

B E T W E E N :

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

Claimants

-and-

THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Defendant

-and-

(1) AB AND A CHILD AND OTHERS  
(2) GRAHAME PIGNEY AND OTHERS ("THE PEOPLE'S CHALLENGE")

Interested Parties

-and-

GEORGE BIRNIE AND OTHERS

Intervener

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CLARIFICATORY NOTE ON BEHALF OF  
THE PEOPLE'S CHALLENGE INTERESTED PARTIES

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1. This note is to clarify an important misapprehension in the skeleton of the Secretary of State ("SoS") as to the position of the People's Challenge IPs.
2. At §20(3) of his skeleton the SoS asserts that it is "*apparently common ground between all parties, save for FDE*" that a (constitutionally) valid decision that the UK should withdraw from the EU *has already been taken*.
3. The assertion that this is common ground is wrong. Indeed, it contradicts §6(2) of the SoS's skeleton, which suggest that the People's Challenge IPs are mistaken in *failing* to recognise that "*that decision has been taken*"<sup>1</sup>. For the avoidance of doubt, the People's Challenge IPs do not accept that any constitutionally valid decision that the UK should leave the EU has already been taken.
4. The position of the People's Challenge IPs (§§1-4 & 16 of the People's Challenge IPs' skeleton) is that the referendum result was not, as a matter of constitutional law, a

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<sup>1</sup> This was the first reference, of which the People's Challenge IPs were aware, to any decision having been taken: see their enquiry in the pre-action letter at D/23/300 and the Secretary of State's response of 25 July 2016 (D/23/313-314) which referred to the challenge as being to "*a future decision by a Government Minister to give notification to the European Council under Article 50(2)*".

“decision” by the United Kingdom to leave the EU. The “outcome of the referendum” conducted under the terms of the EU Referendum Act 2015 was the answer to an advisory question: “*Should the UK remain a member of the EU or leave the EU?*”<sup>2</sup> Parliament did not, in the European Referendum Act 2015, delegate power to the executive to take steps to “implement” the result of the referendum, nor has Parliament taken a decision that the UK should leave the EU. There may be a declared executive policy intention that the UK should withdraw from the EU in the light of the outcome of the referendum, but government policy is not law.

5. The People’s Challenge IPs’ position is that, as a matter of law, the decision to leave the EU has not yet been taken, and must be taken by Parliament. No constitutionally valid decision has therefore yet been taken.
6. Rather than being common ground between the parties, the question of whether a constitutionally valid decision to leave the EU has been taken, and who may lawfully take that decision, is one of the issues that the Court must decide in this litigation.

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GERRY FACENNA QC  
TIM JOHNSTON  
JACK WILLIAMS

JOHN HALFORD  
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4 October 2016

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<sup>2</sup> The referendum was an orthodox consultative, advisory and pre-legislative referendum, like the 1975 Referendum on continued EEC membership. Parliamentarians were briefed to that effect before passing the requisite referendum act on both occasions: House of Commons Briefing Paper Number 07212, European Union Referendum Bill 2015, June 2015, p 25; Hansard HC Vol 888 Col 291-293, 11 March 1975.