

IN THE HIGH COURT OF JUSTICE

CO/3809/2016; CO/3281/2016

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N :-

R on the application of

(1) GINA MILLER

(2) DEIR TOZETTI DOS SANTOS

Claimant

– and –

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Defendant

– and –

(1) GRAHAME PIGNEY & OTHERS

(2) AB, KK, PR & CHILDREN

Interested Parties

– and –

MR GEORGE BIRNIE & OTHERS

('The Expat Interveners')

Interveners

**CLARIFICATORY NOTE
ON BEHALF OF THE EXPAT INTERVENERS**

This note

1. This note seeks to correct two inaccuracies in the Secretary of State's Skeleton Argument dated 30 September 2016 about the case made on behalf of the Expat Interveners, because the invitation to the GLD to correct them on behalf of the Secretary of State¹ has not received a response, nor been acted upon.

¹ Letter from Croft Solicitors to the GLD dated 3 October 2016. The Secretary of State was asked to correct these points, in order to assist the Court by correctly identifying the issues between the parties.

No Decision for the purposes of Article 50(1) TEU

2. Firstly, the Secretary of State wrongly states² that the Expat Interveners accept that the Article 50(1) withdrawal decision has already been taken.
3. That is incorrect: on the contrary, the Expat Interveners' case is that there is no identifiable decision having legal effect that could be recognised as a decision of the UK to leave the EU for the purposes of Art. 50(1). Further, any such decision would be legally flawed.
4. This is made explicit not only in the '*Key Submissions*' section at the front of their Skeleton Argument dated 21 September 2016,³ but when amplified in their submissions under the heading '*No Decision*'.⁴
5. The Secretary of State has also failed to specify any details of the content or date of the decision⁵:
 - (a) Immediately following the hearing before Sir Brian Leveson P and Mr Justice Cranston on 19 July 2016, the Expat Interveners asked the Secretary of State to confirm whether the Government had a policy, or had made a decision, that the referendum result should be followed automatically and, if so, to state clearly what the policy or decision was and when it was adopted or made.⁶ It was suggested that a response could be included in the Secretary of State's Pre-Action Protocol ('PAP') letters of response. No answer was received. Nor were the details set out in either of the PAP responses.
 - (b) The taking of such a decision now appears to loom large in the Secretary of State's case. Those acting for Mr Dos Santos have also pressed for an answer on the point and received a response today. Counsel for Mr Pigney and others

² See: §6(3) and 53 Skeleton Argument for the Secretary of State.

³ See: §5, §6(3) and §6(4) ('*Key Submissions*') Skeleton Argument for the Expat Interveners.

⁴ See, in particular: §30 to §39 ('*No Decision*'), pp.12-14; and see §45, p.16.

⁵ The recent response to Edwin Coe doing little more than repeating §6(2) of Skeleton Argument for the Secretary of State.

⁶ Letter Croft Solicitors to GLD dated 20 July 2016 [**Hearing Bundle/p.430**].

have also needed to clarify their position in relation to the decision relied upon by the Secretary of State in a Clarificatory Note dated 4 October 2016.

6. It is unhelpful for there to be opacity as to the existence, date, content and reasoning for the decision upon which the Secretary of State seeks to rely.

R (Shindler) v Chancellor of the Duchy of Lancaster

7. The Secretary of State also incorrectly states that the Expat Interveners rely upon *Shindler*⁷ as having decided that Parliament needs to authorise withdrawal.⁸
8. That is incorrect and indeed, not what was decided in *Shindler*. Rather, as made clear in the Expat Interveners' Skeleton Argument:
 - (a) The Court of Appeal determined in *Shindler* that Parliament had decided that the referendum was one of the '*constitutional requirements*' to be complied with in respect of a notifiable decision under Art. 50 TEU;⁹ and
 - (b) The tenor of the decision in *Shindler* was that Parliament is sovereign and able to ask any question, by way of a referendum, *a fortiori* a non-binding one.¹⁰

PATRICK GREEN QC

HENRY WARWICK

PAUL SKINNER

MATTHIEU GREGOIRE

7 October 2016

⁷ *R (Shindler) v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469.

⁸ See: §23 Skeleton Argument for the Secretary of State.

⁹ See: §18 and §39 Skeleton Argument for the Expat Interveners; *Shindler* at §13 and, for example, §19:

"In short, by passing the 2015 Act, Parliament decided that one of the constitutional requirements that had to be satisfied as a condition of a withdrawal from the EU was a referendum."

¹⁰ See: §44 Skeleton Argument for the Expat Interveners.

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**SUPPLEMENTAL NOTE TO THE COURT
ON BEHALF OF THE EXPAT INTERVENERS**

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