea and the Contiguous Zone 1958. The primary legislation in that case did not abrogate the Crown's prerogative to extend the territorial waters in conformity to international law. By contrast, and as the DC correctly concluded at § 94, the prerogative power in the present case was removed by the ECA 1972 itself; and in any event no such Order in Council has been or could be implemented in the present case. Furthermore, and unlike the Geneva Convention on the Territorial Sea and the Contiguous Zone 1958, Article 50(2) TEU does not confer on the Crown a measure of discretion to define the scope of its power: see *Lye* at p191E: '*The Convention recognises that [territorial waters] may be measured from the low tide elevation as a baseline if the particular party to the Convention decides so to do. The Order in Council takes advantage of that right and adopts it. That prerogative right has not, in my view, been abrogated…'*.

50) Similarly in *Post Office v Estuary Radio Ltd* the Crown's claim to exercise territorial sovereignty over an area of the sea adjacent to the shores was a classic example of a subject matter over which the sovereign exercised territorial jurisdiction, namely the limits of an area of sea adjacent to the shores. By contrast, the present subject matter involves fundamental freedoms derived from Treaties which have been given effect in domestic law and which will be undermined by the giving of the Article 50(2) notice.

51) In the DC the Appellant did not refute the AB Parties' argument on the exposure to criminal liability but wrongly mischaracterised it in his skeleton argument at § 48 as a submission that the criminal liability arises on the giving of the Article 50(2) notice; that is not how the AB Parties put the submission. The submission is that the giving of the Article 50(2) notice sets in train events which, on the present law, will expose this class at a *definable* future point in time to criminal liability. The exposure to such a liability *will* come about in the present case, unless Parliament steps in at some point prior to withdrawal from the EU and puts in place a statutory protection mechanism. To foist such a situation upon Parliament and on the affected persons and to do so in the absence of protection against default criminal liability, is to misuse executive power and to misuse the royal prerogative. It is to indirectly expose a class to criminal liability at a definable point in time; which the executive has no legal power to do.

52) There is no process in place at the moment for affected members of this class to obtain leave to remain. A process may in due course be put in place; but it may not. That depends on the will of Parliament, which the Appellant cannot lawfully pre-empt. And even if Parliament chooses to provide a mechanism, that will have to be done under the statutory authority of the Immigration Act 1971. That is a matter for Parliament for determine, not for the Appellant to force upon Parliament. By ordinary public law principles, it is unlawful for the Appellant to bring this situation about. Even in the period after the notice and prior to withdrawal, this situation will

be a matter of acute worry and stress for the class of persons affected. The Appellant has no legal power to undermine current statutory protections in this way.

(iv) The use of an Art 50 notice will amount to an unlawful usurpation of Parliament's power to make law as to the rights of non-EEA nationals to enter and remain in the UK

53) **Fourth**, the prerogative cannot be used to make a decision to withdraw from the EU under Article 50(1) TEU or to give a notice under Article 50(2) of such a decision not only because questions as to such matters are matters currently to be decided in accordance with laws laid down by Parliament (s2 ECA 1972; s7 Immigration Act 1988; and the 2006 Regulations which are made under Parliamentary authority in pursuance of the power of implementation in s2(2) ECA 1972), but also because the power to grant or refuse leave to remain in the UK to any person after the point of withdrawal from the EU is a power that is covered exclusively by the Immigration Acts which set out a constitutional framework for the grant or leave to enter or remain.

54) Even more significantly, the rights of the AB parties to remain in the UK under the Immigration Acts after the UK's withdrawal from the EU are not matters which the Crown is permitted to negotiate with other Member States without prior Parliamentary authority. Such rights are a matter for Parliament, not the prerogative. The Appellant cannot rely simply on the hope of being able to negotiate something as to the rights of residence in the UK of EEA nationals, their family members and of others deriving rights of residence under EU law with other Member States via the European Council. This is because *inter alia*:

- firstly, leave to remain in the UK is covered by the Immigration Acts which set out a constitutional framework for rights of residence, and the discretionary giving of the Article 50(2) notice without Parliamentary approval will directly affect future rights of residence in the UK of all those affected (including the AB

Parties) and will conflict with the purpose of the Immigration Act 1971: see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 **[Auth V6/Tab 49]** a discretionary power must not be used to frustrate the object of the Act which conferred it;

- secondly, the right to remain in the UK is not a matter which is negotiable with other Member States but is a matter for Parliament, see the Appellant's Defence before the DC at § 34 **[Appendix p90-109]**);

- thirdly, these rights of leave to remain must be addressed by Parliament before the giving of the Article 50(2) notice. As the Supreme Court has made clear, there is simply no room for the use of the prerogative to control immigration outside of the framework of the Immigration Acts: *R (Munir) v Home Secretary* [2012] UKSC 32, [2012] 1 WLR 2192 at §§ 33, 44 **[Auth V7/Tab 62]** and *R (Alvi) v Home Secretary* [2012] UKSC 33, [2012] 1 WLR 2208 at § 33 **[Auth V6/Tab 52]**. That position cannot be by-passed by the executive deciding to simply cut Parliament out before the Article 50(1) decision is made.

55) All these considerations drive to the conclusion that the Appellant must first obtain authority in the form of an Act of Parliament to give the Article 50(2) notice.

(v) The questions of expenditure that will arise require the prior approval of HM Treasury and of Parliament

56) **<u>Fifth,</u>** before any decision is taken under Article 50(1) TEU and any decision is taken to give notice under Article 50(2) TEU, which decisions will have far reaching financial implications on the UK's economy, there must first be approval by H.M. Treasury and then by Parliament before such a decision can lawfully be made.

57) As the DC stated, correctly, at §§ 105 and 106 the referendum under the EU Referendum Act 2015 **[Auth V1/Tab 7]** was advisory and did not supply a statutory power for the Crown to give notice under Article 50(2) or to leave the EU/EEA.

58) Parliament must have considered that the referendum was intended to be advisory and that many important issues, including substantive public expenditure, following the referendum result would have to be approved by H.M. Treasury and Parliament prior to the giving notification under Article 50(2). Constitutional propriety requires in all matters which concern financial commitments, and specifically in respect of expenditure which is novel (this will include any decision to leave the EU/EEA), that the approval of both H.M. Treasury and Parliament. Such consent must be sought in good time to allow reasonable consideration before notification is given under Article 50(2).

59) The DC was also correct in stating that the Crown should not be able, by the exercise of its prerogative powers, to make profound changes in domestic law by unmaking all the EU rights (at § 93.8). The AB Parties submit this is all the more so in a situation where the giving of notice under Article 50(2) by the Crown without Parliamentary approval (in the form of an Act of Parliament) will result in commitments to use public resources beyond agreed budget plans or will involve expenditure which is novel, or contentious, or which carries wider repercussions or gives rise to other legislative changes.

60) The constitutional practice of the United Kingdom is that the approval of H.M. Treasury is required in such cases and that Parliament must approve (by an Act of Parliament) and authorise the commitment to public expenditure or funding. This practice is now well established: *HM Treasury, Managing Public Money, July 2013 (with annexes revised as at August 2015), Contents, Foreword, Chapters 1, 2 and 5, Annexes 2* **[Additional Auth/Tab 345]**. The constitutional practice as set out in this document supports the main thesis advanced by the AB Parties that Parliamentary approval is required before notification is issued under Article 50(2) as it involves major financial consequences.

(vi) The giving of an Art 50 notice unlawfully undermines children's rights

61) **<u>Sixth</u>**, the AB Parties submit that the obligation to protect the best interests of children, the rights contained in the UN Convention Rights of the Child 1989 **[Auth**

V14/Tab 145], the rights of children arising from the fact of EU Citizenship and the child-related rights arising from the EU Charter on Fundamental Rights **[Auth V14/Tab 149]** (whether for children or their families or carers), are all part of UK law as a consequence of the ECA 1972 and/or to be applied as part of UK law.

62) The giving of an Article 50(2) notice, without prior Parliamentary authority, unlawfully undermines such fundamental rights, which are rights given by Parliament. The prerogative cannot be used to undermine such rights without prior Parliamentary authority; especially when the prerogative is invoked merely on the basis of an advisory referendum which excluded many of the affected children and their carers.

63) Article 24 of the EU Charter on Fundamental Rights **[Auth V14/Tab 149]** is of particular importance in understanding the content, from a child's perspective, of rights arising under EU law. It provides:

> *"The rights of the child*
> *1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
> *2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
> *3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."*

64) Article 24 was specifically based on the UN Convention on the Rights of the Child, particularly Articles 3, 9, 12 and 13 thereof (as is expressly stated in the *Explanations Relating To The Charter Of Fundamental Rights* (2007/C 303/02) [17]. It is more specific than the protections given by s.55 of the Borders Citizenship and Immigration 2009, which embodies 'the spirit if not the precise language' of the

[17] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF

UNCRC 1989: see *ZH (Tanzania) v SSHD* [2011] UKSC 4, [2011] 2 AC 166 § 23 **[Auth V9/Tab 90]**.

65) The Appellant's position in the DC was not to dispute the existence of such child-centred rights but to argue that they could be protected in other ways in UK law, following the withdrawal from the EU. Of course, the position of children, who currently rely on rights arising from EU law, *might* be protected to some extent or other by other means in due course after the Article 50(2) notice is given; but equally it might not or it might be protected to a lesser extent. The question at this stage is one of legality. If the Claimants and the AB Parties are correct in asserting that a prior Act of Parliament is required in order to make the decision to withdraw from the EU and to authorise the giving of a notice of withdrawal under Art 50(2), it is no answer for the Appellant vaguely to say that the position of persons like the AB Parties could be protected at some later point in time. That vague possibility is not a basis for taking an unconstitutional step which will inevitably deprive the AB Parties of the rights that they *currently* enjoy, as the DC correctly held.

66) The effect of an Article 50(2) notice given by the executive without Parliamentary authority in the form of an Act of Parliament will be immediately to render the position of a very significant number of British Citizens and of the persons who reside in the UK in pursuance of EU law rights precarious, causing them great uncertainty and instability. This would be greatly damaging to the best interests of children and to their '*Zambrano* carers'. This position will tend to force British Citizens including children to leave the UK, the country of their nationality and perhaps birth, which raises an issue of constitutional importance: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs and Another* [2001] QB 1067, 1105 § 61.

67) There is simply no authority which permits the executive to use the prerogative in such circumstances, in the absence of an Act of Parliament. If Parliament were to bring about the position, authorising the Appellant to give the Article 50(2) notice, after having had the opportunity to debate the matter and to consider the

consequences and to require guarantees or other protections to be put in place, that would be a different matter; the notice would at least have been given in accordance with the UK's constitutional requirements.

68) Accordingly, the AB Parties maintain the submission that the exercise of the claimed prerogative power must *in particular* protect without discrimination the rights and best interests of children and their *Zambrano* carers. Children did not have the right to vote or the right to be heard in the referendum on the basis of which the Government proposes to trigger Article 50(2). It is of constitutional importance that their position is considered by Parliament before any Article 50 notice is given.

CONCLUSION

69) Accordingly, for these additional reasons, the AB Parties submit that the appeal should be dismissed.

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