IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

CO/3281/2016
CO/3809/2016

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

Interested Parties

- and -

GEORGE BIRNIE AND OTHERS

Intervener

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANT DEIR SANTOS IN CASE CO/3281/2016

A. Mr Santos' Claim and these submissions

1. Mr Santos' claim, which has been joined to the lead claim brought by Ms Miller[1], advances two, to some extent interlocking, arguments[2]. They are that under the United Kingdom's constitutional arrangments:

   (1) By reason of the fundamental constitutional principle of Parliamentary sovereignty, in light of the existence and terms of the European Communities Act 1972 ("the 1972 Act"), and other statutes, it is only Parliament that can lawfully and constitutionally decide that the

[1] By the Divisional Court's directions order of 19 July 2016
[2] As set out in the detailed grounds (dated 29 June 2016) and the preliminary skeleton argument (dated 5 July 2016) filed in support of his judicial review Claim Form dated 28 June 2016

United Kingdom is to withdraw from the European Union. Parliament has not done so and, accordingly, a notification under Article 50(2) of the Treaty on the European Union ("TEU") of a decision to withdraw from the EU may not lawfully be given by anybody until it has ("the Parliamentary sovereignty argument"); and

(2) In any event, without prior Parliamentary authorisation a purported use of the Royal prerogative by the Government or any Minister of the Crown to give notification under Article 50(2) would be unlawful ("the Royal prerogative argument").

2. Mr Santos adopts the submissions of Ms Miller set out in her skeleton argument in relation to the Royal prerogative argument and, subject to one addition[3], in relation to the various so-called *in limine* objections raised by the Defendant. In accordance with the directions given by the Divisional Court on 19 July 2016 (para. 9), this skeleton argument only sets out Mr Santos' additional submissions on his "Parliamentary sovereignty argument".[4]

3. Before turning to those submissions, it is important to underline that, by this claim, Mr Santos (who is a British citizen resident in the UK) does not seek to "challenge" the outcome of the Referendum (or any lawfully taken decision that the UK should withdraw from the EU). The Claimant's concern is to protect the fundamental doctrine of parliamentary sovereignty, and thereby uphold the rule of law. The Claimant seeks the protection of the Court to ensure that, if he is to be deprived of his domestically enforceable EU legal rights, such rights are taken away from him in a constitutionally proper and lawful manner. The purpose of the Claimant's challenge is therefore to ensure that, if a decision by the UK to withdraw from the EU is notified under Article 50(2), that decision is one taken in accordance with the UK's constitutional requirements.

B. The Parliament sovereignty argument: Introduction and Summary

B.1 The Key Question

4. The central question in this case is this: "**Who, under the UK's constitutional requirements, can lawfully take the decision that the UK is to withdraw from the European Union**?"

[3] See para. 12 below.
[4] In doing so, again to avoid unnecessary repetition, Mr Santos does not in general quote in detail the relevant provisions of the TEU or the 1972 Act which have been quoted in full in Ms Miller's skeleton argument and copies of which will be in the Bundle.

5. That question is mandated by Article 50(1) of the TEU, which provides that "*[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements*"), as well as by domestic law. The answer to the question is one of domestic law only, entirely unaffected by any EU law issues[5]. It involves establishing the true meaning, effect and significance of the 1972 Act (and subsequent statutes relating to the UK's membership of the EU) in the context of the UK's constitutional arrangements.

6. Until that key question has been answered, and a valid decision to withdraw has been taken, nobody can lawfully and constitutionally give notification of a decision by the UK to leave the EU under Article 50(2).

B.2 The Answer to the Key Question

7. For the reasons developed in in this skeleton argument, the answer to the key question is that under the UK's constitutional requirements:

   (1) By virtue of the doctrine of Parliamentary sovereignty/supremacy, only Parliament can lawfully take the decision that the UK withdraw from the EU: that is, in particular, in light of the existence and content of the 1972 Act, a constitutional statute, which enshrined in UK law a number of the central incidents of EU membership, including a whole host of EU law rights and obligations enjoyed by UK citizens and other legal entities, as well as (in various circumstances) certain foreign citizens and legal entities[6]. That which Parliament has granted, only Parliament can remove or alter.

   (2) The only way in which a person or body other than Parliament (such as, e.g., the Government or the people in a referendum) could legally and constitutionally take the decision to withdraw from the EU is if Parliament had empowered such other person or body to do so. This has not happened – as a matter of law, the 2016 EU referendum ("the Referendum") was "advisory" only.

8. The Defendant's position is that the Government can simply "*implement the outcome of the referendum by giving notification to the European Council under Article 50(2)*"[7]. The exact

[5] See generally ***R (Shindler) v Chancellor of the Duchy of Lancaster*** **[2016] EWCA Civ 469** at paras. 16 and 60
[6] References in this skeleton argument to "rights" include obligations, where appropriate, and to "UK citizens" include, as appropriate, other legal entities (such as corporations) and other nationalities in the UK
[7] Detailed Grounds of Resistance, para. 11.

basis on which this position is maintained is not entirely clear from his Detailed Grounds of Resistance.

9. The logic of at least some part of the Defendant's submissions[8] leads to the conclusion that the Executive – through use of the Royal prerogative – has always (i.e. even without the Referendum) been constitutionally able to decide to withdraw from the EU and give notification under Article 50(2) at any time, and without more. That is: without any scrutiny from Parliament, or a referendum or anything else. That is a startling proposition and it cannot be right: for the reasons explained in more detail below, it would amount to the effective repeal by the Executive, on a unilateral and (on the Defendant's case) unreviewable basis, of a (constitutional) statute passed by Parliament (the 1972 Act). That the Executive cannot lawfully do.

10. The Defendant understandably seeks to avoid having to put matters so baldly. To make his position more palatable, he appeals (on what precise legal basis is unclear) to the uncodified nature of the UK's constitution, and he invokes (1) the Government's stated policy at the time the European Union Referendum Act 2015 ("the 2015 Act") was passed that the Referendum result would be respected, and (2) a role for Parliament in scrutinising and passing the legislation necessary to implement whatever deal (if any) the Government brings back from Brussels after the negotiations that will follow an Article 50(2) notification (in accordance with Article 50(3) of the TEU)[9]. Such a stance may be thought to be politically expedient at present, but it will not do.

11. As explained further below:

    (1) Parliament chose not to legislate that the outcome of the Referendum should be binding, in contrast to the decision it has made in relation to other referendums in the UK. Accordingly, Parliament's decision to enact the 2015 Act cannot be construed as Parliament's pre-approval of a "leave" result in the Referendum, or as Parliament's decision to withdraw from the EU if there were to be a "leave" result, no matter what policy the Government was (and is presently) stating as to what should follow such a result. Absent such "pre-approval", in a representative Parliamentary democracy such as the UK's, the Referendum cannot directly empower the Executive to do something which it is not able to do of its own volition[10].

[8] Detailed Grounds of Resistance, section IV.
[9] Detailed Grounds of Resistance, section II.
[10] Some points in the Defendant's Detailed Grounds of Resistance might be read as a suggestion that the Referendum itself amounted in law to the decision of the UK to withdraw from the EU – see, for example, in para. 2. If the Defendant does indeed

(2) The "role" for Parliament envisaged by the Defendant is entirely ancillary to that of the Executive and, in the critical respects, is illusory:

(a) Accepting that any notification by the Government under Article 50(2) will be valid vis-à-vis the other 27 member states of the EU on the international plane, and that once given it cannot be withdrawn[11], the inevitable effect of giving notification is that the UK will – inexorably and unavoidably – leave the EU at some point: see Article 50(3).

(b) It will do so on such different terms, or none, as to the various EU legal rights, currently existing and enshrined in the 1972 and other Acts, as the Government may (or may not) be able to negotiate.

(c) Most importantly, that means that Parliament's "scrutiny" will not include the very question which Mr Santos contends Parliament must consider and decide, namely whether the UK should withdraw from the EU. Rather, Parliament will simply be required to repeal the 1972 Act, a decision about which it will have no effective choice; and the rights for which it provides will go.

(d) Parliament may then be invited to replace the 1972 Act with legislation giving effect to whatever new arrangments the Government has negotiated (if any) under the Article 50(3) process; and/or with new leglislation replicating some currently existing laws. Parliament would have a choice about that (albeit circumscribed by what legislation the Government chooses to promulgate), but it would not have an effective choice about the anterior repeal of the 1972 Act and the loss of the rights enshrined in it; any new laws Parliament chose to enact would, of course, be different and on a different legal basis.

(e) Further, at least some of the EU law rights currently enjoyed by UK citizens by virtue of the 1972 Act (and other domestic legislation) will inevitably and irreplaceably be lost by a withdrawal from the EU, no matter what further legislation Parliament may in

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say that, his contention is hopeless as a matter of law for the reasons summarised in para. 11(1) and explained in detail in section G below. Mr Santos understands the Defendant's position to be that set out in para. 12(3) of his Detailed Grounds of Resistance: that the Government is entitled, in light of the Referendum result, to decide that the UK should withdraw from the EU and give Article 50(2) notification accordingly.

[11] Although the position is not definitively settled, the overwhelming view of commentators is that, once given, an Article 50(2) notification cannot be unitlaterally withdrawn. It is a question of European law which would ultimately have to be determined by the CJEU. For present purposes, the parties and the Court should proceed on the basis that an Article 50(2) notification is irreversible. Even if that were not the position, it would not affect the Parliamentary sovereignty argument: a notification that can be made and withdrawn at the discretion of the Executive alone does not maintain Parliamentary control over the fate of the 1972 Act and the decision as to whether the UK leaves the EU.

due course pass. In relation to those rights, Parliament will be presented with a *fait accompli* about which it will have no choice at – all as a result of the Executive's act in giving notification under Article 50(2).

(f) All this would be to permit the Executive tail to wag the Parliamentary dog: giving notification under Article 50(2) leads to the repeal of the 1972 Act and the emasculation of many of the rights which it currently enshrines.

Accordingly, since the Defendant's points considered in paragraphs 10 and 11 above avail him nothing, the legal reality of the Defendant's position is the unsustainable one set out in paragraph 9 above.

B.3 Justiciability/Amenability to Review

12. The last point by way of introduction relates to jusiciability/amenability to review. As stated above, Mr Santos adopts the submissions of Ms Miller in this regard (set out in paragraph 50 of her skeleton argument), and makes one additional point. The challenge in this case relates to threatened action by the Executive which is directly contrary to the principle of parliamentary sovereignty, the highest ranked legal principle in the UK's constitution. In ***R (on the application of Wheeler) v Office of the Prime Minister*** **[2008] EWHC 1409 (Admin)**, at para. 55, the Court considered the example of section 12 of the *European Parliamentary Elections Act 2002*, which makes statutory approval a legally required condition precedent to the ratification of any treaty which provides for an increase in the powers of the European Parliament. The court observed that Mr Jonathan Sumption QC (as he then was), who was acting for the defendant, *'realistically conceded that a decision to ratify without such approval would be amenable to review*". The court went on to say that the challenge in that case related to the procedure followed in reaching the decision to ratify, rather than to any potentially sensitive issue of policy involved in the decision itself. The same considerations apply in the instant case: Mr Santos argues that approval by Act of Parliament is legally required before an Article 50(2) notification can be given – he is challenging unlawful procedure in *how* a decision is reached (in the instant case, how it is to be decided that the UK should withdraw from the EU and an Article 50(2) notification made), rather than any policy in connection with the *content* of the decision itself (i.e. whether to the UK should withdraw from the EU and/or whether and when an an Article 50(2) notification should be made).

C. The doctrine of Parliamentary sovereignty/supremacy

13. The sovereignty of Parliament is the central organising principle, and focal point, of the UK constitution. It was described as "*the bedrock of the British constitution*" by Lord Bingham of Cornhill in ***R (Jackson) v Attorney General*** [2006] 1 AC 262 at para. 9.[12] The legislative power of The Queen in Parliament is hierarchically superior to all other constitutional authority: it is supreme. Legislation enacted by Parliament takes effect over and above any inconsistent rules of common law or prerogative powers. The supremacy of statute, which is derived from the doctrine of Parliamentary sovereignty, means that all other constitutional rules and principles operate subject to the possibility that they might be altered, augmented or abolished by Parliament.

14. The seminal definition of Parliamentary sovereignty is that given by AV Dicey in *An Introduction to the Study of the Law of the Constitution* (8th edition, 1915) at pages 2 - 3:-

> "*Parliament means, in the mouth of the lawyer, (though the word has often a different sense in ordinary conversation,), the King, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the "King in Parliament,", and constitute Parliament.*
>
> *The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament.*"

15. As elaborated by the Divisional Court (Lord Judge CJ, David Clarke, Lloyd Jones LJJ) in ***Interfact Ltd. v Liverpool City Council*** **[2011] QB 744** at para. 2, this definition has a positive and a negative side. The positive side is that Parliament may 'make or unmake any law whatever' in accordance with which the UK legislature is entitled to enact legislation relating to any substantive subject-matter. The negative side is the corollary of the positive side: no other institution or body is empowered to override or set aside legislation duly enacted by Parliament (save where Parliament itself has granted that power). Whilst the positive side has been the subject of modification over the years, as illustrated by ***Interfact*** at para. 3, the negative side remains absolute, as illustrated by ***Interfact*** at para. 36. Only Parliament has the power to

[12] In *Jackson* at first instance [2005] EWHC 94 (Admin) Maurice Kay LJ said in paras. 4 and 5 that parliamentary sovereignty was acknowledged in the Bill of Rights 1688 and in seminal jurisprudence such as *The Prince's Case* 8 Co Rep la. He said that it is, in the words of Professor Sir William Wade, "*the ultimate political fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation."* Maurice Kay LJ concluded that parliamentary sovereignty is accordingly, in the analysis of Professor HLA Hart, "*the ultimate rule of recognition"* in our constitution, its validity not resting on some anterior legal rule but on accepted practice.

amend or repeal a statute, and no other person or body (including, importantly in the context of this case, the Executive) can act to nullify or override a statute.

16. This has been the central pillar of UK constitutional law since (at least) the ***Bill of Rights 1688*** which, by Section I arts. 1 and 2 and Section II, provides that statutory laws cannot be dispensed with or suspended without the consent of Parliament[13]. It is a legal doctrine, definitively established in the aftermath of the Glorious Revolution of 1688, rather than a construct of the common law.[14]

17. As Lord Parker of Waddington said in ***The Zamora*** **[1916] 2 AC 77** at 90: "*The idea that the King in Council, or indeed any other branch of the executive, has power to prescribe or alter the law to be administered by the courts of law in this country is out of harmony with the principles of our Constitution*." Similarly, in ***R v Secretary of State for the Home Department ex p Fire Brigades Union*** **[1995] 2 AC 513** at 552E Lord Browne-Wilkinson said: "*It is for Parliament, not the executive, to repeal legislation.*"

D. Parliament's role in the UK's entry into, and continued participation in, the EU

18. Parliament played a constitutionally essential role in approving and effecting the UK's entry into the (then) EEC: the passing of the 1972 Act was a necessary step in the accession process. Without it, the UK would not, and could not legally effectively, have joined the EU.

19. On 28 October 1971 the House of Commons resolved that "*This House approves Her Majesty's Government's decision of principle to join the European Communities on the basis of the arrangements which have been negotiated"* by 356 votes to 244 votes.[15] On the same day, the House of Lords had already[16] passed the same resolution by 451 votes to 58 votes.[17] If the vote had gone against the Government, the Accession Treaty would not have been signed by the UK

[13] Section I Art. 1: "*That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without the Consent of Parlyament is illegall.*"
Art 2: *"That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authorities as it has beene assumed and exercised of late is illegall.*"
Section II: "*Noe Dispensation by Non obstante* [Crown licence to do something notwithstanding any law to the contrary] *of or to any Statute or any part thereof shall be allowed but the same shall be held void and of noe effect Except a Dispensation be allowed of in such Statute*".
[14] See the analysis in *Parliamentary Sovereignty in the UK Constitution – Process, Politics and Democracy*, Michael Gordon, 1st edition (2015) at pages 201 – 206, esp. at 204, and at 131 – 137.
[15] HC Deb. 28/10/71 vol. 823 cols. 2076 and 2217. At the end of the debate the Prime Minister said "*I have always made it absolutely plain to the British people that consent to this course* [entry into the EEC] *would be given by Parliament .. Parliament is the Parliament of all the people*" (col 2212).
[16] HC Deb. 28/10/71 vol. 823 col. 2202.
[17] HL Deb. 28/10/71 vol. 324 cols. 849 and 953.

(as it was on 22 January 1972) and the *European Communities Bill* would not have been introduced into Parliament (as it was on 25 January 1972).

20. The UK's signature to the Accession Treaty imposed no legal obligations on the UK, whether under international law or domestic law and it did not come into effect immediately. The Accession Treaty would only bind the UK under international law once ratified by the UK "*in accordance with* [its…] *constitutional requirements*"[18], and it would only become part of domestic law once the 1972 Act had received Royal Assent[19].

21. The Accession Treaty could not be ratified until the 1972 Act had received Royal Assent. This is because the UK's membership of the EEC not only imposed fiscal obligations on the UK, but also entailed changes to domestic law to give effect to elements of (what is now) EU law and, in particular, the conferral of EU law rights directly on individuals in the UK. Without Parliament, and only Parliament, having decided on a number of essential features of EEC membership, the UK simply would not, and could not legally effectively, have become a member of the EEC. For example, only Parliament could decide to subjugate UK law to EU law in the relevant respects (see s. 2(4) and s. 3(1) of the 1972 Act); only Parliament could decide to authorise the fiscal obligations taken on by EEC member states (see s. 2(3) of the 1972 Act); only Parliament could decide to confer directly on UK citizens EU law rights, which membership under the Treaties entailed. In all these respects Parliament had to, and did, take the requisite decisions.

22. Primary legislation was therefore one of the constitutional requirements of the UK for ratification of the Accession Treaty, which led to the UK joining the EEC. Indeed, the long title of the 1972 Act is "*An Act to make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar*"; and section 2(1) of the 1972 Act expressly refers to and gives domestic legal effect to the Accession Treaty.

23. On 17 October 1972, the 1972 Act received the Royal Assent. Thereafter, on 18 October 1972, the UK was in a position to, and did, ratify the Accession Treaty. On 1 January 1973, the UK

[18] By Article 2, instruments of ratification were to be deposited by 31 December 1972 and, if that was done, the Treaty was to come into effect on 1 January 1973

[19] In accordance with well-established principles relating to unincorporated international treaties which have been ratified by the UK, as set out in *JH Rayner (Mincing Lane Ltd.) v DTI* [1990] 2 AC 418 at 499-500 and in *R v Lyons* [2003] 1 AC 976 at paras. 13, 27 and 40 per Lord Hoffmann, (a) unincorporated international treaties do not form part of domestic law, (b) domestic courts have no jurisdiction to interpret or apply unincorporated international treaties, (c) as a source of rights and obligations, unincorporated treaties are irrelevant, (d) unincorporated treaties cannot create directly enforceable rights in domestic law, and (e) in domestic law the courts are obliged to give effect to the law as enacted by Parliament, and this obligation is entirely unaffected by international law

formally became a member of the then EEC and the Treaties were incorporated into UK domestic law by the 1972 Act.

24. Accordingly, the 1972 Act was an essential instrument through which the UK joined what is now the EU. Irrespective of whether the signature and subsequent ratification of the Accession Treaty were formally acts done under the Royal prerogative, they had to be, and were, mandated by Act of Parliament. Without the decision of Parliament by the 1972 Act, the UK would not have become a member of the EU.

25. Further, in respect of each of the subsequent EU Treaties (the Single European Act, the Maastricht Treaty, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon), the position has been the same. On each occasion, the relevant Treaty has (by its terms) not taken effect until ratification by each member state in accordance with its "constitutional requirements". In the UK, that has included an Act of Parliament to make the desired alterations to domestic law. In each case, prior to ratification, Parliament has adopted assenting legislation, amending the 1972 Act to bring the relevant parts of the new Treaty within the ambit of the Treaties to which the 1972 Act applies[20]. So, without, in each case, Parliament passing the assenting and amending legislation, the UK could not have ratified the relevant Treaty and it would not have taken effect (either in the UK or at all).

E. EU law rights conferred by Parliament since the UK joined the EU

26. From the moment of the UK's entry into the EU, the whole host of domestically enforceable EU law rights conferred on UK citizens, which of course have been further added to since 1973, have been conferred by Parliament.

27. Many of these rights are now contained in the *Charter of Fundamental Rights of the European Union* which, by virtue of the 1972 Act, was given direct effect in UK domestic law by the adoption of the Lisbon Treaty on 1 December 2009 ("Charter Rights") – see generally ***Rugby Football Union v Consolidated Information Services*** **[2012] 1 WLR 3333** (Supreme Court) at paras. 26 – 28.

28. Many other EU law rights are given domestic effect through Regulations, Directives and secondary legislation.

[20] A table setting out the timetable in respect of each relevant piece of legislation will be included in the Bundle

29. The 1972 Act (and the Acts implementing the subsequent EU Treaties) are not the only Acts of Parliament which confer domestically enforceable EU law rights. For example, the *European Parliamentary Elections Act 2002* ("the 2002 Act") gives UK citizens the right to stand for election to the European Parliament, and also the right to vote in European Parliamentary elections ("EP Rights").

F. The implications of the 1972 (and subsequent) Acts for UK withdrawal from the EU

30. Just as the fundamental constitutional principle of Parliamentary sovereignty required Parliament to take a decision that the UK should join the EEC by way of enactment of the 1972 Act, so must any decision by the UK to withdraw from the EU be taken by way of an Act of Parliament. This flows ineluctably from the principle of Parliamentary sovereignty/supremacy itself: the legal effect of an Act of Parliament – in this case the UK's membership of the EU as a matter of domestic law through the 1972 Act and all that it entailed in terms of the subjugation to domestic law to EU law and the conferral of EU law rights – can only be overridden, reversed or altered by another Act of Parliament.

31. In particular, in relation to the EU law rights conferred by the 1972 Act, and other subsequent statutes, a decision to withdraw from the EU under Article 50(1) necessarily includes the decision to deprive UK citizens of the rights which they enjoy under the current arrangements. Although the actual deprivation of rights will not occur until the (inevitable) withdrawal itself takes effect under Article 50(3), the key point is that, once notification is made under Article 50(2), it is inevitable that domestically enforceable EU law rights will be lost because notification, once given, cannot be withdrawn and will be valid on the international plane vis-à-vis the remaining 27 member states of the EU.

32. The Defendant seeks to argue[21] that it remains a matter for negotiation with the EU and other Member States what the terms of the withdrawal will be, what the relationship with the EU will be following withdrawal, and what rights will flow from that relationship, the outcome of which negotiation cannot be known at this stage. He says that Parliament's role will be to implement the terms agreed in domestic legislation.

33. But that fails to understand the nature of the Article 50 process and the impact of it on the rights already granted and currently enjoyed by virtue of UK statutes:

[21] Detailed Grounds of Resistance, para. 34.

(1) All the rights, conferred by Parliament and currently enjoyed by UK citizens, can be divided into three categories: (i) rights (such as, for example, employment law rights and equality rights) which Parliament would be able to replace or replicate if it wished to do so after the UK's withdrawal from the EU; (ii) rights (such as, for example, the right to work in an EU state) which may be replicated by the implementation by Parliament of whatever deal emerges from the Article 50(3) negotiations, but which depend on what the 27 remaining member states will agree to (and are, therefore, not within the unilateral gift of Parliament); and (iii) rights, for example the EP Right (if elected) to take up a seat in the European Parliament in Brussels, and the right to EU citizenship, which will because of their very nature be lost irreplaceably when the UK withdraws from the EU.

(2) Depending upon what transpires during the withdrawal negotiations and what legislation the Government decides to promulgate, rights in categories (i) and (ii) above may cease to exist or may be replaced or replicated in some form by new leglsiation. If they cease to exist, they will have ceased to exist without Parliament's consent. But even if they are replaced or replicated, the new rights will be different rights under different arrangements and on a different legal basis to the present: they will no longer have as their source the 1972 Act. An Article 50(2) notification *will* lead to the withdrawal of the UK from the EU; accordingly, there will be no effective choice but to repeal of the 1972 Act and *then* consider replacing it with whatever new, but different, arrangements can be negotiated.

(3) Because the notification will lead inescapably to the repeal of the 1972 Act (and the possible conferral of new and different laws), Parliament must be the body to authorise notification (i.e. to take the decision that the UK should withdraw from the EU, which is a necessary pre-requisite to a lawful Article 50(2) notification): since the current EU law rights have been given by Parliament, they can only be taken away by Parliament (even if they are replaced to some degree or other by something similar).

(4) And, because of the way that Article 50 works, it is no answer to say, as the Defendant seeks to do, that the giving of notification does not itself change any statute or other law or custom on the realm: it sets in train an unstoppable process by which that will happen.

(5) Further and in any event, there are some rights currently enjoyed by UK citizens which will certainly be lost forever, whatever the outcome of the Article 50(3) negotiations and whatever legislation Parliament subsequently enacts: these are the rights in category (iii) above, for example the EP Rights.

(6) From the moment notification is given under Article 50(2), it is inevitable that when withdrawal takes effect under Article 50(3), UK citizens will no longer enjoy the right to vote in European Parliamentary elections and will no longer be eligible to stand for or take up a seat in the European Parliament. There is nothing that the UK Parliament can do to stop this from happening. This will have happened solely as a result of a Government notification under Article 50(2), and Parliament will have been by-passed altogether. The result is that the 2002 Act will remain on the statute books, but that the rights granted under that Act will have been lost forever: that is exactly the result that the doctrine of Parliamentary sovereignty enjoins. It is no answer to say that Parliament could simply repeal the 2002 Act after an Article 50(2) notification has been given and withdrawal pursuant to Article 50(3) has taken effect. The decision will already been taken (by the Government at the notification stage) to deprive UK citizens of their EP Rights: Parliament will have lost the choice whether or not to repeal the 2002 Act, which would become simply an administrative formality (and, indeed, it wouldn't matter – as a matter of substance – whether it was done or not). Parliament will have been presented with a *fait accompli*, being required to act as the servant of the Executive and not its master, in direct contravention of the doctrine of Parliamentary sovereignty.

(7) The EP Rights are one example. Another is the right to EU citizenship. This right will inevitably be lost on an Article 50(3) withdrawal, but, again, the causative act will have been the Article 50(2) notification stage.

34. It follows from the above that, under the doctrine of Parliamentary sovereignty, only Parliament can take the decision to withdraw from the EU under Article 50(1). From the moment EU law rights became domestically enforceable through various Acts of Parliament (e.g. the 1972 and 2002 Acts), only Parliament has had the ability to decide that those on whom such rights were conferred should be deprived of them.

35. The correctness of the above analysis is confirmed and underlined by a number of further factors:

(1) The 1972 Act is a constitutional statute: it is one of the UK's constitutional instruments by which a "new legal order" (involving the supremacy of EU law over domestic law in its relevant fields of application and the conferral of the whole suite of concomitant EU law rights) was introduced into the way in which UK citizens and corporations are governed and the scope of their fundamental constitutional rights: see e.g. ***Thoburn v Sunderland City***

***Council* [2003] QB 151** (especially at para. 62) and ***R (oao Buckinghamshire CC) v Secretary of State for Transport* [2014] 1 WLR 324** (especially at para. 207). It is unsustainable to suggest that such a statute – which cannot itself be impliedly repealed by inconsistent subsequent primary legislation and which provides that EU law is to prevail over (even subsequent) inconsistent primary UK legislation – could be effectively repealed, and the very same EU law rights which it confers extinguished, by a unilateral act of the Executive.

(2) The interaction of Article 50 and the doctrine of Parliamentary sovereignty was considered by the previous Government and the House of Lords at the time when it was proposed that the Lisbon Treaty be incorporated into UK domestic law (as subsequently happened after the *European Union (Amendment) Bill* received the Royal Assent on 19 June 2008). In a Memorandum presented to the House of Lords Constitution Select Committee in December 2007 as part of that Committee's consideration of the constitutional implications of the Bill pursuant to the Select Committee's request for "*the Government's view of how the Lisbon Treaty would affect the UK constitution*", the Foreign & Commonwealth Office ("the FCO") said as follows:

> "*The Lisbon Treaty has no effect on the principle of parliamentary sovereignty. Parliament exercised its sovereignty in passing the European Communities Act 1972 and has continued to do so in passing the legislation necessary to ratify subsequent EU Treaties. The UK Parliament could repeal the European Communities Act 1972 at any time. The consequence of such repeal is that the United Kingdom would not be able to comply with its international and EU obligations and would have to withdraw from the European Union.* ***The Lisbon Treaty does not change that*** *and indeed for the first time includes a provision explicitly confirming Member States' right to withdraw from the European Union.* (emphasis added).

The FCO's evidence directly led to the House of Lords Constitution Select Committee's conclusion in paragraph 95 of Chapter 3 of its Sixth Report of Session 2007-2008 entitled "*European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution*" published on 28 March 2008 HL Paper 84 ("the 6th Report") as follows:

> "*We conclude that the Lisbon Treaty would make no alteration to the current relationship between the principles of primacy of European Union law and parliamentary sovereignty. The introduction of a provision explicitly confirming Member States' right to withdraw from the European Union underlines the point that* ***the United Kingdom only remains bound by European Union law as long as Parliament chooses to remain in the Union***." (emphasis added). See also paragraph 142 of chapter 4 to the same effect.[22]

[22] This Court is entitled to take account of both the FCO's evidence and the 6th Report in accordance with well-established principles, as set out in *Office of Government Commerce v Information Commissioner* [2010] QB 98 at paras. 57 – 64 per Stanley

(3) The Court is also invited to take note of the fact that, in its 4th Report of Session 2016-17 entitled "*The Invoking of Article 50*" dated 13 September 2016 (HL Paper 44), the House of Lords Select Committee on the Constitution concluded[23] in paragraphs 24, 27 and 43, whilst deliberately not expressing a view on the legal merits of the various arguments in the present litigation[24], that:

> "*24. It would be constitutionally inappropriate, not to mention setting a very disturbing precedent, for the executive to act on an advisory referendum without explicit parliamentary approval – particularly one with such significant long-term consequences. The Government should not trigger Article 50 without consulting Parliament.*
>
> *27. In our representative democracy, it is constitutionally appropriate that Parliament should take the decision to act following the referendum. This means that Parliament should play a central role in the decision to trigger the Article 50 process, in the subsequent negotiation process, and in approving or otherwise the final terms under which the UK leaves the EU.*
>
> *43. We consider it constitutionally appropriate that the assent of both Houses be sought for the triggering of Article 50.*"

36. The Defendant makes further points (i) in relation to Parliamentary control of treaty re-negotiation and withdrawal in general (including by reference to double taxation treaties)[25] and (ii) that there would be no inconsistency between the terms of s. 2(1) of the 1972 Act and a situation where there were no continuing EU law rights following a UK withdrawal, because in that situation there would simply be no Treaties and/or rights etc on which s. 2(1) would then bite[26]. In relation to those points, Mr Santos adopts the submissions made on behalf of Ms Miller at paras. 47 and 45 respectively of her skeleton argument (the points raised being ones which apply equally to the Parliamentary sovereignty argument and the Royal prerogative argument).

Burnton J, and *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin) at para. 54 per Richards LJ, giving the judgment of the court. The FCO's evidence is non-contentious and so is admissible (para. 64 of *Office of Government Commerce)*, and the 6th Report led to the enactment of the 2008 Act and so the conclusions are admissible (*Office of Government Commerce*, paras. 62 and 64, *Wheeler*, para. 54).

[23] Consistent with the doctrine of Parliamentary privilege, the Claimant does not invite the Court to express a view on these conclusions. The Claimant simply draws them to the Court's attention so that the Court is aware that, from a purely constitutional perspective, the legal conclusion which the Claimant invites the Court to come to in this litigation accords with the constitutional position as set out in the Select Committee's 4th Report.

[24] Para. 16 of the Report.

[25] Detailed Grounds of Resistance, para. 35-36

[26] Detailed Grounds of Resistance, para. 34

G. Parliament did not surrender its sovereignty to the people through the Referendum

37. The UK is a representative democracy. Referendums are rare. They are governed by the *Political Parties, Elections and Referendums Act 2000*, and each referendum requires its own enabling primary legislation.

38. Under the UK's constitution, because of the sovereignty of Parliament, a referendum is advisory only and the result is not legally binding unless the relevant enabling legislation provides otherwise – i.e. unless Parliament itself decides otherwise. The House of Lords Select Committee on the Constitution, in its 12th Report of Session 2009-10 entitled "*Referendums in the United Kingdom*" ("the 12th Report"), said (in paras. 193 – 194), under the heading "Advisory or binding referendums":

> "*193. Despite referendums in the UK being legally advisory, a number of witnesses pointed out that in reality referendums might be judged to be politically binding. Dr Setala argued that 'in established democracies, it seems to be very difficult for parliamentarians to vote against the result of an advisory referendum" (p 139). Dr Blick similarly stated that 'the political pressure upon a government seeking to ignore the outcome of a referendum would be immense' (p 111). More specifically, Professor Bogdanor explained that 'a clear majority on a reasonably high turnout would leave Parliament with little option in practice other than to endorse the decision of the people' (p 47).*
>
> *194. In practice, however, the UK Parliament can square the circle by passing legislation which does not come into effect until a referendum is held, or by agreeing to be bound by the result in enabling legislation. Professor Bogdanor thought that it would be possible in the UK to 'frame a referendum provision by which legislation was required to come into effect with a 'Yes' vote, and required to be repealed with a 'No' vote, in other words, a mandatory referendum (p 47).*"

39. The Committee's recommendation was expressed in paragraph 197 of the 12th Report (repeated in the recommendations summarised in Chapter 7), as follows:

> "*We recognise that because of the sovereignty of Parliament, referendums cannot be legally binding in the UK, and are therefore advisory. However, it would be difficult for Parliament to ignore a decisive expression of public opinion.*"

40. In the Government's Response to the 12th Report as set out in the House of Lord's Select Committee on the Constitution, 4th Report of Session 2010-11 entitled "Government Response to the Report on Referendums in the United Kingdom", the Government responded as follows:

> "*The Government agrees with this recommendation. Under the UK's constitutional arrangements Parliament must be responsible for deciding whether or not to take action in response to a referendum result.*"

41. The Referendum was held pursuant to the provisions of the *European Union Referendum Act 2015* ("the 2015 Act"). Section 1(1) of the 2015 Act merely required the Referendum "to be held".

42. Consistently with the status of referendums in the UK, the Referendum was advisory only. This was expressly confirmed in the House of Commons Briefing Paper on the Bill dated 3 June 2015, briefing paper number 07212 ("the Briefing Paper"). The Briefing Paper said in section 5 (page 25) as follows:-

> "*The Bill requires a referendum to be held on the question of the UK's continued membership of the European Union (EU) before the end of 2017. It does not contain any requirement for the UK Government to implement the results of the referendum, nor set a time limit by which a vote to leave the EU should be implemented. Instead, this is a type of referendum known as pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the Government in its policy decisions. The referendums held in Scotland, Wales and Northern Ireland in 1997 and 1998 are examples of this type, where opinion was tested before legislation was introduced. The UK does not have constitutional provisions which would require the results of a referendum to be implemented, unlike, for example, the republic of Ireland, where the circumstances in which a binding referendum should be held are set out in its constitution.*
>
> *In contrast, the legislation which provided for the referendum held on AV in May 2011 would have implemented the new system of voting without further legislation, provided that the boundary changes also provided for in the* Parliamentary Voting System and Constituency Act 2011 *were also implemented. In the event, there was a substantial majority against any change.*"

43. When passing the 2015 Act, Parliament therefore made the informed decision that the result of the Referendum would <u>not</u> be legally binding. Parliament could have chosen to make the result legally binding, as it did with the AV referendum in 2011. But it did not: instead, Parliament chose to retain its sovereignty to decide whether or not the UK should withdraw from the EU in the light of the referendum result.

44. In paragraph 1 of his Detailed Grounds of Resistance, the Defendant says that prior to the Referendum the Government's policy was unequivocal that the outcome of the Referendum would be respected and implemented; and that was clearly understood by Parliament. This may well have been <u>Government</u> policy but it was not the <u>will of Parliament</u>, as expressed in the 2015 Act, whatever the Defendant says Parliament 'understood'. If Parliament had wanted the result of the Referendum to be implemented without more, it would have made appropriate provision for that in the 2015 Act, just as it did for the AV referendum in 2011. And no one can know whether, had the Bill for the 2015 Act proposed a binding referendum, Parliament would have enacted it. As it is, no matter what Parliament may or may not have "understood",

Parliament retained its sovereign right to decide whether the UK should withdraw from the EU; no other body or person can override that right. It will be for Parliament to take into account the result of the Referendum. But it is only Parliament that can take the decision; the Government alone has no power to do so.

H. Conclusion

45. The Claimant accordingly does not accept the Defendant's central proposition that it is a "*proper, constitutional and lawful step"* for the Government to give effect to the outcome of the Referendum by bringing about the UK's exit from the EU without Parliament having first decided that the UK should leave the EU.

46. As matters stand, the Defendant has no power to give a notification under Article 50(2) because no lawful decision that the UK withdraw from the EU under Article 50(1) has yet been taken.

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19 September 2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

CO/3281/2016
CO/3809/2016

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

Interested Parties

- and -

GEORGE BIRNIE AND OTHERS

Intervener

ADDITIONAL NOTE
ON BEHALF OF DEIR SANTOS

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1. The Defendant's skeleton argument of 30 September 2016 revealed two key areas of confusion:

   (1) While the Defendant makes it clear that his case is that a constitutionally valid decision that the UK should withdraw from the EU has been taken, he is not clear as to who he says has taken that decision and when it was taken.

   (2) The Defendant appears to advance contradictory positions as to whether it is "common ground" that the Government "in implementation of the outcome of the referendum, [has] validly decided that the UK should withdraw from the EU". In para. 20(3), it is asserted by the Defendant that this is common ground between the Defendant and Mr Santos; but, in para. 6(2) for example, it is asserted that Mr Santos does not appear to recognise that that decision has been taken.

2. In order to seek clarity on the first of those issues, Mr Santos' solicitors wrote to the Government Legal Department asking who, on the Defendant's case, took the decision to leave the EU and when. The response was that the alleged decision comprised a number of stages: "[T]*he Government made clear before the referendum and during the passage of the 2015 Act that it would respect and implement the outcome of the referendum. The directly expressed will of the British people was to leave the EU. The then-Prime Minister confirmed on 24 June 2016 that the Government would, as previously stated, implement the outcome of the referendum and (in the circumstances) bring about the withdrawal of the UK from the EU. The current Prime Minister, and the Secretary of State, have repeatedly reaffirmed that position on behalf of the present Government*".

3. Thus, the Defendants position appears to be that a valid decision to withdraw from the EU, notifiable under Art 50(2) without more, has been taken by an amalgam of events which, whether taken individually or together, are unknown to English constitutional law as a lawful mechanism for overriding primary legislation passed by Parliament. That will be a matter for further submission at the hearing.

4. The balance of the Government Legal Department's letter evinced further confusion as to the second issue outlined in paragraph 1 above. In an attempt to resolve that confusion once again, Mr Santos sets out his position, which is unaltered from the start of this case, as follows:

   (1) It is not accepted by Mr Santos that a constitutionally valid decision that the UK should leave the EU, which is capable of notification under Article 50(2), has been made.

   (2) The central issue between the two sides in this case[1] is – or should be – clear: by reason of the facts and matters quoted in paragraph 2 above, the Defendant's case is that a decision has been made to withdraw from the EU which the Government is now entitled to notify under Article 50(2). Mr Santos' case is that this is wrong because Parliament is the only body that can authorise the necessary consequence of that decision and notification, namely the effective repeal of laws made by, and the rights enshrined in, various UK statutes – most particularly the 1972 Act. Put another way, before a notification can be made, it is (as a matter of law) a constitutional requirement that Parliament approve the repeal of the 1972 Act (and other statutes), whether by legislation empowering the Defendant to notify under

[1] Which arises as a matter of domestic law, as well as being mandated by Article 50 itself.

Article 50(2) or otherwise. Thus, in substance, Parliament must decide that the UK should withdraw from the EU. It has not done so.

(3) That is the substance of the matter. Contrary to what the Defendant seems to be trying to establish, there is no great legal magic to the distinction between a "decision" to leave the EU under Article 50(1) and its notification under Article 50(2). For the purposes of the issues to be addressed in this case, the two are hardly distinct, but are instead inextricably linked. It is wholly unreal to divorce one from the other, as a decision under Article 50(1) is made to be implemented by notification under Article 50(2): it is, in effect, a decision to withdraw and notify. Under the UK's constitutional law, it must be made by Parliament.

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7 October 2016