

1 DRAFT TRANSCRIPT

2 Monday, 5 December 2016

3 (11.00 am)

4 Opening statement by THE PRESIDENT

5 THE PRESIDENT: Before we start, I would like to raise a few
6 matters. We order that no one shall publish or reveal
7 the names or addresses of various parties, prospective
8 claimants and interested parties in these proceedings,
9 or any information likely to lead to the identification
10 of those people or their families, in connection with
11 these proceedings, or the home address of the first
12 respondent or any of the interested parties. Copies of
13 this order with further details will be available to
14 anybody who wishes to see it.

15 We have made this order largely because various
16 individuals have received threats of serious violence
17 and unpleasant abuse in emails and other electronic
18 communications.

19 Threatening and abusing people because they are
20 exercising their fundamental right to go to court
21 undermines the rule of law. Anyone who communicates
22 such threats or abuse should be aware that there are
23 legal powers designed to ensure that access to the
24 courts is available to everybody.

25 Secondly, it is right to record that at the

1 direction of the court, the registrar has asked all the
2 parties involved in these proceedings whether they wish
3 to ask any of the justices to stand down. All parties
4 to the appeal have stated that they have no objection to
5 any of us sitting on this appeal.

6 Third, these proceedings involve a large number of
7 parties and a great deal of legal submissions and
8 supporting material, and the proceedings have come to
9 this court very quickly. That this has occurred in
10 an orderly fashion is entirely thanks to a lot of hard
11 work done by and cooperation between the parties, their
12 lawyers and the court staff. The justices would like to
13 thank all those involved.

14 There are an unprecedented number of lawyers and
15 party representatives. We are grateful to them for
16 agreeing seating arrangements which involve many of them
17 sitting in less convenient places than they may have
18 expected. We have been keen to ensure that members of
19 the public can be here and given the limited space, this
20 has meant that not all members of the legal teams can be
21 accommodated in the courtroom.

22 All parties have filed written submissions which we
23 have carefully read. Because of the limited time
24 available for the hearing, we have had to ask some
25 advocates to confine their submissions to their written

1 argument, and others to spend less time developing their
2 oral submissions than they would have wished. We are
3 grateful for their cooperation and understanding.

4 I remind those advocates who will be addressing us
5 that their oral submissions must not repeat points
6 already raised by other advocates in earlier
7 submissions.

8 Next, many people are watching these proceedings
9 because they are being streamed on our website and
10 broadcast on television. This is a very important
11 aspect of open justice, and we are pleased that so many
12 people are able to read the written arguments online and
13 listen to the oral arguments as they are being
14 developed.

15 Finally, I would like to take this opportunity to
16 remind everyone who has taken an interest in these
17 proceedings that the Supreme Court exists to decide
18 points of law which fall within its jurisdiction. The
19 justices of the court are of course aware of the public
20 interest in this case, and we are aware of the strong
21 feelings associated with the many other wider political
22 questions surrounding the United Kingdom's departure
23 from the European Union.

24 However, as will be apparent from the arguments
25 before us, those wider political questions are not the

1 subject of this appeal. This appeal is concerned with
2 legal issues, and as judges, our duty is to consider
3 those issues impartially and to decide the case
4 according to the law.

5 That is what we will do.

6 Mr Attorney.

7 Submissions by THE ATTORNEY GENERAL

8 THE ATTORNEY GENERAL: My Lady and my Lords, good morning.

9 I appear on behalf of the appellant in this matter, and
10 I know that the court has seen a list of other
11 representation in this case. In the interests of time,
12 I will not, unless the court wishes me to, take you
13 through that.

14 THE PRESIDENT: Very sensible.

15 THE ATTORNEY GENERAL: I am grateful.

16 I note the court also has a timetable as to the
17 submissions that will be made, and I know that all
18 counsel will do their best to keep to that.

19 There are, if I may, two points I wish to make at
20 the outset on which I believe all parties are agreed,
21 and they follow from what my Lord President has just
22 said. The first is that this is a case of great
23 constitutional significance in which there is
24 understandable and legitimate interest, both inside and
25 outside this courtroom and, second, in light of what

1 followed the divisional court's judgment, it should be
2 said with clarity that this is a case which the
3 claimants brought perfectly properly and which it is now
4 perfectly proper for this court to decide.

5 That is so because there is a clear question of law
6 before the court, namely, whether the Government has the
7 legal power to give notice under Article 50 of the
8 Treaty on European Union to begin negotiations for the
9 UK's withdrawal from the EU, or whether further specific
10 legislative authority is required to do so.

11 That, we submit, is a clear question. But it is not
12 a narrow one. It raises issues going to the very heart
13 of our constitutional settlement. The question arises,
14 of course, because the United Kingdom is about to leave
15 the European Union, as a result of a course of events
16 which I submit is worth restating.

17 At the last general election, the Government was
18 elected with a manifesto commitment to hold an in/out
19 referendum on the UK's membership of the EU. Parliament
20 provided for that referendum through the European Union
21 Referendum Act of 2015. The referendum was conducted,
22 we say, in the universal expectation, including in
23 Parliament, that the Government would implement its
24 result. As the foreign secretary told the House of
25 Commons at second reading of the bill, and I quote:

1 "This is a simple but vital piece of legislation.
2 It has one clear purpose: to deliver on our promise to
3 give the British people the final say on our EU
4 membership in an in/out referendum by the end of 2017."

5 My Lords, I don't propose to ask you to turn to
6 that, but if you wish to find it, it is at volume 18 of
7 the bundles, tab 203.

8 A majority of those who voted in the referendum
9 wanted the UK to leave the European Union, and
10 Article 50 provides the specific legal mechanism to
11 begin doing so.

12 Now, my Lords, the divisional court treated all of
13 that as legally irrelevant and concluded that the
14 process could not lawfully be begun by the Government
15 using prerogative powers but only by further legislation
16 in Parliament. We say, respectfully, that the
17 divisional court was wrong about that. We say that use
18 of the prerogative in these circumstances would not only
19 be lawful but fully supported by our constitutional
20 settlement, in line with parliamentary sovereignty and
21 in accordance with legitimate public expectations.

22 So in opening this appeal, I make three submissions
23 by way of introduction to our case from this fundamental
24 constitutional perspective. My learned friend Mr Eadie
25 will then develop our case and the Advocate General for

1 Scotland will deal with the devolution and other issues
2 raised in relation to the Scottish, Northern Irish and
3 Welsh jurisdictions.

4 My three submissions are these. First, that the
5 foreign affairs prerogative is not an ancient relic but
6 a contemporary necessity. Including the powers to make
7 and withdraw from treaties, it is a fundamental pillar
8 of our constitution as a sovereign state and it is
9 essential to the effective conduct of public business.

10 Second, that the prerogative operates as part of
11 a dualist system, including in the EU context.

12 Third, that the prerogative operates wholly in
13 accordance with parliamentary sovereignty. Parliament
14 has a clear understanding of the constitutional function
15 and usefulness of these powers, and where it chooses to
16 limit them, it does so carefully and specifically.

17 So, my first submission is on the importance of the
18 foreign affairs prerogative. The powers to make and
19 unmake treaties, conduct diplomacy and take part in
20 multilateral decision-making do not, we say, reside with
21 the executive as unfinished business or as a result of
22 historical oversight, but because there are good
23 constitutional and practical reasons why they should.
24 The need for the Government to maintain control over
25 strategy, policy and operational matters in conducting

1 our bilateral or multilateral international
2 relationships is, we say, clear and compelling.

3 That has long been true. I want to read from
4 Blackstone's Commentaries on this matter. Again,
5 I don't invite your Lordships to turn it up for these
6 purposes, but it can be found at volume 27 of the bundle
7 at tab 329.

8 At that point, describing the foreign affairs
9 prerogative as, and I quote "wisely placed in a single
10 hand by the British constitution for the sake of
11 unanimity, strength and dispatch". It goes on to say,
12 and again I quote:

13 "With regard to foreign concerns, the King is the
14 delegate or representative of his people. It is
15 impossible that individuals of a state in their
16 collective capacity can transact the affairs of that
17 state with another community equally numerous as
18 themselves. Unanimity must be wanting to their measures
19 and strength to the execution of their counsels."

20 My Lords, we submit that remains the case. Ours is
21 not the only constitutional system where this is
22 accepted. Other common law jurisdictions recognise
23 similar power for their own governance. In the
24 United States, in Canada and in Australia, the executive
25 branch holds the power to make and unmake treaties, and

1 these are powers that are used often.

2 In the last 12 months the Government has signed 31
3 new treaties on a range of subjects, including
4 transport, mutual legal assistance, defence, prisoner
5 transfer and the environment.

6 They have been used too by the Government in playing
7 our full part as a member state of the European Union,
8 including in the process of shaping the development of
9 the EU legal order, and all the ebb and flow of EU law
10 rights and obligations that that entails.

11 The Government has been doing this since 1972 by
12 participating in Council of Ministers' decision-making
13 as well as in the day-to-day transaction of Commission
14 negotiations in Brussels, and diplomatically with other
15 member states. All this, we say, is done using
16 prerogative powers and with Parliament's acceptance.

17 My second submission is that all this is done as
18 part of the functioning of the UK's dualist legal
19 system. Mr Eadie will develop this submission in more
20 detail, but I want to give the court a flavour of it at
21 this stage.

22 It is common ground that treaties are not
23 self-executing. Prerogative actions of the Government
24 on the international law plane on the one hand, and on
25 the other, Parliament giving effect as necessary to

1 rights and obligations on the domestic plane are legally
2 and constitutionally separate. The EU legal order, we
3 say, is not an exception to that dualist system; it is
4 a clear example of it.

5 To implement the UK's original treaty obligations,
6 the 1972 European Communities Act provided for a conduit
7 for the inflow of the EU legal order; that was its
8 purpose. But the existence of a mechanism such as the
9 1972 Act for implementing the consequences of EU
10 membership in domestic law has no bearing, we say, in
11 a dualist system on the existence or use of the foreign
12 affairs prerogative to remove the EU legal order at
13 international level.

14 That is at least in part because the 1972 Act does
15 not and cannot create EU rights and obligations. It
16 says so in terms, and you will be taken to the relevant
17 language. EU rights and obligations are negotiated and
18 agreed by Government and are created and arise on the
19 international law plane.

20 Doing so we say involves and has always involved the
21 use of prerogative powers. The 1972 Act provides for
22 the rights and obligations from time to time existing on
23 the international plane to be part of domestic law.
24 Those rights and obligations in domestic law are
25 therefore inherently liable to change, to be expanded,

1 shrunk or withdrawn altogether by action at the EU
2 level.

3 An action which has that effect, an effect which can
4 include the removal of previously existing
5 treaty-dependent rights, is action taken in the exercise
6 of prerogative powers. That, we say, is the logical
7 consequence of the conduit mechanism which Parliament
8 brought into being with the 1972 Act.

9 Which brings me to my third submission. Parliament
10 is sovereign. Parliament can, if it chooses, legislate
11 to limit the prerogative and it has done so, but where
12 it has done so, it has done it sparingly and explicitly,
13 conscious, as it has always been, of the need for
14 prerogative powers and the effective conduct of
15 Government business.

16 So Parliament has considered carefully the proper
17 extent of its involvement in the making of treaties.
18 The provisions in part 2 of the Constitutional Reform
19 and Governance Act 2010 were the culmination of
20 a lengthy process of dialogue between Parliament and the
21 executive and of wider public consultation.

22 That Act introduced a series of controls in relation
23 to the ratification of treaties, but it did not
24 introduce a requirement for primary legislative
25 authority, nor did it seek to control the prerogative

1 power to make or significantly to withdraw from
2 treaties.

3 Parliament has also considered, with particular care
4 and in detail, what the balance of legislation and
5 prerogative power should be in the specific context of
6 the European Union. Parliament has done so in a series
7 of acts, beginning with the 1972 European Communities
8 Act and ending with the 2015 European Union Referendum
9 Act. We will take you to the details of that sequence.

10 But I would make two points at this stage: first,
11 there is nothing in the wording of the European
12 Communities Act, or indeed in the later legislation to
13 which Mr Eadie will take you, to inhibit withdrawal from
14 the European Union treaties or subject it to
15 a requirement of prior legislative authority. That
16 therefore remains to be done by the Government in
17 exercise of well-established prerogative powers. It is
18 not as though Parliament has been short of opportunities
19 to impose such restrictions if it had wanted to.

20 There has been legislation in 1978, in 2002, in
21 2008, in 2011 and in 2015, where it could have done so
22 and did not.

23 Secondly, nowhere in the three acts that followed
24 the Lisbon treaty in 2008, 2011 and 2015 is there any
25 basis for inferring a legislative restriction on the

1 prerogative in relation to Article 50, to begin
2 negotiation of withdrawal.

3 On the contrary, we say, close attention to the
4 respective roles of Government and legislature in this
5 context has been given by Parliament in each of these
6 acts, and the Government's role on Article 50 has been
7 consciously conserved.

8 The last of these acts is the 2015 European Union
9 Referendum Act. That Act was passed in the clear
10 expectation inside and outside Parliament that the final
11 decision, made by the people in the referendum it
12 provided for, would be implemented by the Government.
13 At the heart of the referendum campaign between
14 remainers and leavers was the proposition that the
15 referendum would provide the definitive answer to the
16 question of our future inside or outside the European
17 Union, and the assumption that this was so was surely
18 clear from the vigour with which the campaign was fought
19 by both sides.

20 Parliament passed the 2015 Act and provided for the
21 referendum, we say, in full knowledge that the
22 Government had publicly and repeatedly committed to
23 implement the outcome and fully expecting it to do so.
24 We say, too, that because implementation of a decision
25 by the people to leave the EU would require withdrawal

1 from treaty obligations, Parliament expected also that
2 this would be done in the normal way, by use of
3 prerogative powers. We say Parliament definitively and
4 deliberately assigned to the public vote and to
5 prerogative action, the very question it is said it now
6 needs to ask itself again in precisely the same terms.

7 Parliament passed the 2015 Act in the clear
8 knowledge, and expectation, that the process by which
9 the exit from the EU would take place was set out in
10 Article 50 of the Treaty on European Union.

11 It knew what would happen when that process was
12 begun, and it took no step, made no provision, imposed
13 no constraint, to prevent the Government giving notice
14 to do so in the usual exercise of prerogative power.

15 So, my Lords, the triggering of Article 50, we say,
16 will not be an exercise of prerogative power on a whim,
17 or out of a clear blue sky. It is the logical
18 conclusion of a process in which Parliament has been
19 fully and consciously involved, a process in which
20 Parliament resolved to put a clear and decisive question
21 about our nation's future to the British people, and in
22 which Parliament expected the Government to act on the
23 answer they gave.

24 None of this means, of course, that Parliament will
25 not be closely involved in the process of the UK's

1 withdrawal from the EU over the coming months and years.
2 Through parliamentary debate and scrutiny, through the
3 procedures set out in the Constitutional Reform and
4 Governance Act for scrutinising the withdrawal agreement
5 which phrase Article 50(2) envisages, and through
6 legislation in the form of the Great Repeal Bill to deal
7 to the extent necessary with the domestic law
8 consequences for former treaty-dependent rights and
9 obligations, Parliament will continue to exercise its
10 sovereignty as it does these things, both when it
11 legislates and when it chooses not to, because
12 Parliament can demonstrate its sovereignty, we say, as
13 much when it decides not to act as when it acts.
14 Parliament is sovereign to impose whatever legal
15 controls it wishes on the prerogative, and it is
16 sovereign to choose not to, or to rely on political
17 rather than legal controls on the Government. That must
18 be what parliamentary sovereignty means.

19 The position of the respondents and others in this
20 case has always been that they have no interest in
21 derailing Brexit but only in defending Parliament's role
22 in the process.

23 But if this is all about standing up for Parliament,
24 I say Parliament can stand up for itself. When it comes
25 to leaving the European Union, Parliament has had full

1 capacity and multiple opportunities to restrict the
2 executive's ordinary ability to begin the Article 50
3 process and it has not chosen to do so.

4 However much they may wish it had, those who support
5 parliamentary sovereignty should, we submit, respect
6 this exercise of parliamentary sovereignty too.

7 So, my final submission, my Lords, is that in the
8 context of this case, the imposition of a legislative
9 precondition by the courts which Parliament did not
10 choose to impose itself, cannot be supportive of
11 parliamentary sovereignty, but must be positively
12 inconsistent with it. In the delicate balance of our
13 constitutional settlement, this court should, we submit,
14 resist the invitation to make such an imposition.

15 My Lords, as I indicated, there are some further
16 submissions that the appellant wishes to make. Mr Eadie
17 and Lord Keen will make them. Unless there is anything
18 further I can assist with on what I have said, those are
19 the submissions I wish to make at this stage.

20 THE PRESIDENT: Thank you very much, Mr Attorney, thank you.

21 Mr Eadie.

22 Submissions by MR EADIE

23 MR EADIE: My Lords, my Lady, can I indicate where my
24 submissions are going to go and give you an overview, if
25 I may.

1 THE PRESIDENT: Thank you.

2 MR EADIE: I am going to start with three brief submissions
3 on the nature of the prerogative.

4 Then I am going to deal with some basic principles
5 relating to dualism and the impact of the prerogative on
6 to domestic legal rights and obligations.

7 Then I am going to take you briefly, because I know
8 you will be well familiar with them, through some of the
9 cases dealing with the De Keyser principles.

10 Then I am going to have a slightly longer section,
11 trying to apply both of those basic sets of principle to
12 the concepts that you have before you today, before
13 turning finally to two topics, one of which the Attorney
14 has already flagged, namely parliamentary sovereignty,
15 and secondly asking the direct question which the
16 divisional court treated as being in effect dispositive,
17 namely is there a background constitutional principle of
18 the kind that they described.

19 That is the structure, and, even in describing it,
20 it appears that my submissions to you are going to be
21 longer than they ordinarily would be, but the complex
22 issues in this case perhaps lead to that. But I will
23 bear clearly in mind what I have been told, which is
24 that in order to maintain the broader interest, if there
25 is any in the issues in this appeal, these submissions

1 have to be marginally more entertaining than the one
2 that Serenade the Stars is about to make in the 11.50
3 Maiden Stakes at Lingfield Park.

4 I am not optimistic on that front, but with that
5 lead in, could I turn first to the prerogative. Three
6 basic points if I may. They are general in nature but
7 they are, I would respectfully submit, important to
8 emphasise at the outset of this appeal.

9 Firstly, the point that the Attorney has already
10 flagged, that the prerogative powers are, we submit,
11 an essential and fundamental component or pillar of the
12 modern British constitution. One only has to list the
13 paradigm examples that the courts have given of
14 prerogative powers to appreciate that constitutional
15 fact. War and peace, the conduct of international
16 relations, including the powers to make and unmake
17 treaties.

18 Those are powers that are exercised today and that
19 have, for years, been exercised by the Government. It
20 probably matters not whether that is a good thing or
21 a bad thing. It is, we submit, a basic constitutional
22 fact. If one had to justify that, it is not difficult,
23 particularly in the sphere of foreign affairs, to see
24 why, under our constitution, such powers continue to be
25 exercised by the Government, subject, of course, to the

1 limited and specific control that the legislature has
2 seen fit to impose upon that exercise.

3 The conduct of foreign affairs involves myriad
4 decisions, a daily exercise of power, a series of
5 judgment calls, the negotiations between sovereign
6 states on the international plane leading to the
7 conclusion, and indeed to the withdrawal from agreements
8 that are so made. It was, we respectfully submit,
9 properly described by Viscount Radcliffe in the
10 Burmah Oil case, core authorities bundle 3, tab 34, MS
11 1356 at page 118 as "a power to act according to
12 discretion for the public good".

13 There has been a recent article exploring the
14 question in justificatory terms, good thing or bad
15 thing, the prerogative, by the professor of legal
16 philosophy at Balliol, Oxford, Professor Endicott, and
17 you have that lecture which we recommend as at least
18 interesting reading behind tab 11 of the little blue
19 file, for which apologies, but the little blue or black
20 file on your desk with 11 KBW written on the back.

21 THE PRESIDENT: Thank you.

22 MR EADIE: That is it. Tab 11 is Professor Endicott if you
23 want. I am not going to take you through it now but
24 there it is.

25 THE PRESIDENT: Thank you.

1 MR EADIE: He relies upon, amongst other things, the very
2 section from Blackstone's Commentaries that the Attorney
3 has just taken you to.

4 THE PRESIDENT: Yes.

5 MR EADIE: I say an essential and fundamental component or
6 pillar under our constitution, but we are, as the
7 Attorney has already flagged, not alone in having that
8 system, in having the system that we do. Other common
9 law jurisdictions have exactly or precisely similar
10 systems relating to treaty-making, ratification, and
11 withdrawal.

12 Specifically and for example treaty withdrawal, to
13 focus on that for a moment, is a decision taken by the
14 executive alone in Australia, in Canada, and we cite the
15 Turp case, I am not going to take you to it, authorities
16 26, tab 308, 8950 in the electronic -- and New Zealand.
17 And the same position exists in --

18 LORD CARNWATH: Can I ask, the Turp case does interest me,
19 are you going to come back to that at some point? That
20 is an unusual example of the prerogative being used in
21 fact to go against a specific act of Parliament on one
22 view of the matter. I don't know whether you are going
23 to come back to it.

24 MR EADIE: My Lord, I can come back to it.

25 LORD CARNWATH: Perhaps later on.

1 MR EADIE: Very well. I was saying that the same position
2 exists in relation to the United States where treaty
3 ratification is subject to two-thirds majority Senate
4 approval; that is ratification; but the power to
5 withdraw vests exclusively in the executive. You have
6 got in the bundle, and it is perhaps worth turning this
7 up very briefly -- I will try and keep the authorities I
8 take you to to an absolute minimum, given the time, but
9 this is perhaps of some interest. Authorities bundle 27
10 tab 27, tab 332, and it is 9367 on the electronic.

11 THE PRESIDENT: Thank you.

12 MR EADIE: The passage that it may be worth just inviting
13 you to side line is the passage that you see on
14 page 9367 in the left-hand column, halfway down
15 beginning:

16 "Termination of a treaty ..."

17 THE PRESIDENT: Yes.

18 MR EADIE: Again, with my Lords' permission, could I invite
19 you to read that, just that paragraph.

20 THE PRESIDENT: Ending "section 332"?

21 MR EADIE: Ending "section 332".

22 THE PRESIDENT: Thank you. We will read that.

23 (Pause)

24 Thank you.

25 MR EADIE: This first statement of basic principle, we

1 submit is enhanced and supported and not diminished by
2 the fact that the powers themselves are ancient.

3 LADY HALE: Could you just tell us what it is that you have
4 directed us to? You gave us a tab reference and you
5 didn't actually tell us what it was.

6 MR EADIE: Sorry, that is the third rerestatement.

7 LADY HALE: The third restatement.

8 THE PRESIDENT: 9364 is the page.

9 MR EADIE: I am so sorry, I should have introduced it.

10 THE PRESIDENT: Yes.

11 LADY HALE: Thank you.

12 MR EADIE: It is indeed the case that the prerogative powers
13 in question are ancient. What that implies, we submit,
14 is that a long-standing, well-recognised set of powers
15 can properly be recognised as both firmly established in
16 our constitutional arrangements, and as having real and
17 continuing value in contributing to effective
18 government.

19 Describing a particular prerogative power as a relic
20 of a past age, a phrase which I know my Lords and my
21 Lady will be familiar with, needs to be approached with
22 some little caution. That was the statement or one of
23 the statements by Lord Reid in *Burmah Oil*, and which the
24 divisional court chose as their descriptive quotation,
25 if I can put it that way, in paragraph 24 of their

1 judgment.

2 The statement, if one goes back to Lord Reid in
3 *Burmah Oil*, was in fact made in order to justify the
4 correct analytical approach in that case to the nature
5 of the war prerogative, namely, as Lord Reid described
6 it, a historical one designed to see, in effect, if the
7 Government had ever taken property in time of conflict
8 without compensation. So it was a statement for
9 a purpose, implying no suspicion of the underlying
10 doctrine by reference to its age.

11 If describing it as a relic of a past age implies
12 a long history, we agree. If it implies as a general
13 proposition that more today is done by statute and there
14 is less reliance than in Stuart times on the
15 Government's prerogative, again, we agree, but to the
16 extent that the description has connotations of
17 anachronism because the power has existed for many
18 centuries, we profoundly disagree.

19 The correct starting point, we submit, is not
20 suspicion of prerogative powers accompanied by judicial
21 concern word at their exercise; it is quite the
22 opposite. It is the recognition that the prerogative
23 powers that remain in the hands of Government are
24 fundamental to our constitution, and effective
25 government -- are essential to effective government.

1 That properly leads to the exacting tests that
2 I will come to, that the courts have developed before
3 a conclusion can be reached, either that the powers have
4 been taken away or limited by Parliament, and I will
5 come back to De Keyser obviously and the rigour of that
6 test; my submission is going to be that the rigour that
7 that imposes is sound. Or that the power should be
8 subjected to a broad general limitation in principle
9 imposed by the courts. That is the first submission,
10 therefore, fundamental.

11 The second submission is that prerogative powers are
12 by definition those powers that can be exercised by the
13 Government without statutory authority. They do not
14 depend for their existence or their source on
15 legislation. Otherwise, they would be, and become,
16 statutory powers. So statutory intervention into
17 a sphere in which prerogative powers are exercised
18 involves a legislative decision to impose limits or to
19 abrogate or to remove existing, properly sourced
20 elsewhere, prerogative powers.

21 If a limitation on prerogative power is asserted,
22 such as the interposition of some form of requirement of
23 parliamentary involvement in decision-making in the
24 sphere of a prerogative, decisions will necessarily
25 therefore be necessary as to the precise nature and

1 effect of any such limitation.

2 CRAG, the Constitutional Reform and Governance Act
3 is an example of this. Preceding CRAG, and I will come
4 back to it as you will recall, there was much debate
5 about the precise extent and nature of the parliamentary
6 controls that should be imposed on the exercise of the
7 prerogative, and detailed provisions, a detailed
8 position was arrived at.

9 So these two are factors we respectfully suggest
10 that indicate that clarity of parliamentary intention is
11 necessarily to be looked for if the assertion is made
12 that the prerogative has been controlled a fortiori
13 abrogated.

14 The third submission in relation to the prerogative
15 is this. Parliament is of course sovereign. It can
16 choose to limit, it can choose to control the
17 prerogative power in any way or ways that it sees fit,
18 and, of course, ultimately, it can choose to remove such
19 word power in any particular context altogether. So
20 it is accurate and more accurate, certainly, in the
21 context of foreign affairs, than using "relic" language,
22 to describe the prerogative, again Lord Reid in
23 *Burmah Oil* as "part of sovereignty which Parliament has
24 chosen to leave in the Government's hands".

25 That is 1338 in the MS numbering, core authorities

1 3, tab 34.

2 THE PRESIDENT: Thank you.

3 MR EADIE: In the context of foreign affairs and
4 treaty-making, there has been specific recognition of
5 that fact, ie that that sort of prerogative power is
6 left in the hands of the Government by Parliament, in
7 the Bill of Rights itself, as noted by the court in the
8 McWhirter case. Again, I don't invite you to take it up
9 but that was a case in which there was an unsuccessful
10 challenge made to the Government's signature of the
11 Treaty of Rome and the relevant reference for your note
12 is core authorities 3, tab 46, MS 1849, at paragraphs 6
13 and 8.

14 Again, what this indicates and emphasises is that
15 the continued existence and exercise of prerogative
16 powers, such as in the conduct of international
17 relations, is constitutionally sound and not suspect and
18 is in nature subject to parliamentary control when
19 Parliament chooses to do so.

20 But the premise or the basic constitutional default
21 position is the continued existence of these fundamental
22 powers, and that renders it just as important in the
23 context of an argument about limitations on prerogative
24 power to examine and take into account what Parliament
25 has not done. Legislative intervention is necessary, we

1 submit, to limit or remove. It is not necessary to
2 leave the prerogative power in place, to be exercised in
3 the usual way without further parliamentary
4 authorisation.

5 So those are the submissions we make, the basic
6 submissions we make about the nature of the royal
7 prerogative.

8 Can I turn to the second of the topics, which was
9 basic principles relating to dualism and the impact of
10 the prerogative on domestic legal rights and
11 obligations.

12 LORD CARNWATH: Can I just interrupt again. Will you be
13 coming back to the extent to which the prerogative is
14 reviewable by the courts? Because I think this is
15 an area which is touched on in some of the submissions,
16 whereas I mean some years ago, it would have been
17 assumed it was not word justiciable at all, whereas
18 more recently, in cases like Abbasi and Sandiford, we
19 have accepted the power to review and it is something we
20 might like to look at a little later.

21 MR EADIE: My Lord, we have. I was not proposing to devote
22 a lot of time to that. You will have seen below there
23 was a flirtation, if I can put it that way, with the
24 non-justiciability argument, and that is no longer being
25 mounted before this court. We accept that the

1 prerogative power, including the prerogative power to
2 exercise foreign relations, may raise non-justiciability
3 issues, but in a context such as this which raises the
4 fundamental and basic legal question, namely whether the
5 prerogative exists or has been abrogated, it is
6 appropriate for the court to rule on that issue --

7 LORD CARNWATH: Why it may come in, and we can see how this
8 goes, when one is asking what difference does the
9 referendum make, then arguably, if the Government said
10 we are going to get out of Europe without any
11 parliamentary mandate at all, or indeed in the face of
12 an adverse referendum, that might well be said to be
13 an abuse of power which is reviewable on that basis by
14 the courts; whereas alternatively, when it is doing,
15 phrase as they say, something which has actually been
16 anticipated by Parliament, then it is not an abuse of
17 power. It seems to me that distinction might be worth
18 investigating.

19 MR EADIE: Yes, and that is a point I am going to come back
20 to when I consider the 2015 Act, but the basic
21 proposition that we accept is that exercise of
22 prerogative power, subject of course to the
23 non-justiciability limitations that continue to exist,
24 the subject matter is open but only to some extent. The
25 courts have been very, very wary obviously, a series of

1 cases, Lord Carlisle springs immediately to mind, they
2 have been wary about second-guessing policy judgments
3 made by the Government; but matters of the kind that
4 my Lord raises particularly in the context of the
5 2015 Act, we respectfully submit that if it has
6 a word chime, it is probably there, so that if the
7 Government acted in a way that could properly be
8 described as abusive, at least arguably, that would be
9 a matter word competent at least for the courts to
10 consider.

11 Basic principles in relation to dualism. Obviously
12 I am going to have to come back and develop some of
13 these themes as I go when we go into the statutory
14 scheme, which is going to occupy a little bit of time
15 later, but I wanted to set the scene first by taking you
16 to some basic constitutional principles on dualism, and
17 then some basic principles on De Keyser, and see how
18 those two marry up, and then go to the statutory scheme
19 and show you how that flows. If that is a convenient
20 course, that seems the logical way of doing it.

21 So five, short basic points around dualism and the
22 impact of the prerogative on domestic legal rights and
23 obligations, if I may.

24 Firstly, we submit that prerogative powers may be
25 exercised to create international legal effects on the

1 international plane.

2 When the Government makes a treaty, it binds the
3 United Kingdom, it acts on behalf of the United Kingdom
4 and it binds the United Kingdom to that agreement on
5 that plane. It does so by exercising prerogative
6 powers, as the famous, the now famous quote from Lord
7 Oliver which I will come back to in the JH Rayner case,
8 core authorities 3, tab 43, 1779 in the electronic
9 numbering is the key page, or 1778 to 1779, now engraved
10 on all of our minds, we have set out the relevant quote
11 in our case at paragraph 41, but as that quote
12 acknowledges --

13 LADY HALE: Forgive me, Mr Eadie, I am back at references.

14 Is it 343 or is it 543?

15 MR EADIE: It is core authorities 3. Do you have a set of
16 files called CA?

17 LADY HALE: On the electronic bundle.

18 MR EADIE: On the electronic bundle, it is 1697.

19 LADY HALE: It is 543.

20 THE PRESIDENT: I think it is bundle 3, tab 5.

21 LADY HALE: It is volume 5.

22 LORD MANCE: There is a distinction between core authorities
23 and phrase all the authorities.

24 LADY HALE: I am sorry, it is just confusing.

25 MR EADIE: It is. It is in many places, I am afraid.

1 I think in the core volumes, at least they have
2 maintained consistently the MS numbering. If you take
3 up the hard copy for the moment.

4 LORD CLARKE: The tab numbers are the same.

5 MR EADIE: The tab numbers are the same, which is why it
6 jumps. If you go to core volume 3 in the hard copy.
7 I should have started with the bewildering nature of the
8 bundles.

9 LORD CARNWATH: I don't think we have all caught up with the
10 core authorities.

11 MR EADIE: They are quite useful because they are a proper
12 dragging out from a set of other bundles.

13 LADY HALE: That is very kind of you, Mr Eadie. I just
14 wanted to reassure myself that I was not looking at the
15 wrong thing. Volume numbers were different but of
16 course it is a very sensible thing to have done,
17 especially for those who are not using the electronic
18 bundles.

19 MR EADIE: It means you do not have to lug five boxes
20 around, which I have been doing for most of the weekend.
21 Core authorities 3 in the hard volume, if you will.
22 Just to show you how it works, I will do it once and we
23 can pass on, as it were.

24 Tab 43, and you will see in the hard copy it jumps
25 from tab 34 to tab 43. That, however confusing, is

1 deliberate.

2 THE PRESIDENT: That is page 1778 that we look at.

3 MR EADIE: 1778, but it is the same if you go into volume 5,
4 et cetera, et cetera, et cetera, it is exactly the same.

5 LADY HALE: Thank you for the explanation. That is very
6 helpful. Now we know where we are, we can carry on.

7 MR EADIE: 1778 to 1779, my Lady.

8 Creating effects on the international legal plane is
9 really the first point, and that is acknowledged by Lord
10 Oliver in the famous quote.

11 THE PRESIDENT: Yes.

12 MR EADIE: The royal prerogative embraces the making of
13 treaties, and of course the royal prerogative also means
14 that the Government can withdraw from treaties in
15 accordance with their terms or with general principles
16 of international law in the same way. As Lord Templeman
17 put it also in the Tin Council or the JH Rayner case,
18 this time at 1755 -- I don't invite you to turn it up,
19 for your note it is there. He said:

20 "The Government may negotiate, conclude, construe,
21 observe, breach, repudiate or terminate a treaty."

22 That is the first proposition, effects on the
23 international plane.

24 The second that the United Kingdom system is
25 a dualist system. That means that there is

1 a distinction between the ability to create legal rights
2 and obligations on the international plane and the
3 transposition of those rights and obligations into
4 domestic law. Treaties are not in the trite phrase,
5 self-executing. They do not automatically become part
6 of UK domestic law when made.

7 So the Government cannot, without parliamentary
8 intervention, to take that phraseology also from Lord
9 Oliver, alter domestic law by taking steps on the
10 international plane to make treaties. They require
11 instead the intervention of Parliament in order for
12 domestic law to be altered.

13 That position was, we submit, accurately stated,
14 unsurprisingly, by Lord Hope in the Privy Council in the
15 Roberts case which you have in the little black file
16 with 11 KBW written on the back of it, which doesn't
17 have MS numbers, I am afraid, but it is the Roberts case
18 in the Privy Council, and I know my Lady was also
19 a member of that court. Supplemental tab 9.

20 The facts do not terribly matter, but it was in
21 an extradition context in an appeal from the Bahamas,
22 and some people were wanted for suspected drug
23 trafficking by the United States, who made a request for
24 their extradition to the United States from the Bahamas,
25 but the relevant paragraphs for our purposes are

1 paragraph 9 on page 4, page numbering on the top in the
2 middle, just to see the shape of the argument. You see
3 halfway down paragraph 9 it says:

4 "We also submitted that as legislation was necessary
5 to enable effect to be given to a treaty in domestic
6 law, Parliament had to pass an enabling statute before
7 it was ratified."

8 The "it" there being the international agreement
9 between the Bahamas and the United States regulating
10 extradition.

11 That then leads into the statements of general
12 principle which you see recorded by the Privy Council at
13 paragraphs 12 and 13.

14 THE PRESIDENT: Thank you.

15 MR EADIE: Could I just ask you to cast an eye over those,
16 rather than my reading them out.

17 THE PRESIDENT: Yes, of course.

18 (Pause)

19 Yes, thank you.

20 MR EADIE: The third proposition is that consistently with
21 dualism, legislation then creates by whatever means
22 a conduit between international and domestic law, if the
23 international agreement is to sound in domestic law, but
24 the fact that Parliament needs to do that consistently
25 with dualism and has chosen to do that consistently with

1 dualism, tells one nothing beyond that a conduit is
2 required. It does not imply that Parliament, by
3 creating the necessary conduit and recognising thereby
4 new legal rights and obligations in domestic law, has
5 also intended to constrain future Government action on
6 the international plane.

7 Lord Oliver did not state or come close to
8 suggesting otherwise and there are of course, as you
9 will be aware, various ways in which Parliament may
10 choose to transpose from the international to the
11 domestic planes.

12 We give examples in our case, if I just turn that up
13 so I can take this tolerably quickly, at paragraph 43,
14 core volume 2, the first tab, and in the electronic it
15 is page 12342 -- I don't dare say thousands.

16 12342.

17 LADY HALE: I am sure you are right.

18 MR EADIE: We will test the system to destruction by the end
19 of this case.

20 THE PRESIDENT: You are right, Mr Eadie.

21 MR EADIE: Good. At least that is something.

22 THE PRESIDENT: On this point.

23 MR EADIE: I wondered how long it would be before it came.

24 Paragraph 43 is the one I am after.

25 THE PRESIDENT: Yes.

1 MR EADIE: It gives the examples, including -- so the
2 examples of transposition, how that could be done, the
3 various ways, you could make legislation with no
4 reference to the treaty rights and obligations that are
5 being transposed; the Criminal Justice Act of 1988 about
6 compensation for miscarriages of justice is an example
7 of that, no reference to the treaty at all. You can
8 give effect, but effect in the legislation's own words,
9 indicating as you do that you are giving effect to the
10 international agreement or instrument; EU directives are
11 perhaps a paradigm example of that; or, name HRA, one
12 can simply schedule the treaty rights in their own terms
13 and then say they are to have effect in domestic law.

14 So there are a variety of different ways in which it
15 can be done. All of those models create domestic legal
16 rights by transposition and none of them, we
17 respectfully submit, does anything to constrain. There
18 is no implication in any of those that in some way,
19 shape or form, Parliament, by having chosen those models
20 or any particular model, has sought to constrain or has
21 impliedly constrained Government action on the
22 international plane thereafter.

23 LORD CLARKE: Is each model a statutory model?

24 MR EADIE: Each model is necessarily a statutory model.

25 LORD MANCE: Does any of your three examples cater for

1 a situation where the continued operation of the
2 domestic legal provisions is affected by whether or not
3 the international position remains the same?

4 MR EADIE: My Lord, none of those three does, and of course
5 I am going to come to that because that is the basic
6 1972 model, so I am going to come to that, but the point
7 that I am on at the moment is the prior point, as it
8 were, which is that there are various ways in which this
9 can be done; and the question is whether in relation to
10 these other models which do not directly create that
11 sort of situation, whether in relation to any of these
12 other models, there is some form of implication, that by
13 having introduced the conduit, there is an implication
14 that Parliament thereby intended that you could not do
15 anything on the international plane thereafter. Of
16 course they do not have a direct impact, and I will come
17 to that, but we do respectfully submit that it is at
18 least of some interest to recognise that if another set
19 of models is used, no implication, as it were, of
20 continuation of said rights would flow.

21 LORD MANCE: No implication of continuation ...

22 MR EADIE: Of the rights thereby transposed. They would
23 simply exist on the domestic plane because Parliament
24 has legislated, and the Government could do whatever it
25 wished on the international plane, but it would not

1 obviously sound into the domestic scheme. So, for
2 example, if one takes a directive, a directive imposes
3 an obligation of result as a matter of international
4 law, the usual way of doing that is to introduce
5 domestic regulations; and the domestic regulations would
6 continue to sit irrespective of whether or not the
7 directive formally finishes, begins, is amended or ends.
8 It would require some other act.

9 They are of course different from the situation that
10 we are dealing with, but we respectfully submit that it
11 is at least of some interest, that is the position in
12 relation to those sorts of models, and that there is not
13 any necessary implication to be derived from the mere
14 fact that a conduit is necessary, consistently with
15 dualism, and has been created by Parliament.

16 Of course, I emphasise, to flag submissions that are
17 yet to come, that this sort of implication or inference
18 from what Parliament has done is not, we will be
19 submitting, at large. There are a set of principles
20 that have been developed by the courts to govern the
21 nature of any such inference or implication.

22 My submission is going to be on De Keyser that
23 before you conclude that a prerogative power has been
24 taken away, that needs to be done by Parliament either
25 expressly or by necessary implication. So it is not

1 just an inference which is at large, and that feeds into
2 the other point to bear in mind which I will come back
3 to, which is that if Parliament wants to go to the point
4 of preventing the creation of legal effects on the
5 international plane, it does so specifically. Look at
6 CRAG, look at the bespoke controls under EU law and so
7 on which I will come back to.

8 That is the third of the submissions, the third of
9 five, as it were, on the basic position on dualism.

10 THE PRESIDENT: Yes.

11 MR EADIE: The fourth is that the dualist principle is not
12 that prerogative acts on the international plane can
13 never create effects in domestic law, including the
14 removal of rights and the imposition of fresh
15 obligations, as a result of action on the
16 international plane by the Government. It is plain that
17 in a variety of more or less direct ways, such acts can
18 have an impact into domestic law.

19 Again, I will come back to it, but we give a series
20 of examples of that sort of situation, those sorts of
21 effects, including citing *Post Office v Estuary Radio*,
22 which I will come back to in paragraph 40 of our case.

23 So there are a variety of more or less direct ways,
24 or indirect ways, that action by the Government can
25 affect or effect? affect domestic legal rights.

1 Again, just to jump ahead, *Post Office v Radio*, I am
2 sure you will have seen or you will recall, involves
3 someone broadcasting a radio station from some
4 territorial waters, the Government effectively defined
5 where the territorial waters begin and end, and those
6 territorial waters were then extended by prerogative
7 act, the consequence of which under the relevant
8 legislation was to render criminal the continued
9 word publication of said radio station from where the
10 boat was located, but -- so more or less indirect ways,
11 the prerogative can have those effects.

12 LORD MANCE: That is just another example of your pro tem
13 argument; the rights under the statute or the
14 obligations are whatever -- or relate to whatever the
15 scope of the territorial waters is from time to time.

16 MR EADIE: It is an example of that, and it is a -- whether
17 one puts it directly alongside or as a slightly more
18 indirect version of the next way in which Parliament can
19 do that, which is parliamentary intervention, the point
20 my Lord Lord Mance was raising with me earlier on,
21 parliamentary intervention can be done so as to make
22 express provision, the effect of which in domestic law
23 is without more to give domestic legal force to the
24 exercise of prerogative powers, and I will of course
25 come back to the 1972 Act and other similar models, but

1 that is one of various models of transposition.

2 The effect of that sort of model, perhaps the
3 fourth, I gave you three before, this is the fourth, in
4 other words direct legislative impact and effect to
5 actions by Government on the international plane, but it
6 gives domestic legal effect to what may be described as
7 an ambulatory system, created on the international legal
8 plane; the body of rights and obligations, the entire
9 legal structure or set of structures on the
10 international plane, may change from from time to time;
11 and the domestic legislation on this model makes
12 provision for a transposition into domestic law that is
13 characterised by the fact that it is both automatic, no
14 further parliamentary intervention required, and direct,
15 in terms of impact on or alteration of the scheme's
16 rights and obligations.

17 LORD CLARKE: This is your paragraph 44, is it?

18 MR EADIE: My Lord, this is our paragraph 44, exactly so.

19 The key points we respectfully submit about this
20 model are that Parliament thereby creates a system under
21 which rights and obligations alter and shift. A right,
22 to focus on that, rather than an obligation, for
23 a moment, may be amended or changed by prerogative
24 action. It may be removed altogether by prerogative
25 action, but all of that is done by the exercise of

1 prerogative powers without further parliamentary
2 intervention.

3 LORD CLARKE: sentence Is it the question of the true
4 construction of the legislative provision, the relevant
5 legislative provision, it is?

6 MR EADIE: It is a question of construction of that, it is.
7 But it is of the very essence of this model, if this is
8 the model that you are dealing with, that Government
9 can, under our constitution, entirely lawfully take
10 steps without further parliamentary authorisation,
11 derived, of course, from the initial intention being, as
12 my Lord has correctly pointed out, that that being the
13 intention of Parliament, but the Government can entirely
14 lawfully take steps without further parliamentary
15 authorisation, which directly alter domestic law,
16 including by removing rights. The possibility of
17 subsequent alteration or removal of rights is inherent
18 in the method of creation of domestic law under this
19 model.

20 That is the fourth point.

21 THE PRESIDENT: Yes.

22 MR EADIE: The fifth flows from it. It is that the nature
23 of domestic legal rights recognised under this model of
24 transposition, is contingent. Such rights are
25 inherently limited. That was the description of

1 Lord Millett writing, obviously, extra-judicially, in
2 a recent article which is bundle 34, tab 471 at
3 electronic page -- I think it must be supplemental,
4 1154, so SUP 1154, if the electronics go crazy.

5 The rights are inherently limited. They have no
6 existence independent of the international legal
7 position from which they derive. What that means is
8 that the legislation transposing them from the
9 international plane into the domestic legal plane is
10 a necessary but not a sufficient matter for their
11 existence, and they are also in nature susceptible to
12 change as a result of the exercise of prerogative
13 powers, precisely because they are dependent on steps
14 taken on the international legal plane, where it is the
15 Government that acts.

16 So if one jumps forward a bit to the 1972 Act which
17 I will come to in a moment, they are indeed rights which
18 are dependent on section 2(1) of the ECA, as we
19 will see when we come to it, but that is but one of the
20 twin ingredients necessary to sustain their existence.
21 The other is dependent on the shifting international
22 legal picture, shaped as it is by the exercise of
23 prerogative power.

24 So section 2 of the ECA does not define the rights
25 or shape them so as to require alteration by further

1 legislative intervention, or so as to create
2 an inconsistency with statutory rights, if the
3 Government exercises its powers on the
4 international plane to remodel or reshape EU law.

5 Of course the rights are dependent, not merely on
6 the prerogative acts of the Government, on the
7 international plane, but also the acts of other
8 sovereign actors. We give, in our case at paragraph 51,
9 the example, the hypothetical example of Greece leaving
10 the EU, with the impact on free movement rights of UK
11 citizens that that would necessarily have.

12 A real life example is the departure of Greenland
13 within which, should they have chosen to do so, UK
14 citizens could no longer exercise their treaty rights,
15 and the leaving of which was subject to a withdrawal
16 treaty given effect to by an order and not by primary
17 legislation. You have that order, if you want it, in
18 authorities 19, tab 233, MS 6656.

19 THE PRESIDENT: Sorry, can you say that again, please.

20 MR EADIE: The Greenland order is in authorities bundle 19,
21 tab 233, MS 6656.

22 LADY HALE: 66?

23 MR EADIE: 6656.

24 I think I gave you a wrong reference in relation --

25 LADY HALE: You did earlier on but we found it out.

1 THE PRESIDENT: My Lady found it first.

2 LADY HALE: That is why we need to know how to navigate,
3 because you cannot get everything right all the time,
4 Mr Eadie.

5 MR EADIE: Even on some points perhaps.

6 In relation to the hypothetical example of Greece
7 leaving and the real example of Greenland leaving as
8 illustrations of the broader proposition, which is that
9 they are not merely dependent on prerogative exercise,
10 prerogative powers by the UK Government but also other
11 sovereign governments, my learned friend Lord Pannick
12 says: that is irrelevant because our constitutional
13 principles regulate the conduct of the the UK Government
14 and not that of other states. Of course he is right, so
15 they do. But that doesn't answer the point, and the
16 point is that the rights are self-evidently of a very
17 special kind, linked to action, not merely of the UK but
18 also of other sovereign states on the
19 international plane, and it is therefore simply
20 inaccurate by way of analogy to treat them as if, in
21 relation to their creation, modification or even
22 removal, as if they were the same as what might be
23 called purely domestic rights.

24 So those are the five points we make.

25 LORD MANCE: Is there a distinction between the scope of the

1 rights under the treaties which, as you point out, is
2 ambulatory, may go up or down, may even be affected by
3 somebody else leaving the treaty, and the existence of
4 the treaties themselves?

5 MR EADIE: Well, my Lord, we know that there are certain
6 provisions in the ECA when we get to it that deal with
7 the treaties themselves, but my respectful submission is
8 that in terms of whether or not the Government can enter
9 into or withdraw from treaties themselves, the position
10 is fundamentally the same. That goes back to
11 Lord Millett's concept of inherency; it is not just
12 dependent upon or contingent upon the methods of
13 creation of EU law; it is dependent upon the
14 continuation of the very structures which govern. So we
15 respectfully submit that it is essentially the same
16 principle that governs.

17 I was going to move to the De Keyser principles, the
18 third of the topics.

19 THE PRESIDENT: Yes.

20 MR EADIE: The courts have considered, on various different
21 occasions and at the highest level, the correct approach
22 in principle to be applied in considering the question
23 whether Parliament has abrogated or limited prerogative
24 powers or their exercise.

25 Again, to try and identify the core principles if

1 I may before taking you to -- it will probably only be
2 three or four cases, the core principles are we submit
3 as follows.

4 LORD CLARKE: Are these summarised in your case?

5 MR EADIE: I am not sure in quite the order or form I am
6 about to do them, but I will locate the bit in the case
7 if I may, if I can ask someone to find the most directly
8 analogous bit.

9 Firstly, Parliament can, of course, limit, control
10 or remove prerogative powers expressly. It is sovereign
11 to decide whether to do so and if so how.

12 Secondly, whether it has done so outside that
13 express sphere and therefore in other circumstances is
14 a question of statutory interpretation.

15 THE PRESIDENT: Yes.

16 MR EADIE: I am told that the nearest is 64 in our case
17 where we start dealing with De Keyser, 64 and following.

18 THE PRESIDENT: Yes.

19 MR EADIE: Thirdly, the starting point is to expect from
20 Parliament and for the courts to require real clarity,
21 to put it neutrally, real clarity before prerogative
22 powers are removed. There is good reason for that. It
23 is no small thing, we submit, to alter the
24 constitutional balance, particularly one that has
25 existed for many years, by abrogating or limiting

1 long-standing powers. All the more so where they are,
2 as the foreign relations powers are, fundamental and
3 essential to effective Government.

4 LORD SUMPTION: Most cases in which statutes have been held
5 to limit the prerogative have been cases where it has
6 done so implicitly, is that not right, by virtue of the
7 field being at least partly occupied by a statutory
8 scheme; it is never said the prerogative is now
9 abolished, all that has happened is that the subject
10 matter has received legislative treatment.

11 MR EADIE: My Lord, that is true. I don't want to quibble
12 at this stage because I am going to develop the
13 principles as we come, but covering the field exactly is
14 going to be the submission, but there are cases,
15 including in the specific context of EU legislation, the
16 Rees-Mogg case being the paradigm example of that, in
17 which the courts, in approaching the concept of
18 necessary implication, have effectively reasoned thus:
19 they say here is Parliament that has intervened
20 expressly to impose a sequence or series of controls on
21 the exercise of prerogative in a particular sphere.

22 So, is the next step of the reasoning, one can fully
23 expect them if they are going to do it in relation to
24 some other matter in the same sort of context to do so
25 equally expressly, and we respectfully submit that is

1 the correct reading of Lord Justice Lloyd's judgment in
2 Rees-Mogg.

3 But my Lord is right, that in the majority of cases
4 where the issue is controversial, the question has been
5 whether Parliament has, by occupying the field to
6 whatever degree, created the necessary implication.
7 That is why I put as this third proposition, it was
8 neutral, as it were, to the precise nature of the test;
9 it was one can expect clarity because of what is being
10 done; one can expect clarity because it is no small
11 thing to alter that constitutional balance, but one can
12 expect clarity for a slightly different reason, which is
13 that clarity is obviously necessary where there are, or
14 there is, a variety of ways in which the powers could be
15 limited or controlled.

16 LORD MANCE: Mr Eadie, do you say that the European
17 Communities Act 1972 was neutral as to whether the
18 United Kingdom was a member of the European Communities?

19 MR EADIE: We say it proceeded on the fundamental assumption
20 that that ultimate decision on the international plane
21 was a matter for Government, and I am going to come to
22 develop that submission. It was a subject of particular
23 consideration which I am going to take you to by
24 name Professor Furniss recently, drawing a comparison
25 between -- in relation to the long title, but equally in

1 relation to the operative provisions of the relevant
2 legislation between the ECA and various bits of
3 legislation that dotted around it temporally, 67, 70,
4 73, to do with the creation of independent status in the
5 Bahamas, Barbados and so on. But I am going to draw
6 that contrast and come back to that if I may in the
7 context of the 1972 Act.

8 THE PRESIDENT: Very well.

9 MR EADIE: I am simply on De Keyser for the moment, if
10 I may.

11 THE PRESIDENT: Yes.

12 MR EADIE: The second reason for expecting clarity and for
13 the courts demanding clarity, because obviously the
14 principles are for you, is obviously necessary to have
15 clarity where there are a variety of ways in which
16 control could be exercised, could be imposed. Various
17 mechanisms of parliamentary control. What is the nature
18 of that control? Is it primary legislation, is it
19 affirmative resolution, is it negative resolution, is
20 it approval by motion; all sorts of questions that would
21 need to be resolved if control is to be imposed.

22 So that the third of the propositions. The starting
23 point is clarity, or the expectation of clarity.

24 THE PRESIDENT: Yes.

25 MR EADIE: The fourth is that it is just as important to

1 have regard to what Parliament has chosen not to do, as
2 it is to have regard to what it has done in the context
3 of a particular legislative scheme. So a limited,
4 carefully considered scheme of limits and controls will
5 imply that matters falling outside such limits and
6 controls remain untouched. That is likely to lead in
7 practice and in principle to a place in which Parliament
8 has evinced an intention in the particular context, if
9 that is so, to control expressly or not at all, to come
10 to the point that my Lord Lord Sumption was putting to
11 me. That is significant.

12 LORD SUMPTION: This is presumably a harbinger of the point
13 you want to make about the 2008 and 2011 acts.

14 MR EADIE: They are. They are leading towards those. I am
15 going to take you through that statutory scheme.

16 Fifthly, if there is no express control and the
17 context is not as I have just described, in other words
18 Parliament has already intervened to put a series or
19 sequence of controls in place, if there is not express
20 control and you are not in that place, the test
21 developed by the courts is whether legislative
22 intervention in a sphere where prerogative powers exist,
23 creates a necessary implication. That is the test, that
24 the prerogative can no longer be exercised. In other
25 words, that it can no longer be exercised without

1 legislative -- prior legislative authority.

2 A necessary implication is, we submit, the correct
3 test, it is the test that has been regularly applied by
4 the courts, and it imports the stringency of logical
5 imperative from the language used, rather than mere
6 reasonableness.

7 Again, you need no introduction from me to that test
8 first laid down by Lord Hobhouse in *Morgan Grenfell* but
9 that, we respectfully submit, is the nature of the
10 necessary implication case. The necessary implication
11 flows, again to finish the answer to my Lord Lord
12 Sumption's point, it flows if at all from the fact that
13 the very thing, the very thing which had been previously
14 done by prerogative has now been, to use the phrase that
15 we will see in the case law when I come to it in
16 a moment, "directly regulated by statute".

17 The sixth of the propositions, before coming to the
18 case law, is that, in approaching the issue of whether
19 or not the prerogative continues to exist at the point
20 at which the power is to be exercised or is proposed to
21 be exercised, it is necessary to consider the scheme of
22 the the legislation as it exists at that time. Because
23 legislative schemes can change from time to time and the
24 question is a current one.

25 That is the conventional approach, the set of

1 principles that I have just outlined, we respectfully
2 submit is the conventional approach that the courts have
3 developed over the years for asking the question whether
4 fundamental prerogative powers existing under our
5 constitution have or have not been abrogated. It is to
6 be acknowledged as such, in other words, it is to be
7 acknowledged as the conventional approach directly
8 relating and directly addressing the principles that
9 apply in answering that question.

10 tohere I fully appreciate and I will come back to
11 it, that the key focus of the respondent's case is
12 whether there is another principle or set of principles
13 in play in the present context to do with affecting
14 statutory rights as a result of the exercise of
15 prerogative powers but the conventional approach remains
16 we submit of critical importance, as the correct
17 approach and in any event in testing whether a principle
18 of such clarity and such weight of the kind for which
19 the respondents contend, is properly applicable in our
20 context. In effect, to reverse that conventional
21 approach. In effect to say it is no longer a question
22 of asking whether Parliament has expressly or by
23 necessary implication removed the prerogative, now if
24 this other principle is in play, that test is in effect
25 reversed and it is said you have to ask the question the

1 other way round and point to or be able to point to
2 express powers and legislation permitting you to
3 interfere with rights. So it does involve a pretty much
4 direct reversal of the conventional approach set out in
5 De Keyser.

6 LORD KERR: This is prerogative by implication and the act
7 that brings about that implication is repelled, does the
8 prerogative power revive? Is it resurrected?

9 MR EADIE: My Lord, it can do, is I think the logical
10 consequence of my submission because it is a current
11 question. If I propose to exercise prerogative power on
12 behalf of the Government, what the courts need to do is
13 ask the question does that prerogative power exist
14 today -- of course there are some circumstances where a
15 prerogative that has been put into obedience doesn't come
16 back but if it is fundamentally dependent on the nature
17 of the legislative scheme, that we respectfully answer
18 to my Lord's question is a current question I will come
19 back, I am going to develop submission as to whether or
20 not -- on one view it is fairly critical because it is
21 jolly difficult we will respectfully submit for my
22 learned friend's to answer the flow of the legislation
23 that follows the 1972 Act, the high-water mark for that
24 case is the 1972 Act because it does not contain the
25 great scheme of controls that Parliament subsequently

1 developed and you know from the divisional court's
2 judgment that they effectively treated as legally
3 irrelevant for this purpose any Act which followed the
4 1972 Act and we submit that that is fundamentally wrong
5 as an approach but I will come back to develop that
6 submission if I may.

7 I was going to take you to De Keyser, it is in core
8 authority's bundle 2, tab 10.

9 The essence we submit is in, just for my Lord Lord
10 Clarke's note, is in the quote from Lord Palm which we
11 have set out in our case at paragraph 66.

12 THE PRESIDENT: Thank you.

13 MR EADIE: The basic points we get from it I have already
14 summarised, if the statute directly regulates, directly
15 regulates, the source of the authority becomes
16 statutory, it ceases to be the prerogative, and then is
17 subject to such controls as Parliament has specified but
18 it is the direct regulation of the very thing which
19 creates the necessary implication of legislative
20 abrogation or control so it requires, as essential to
21 this approach, a precise identification of the
22 Government activity and then asks the question has that
23 very activity been subject to new statutory conditions,
24 governing its exercise so as to lead to that
25 implication, and of course, so as to avoid having to

1 repeat it as we go through, the precise activity in
2 question is the withdrawal from the treaties on the
3 international plane or more directly the giving of the
4 Article 50 notice.

5 So when we come to our legislation, that is going to
6 be the key focus.

7 You know I hope, and think, and if not someone
8 better shout, but you know the background and the nature
9 of the facts. The army council requisitioned a hotel
10 for the use of the royal flying corps and it denied the
11 hotel owners a right to compensation. Compensation
12 which the claimant said was due to them and the Crown,
13 in the House of Lords, claimed that the right to
14 requisition was a right to be found and sourced in the
15 prerogative and the prerogative did not carry with it
16 the burden of compensation. So a critical question was
17 whether or not the requisition was entitled to be done
18 in exercise of that prerogative for which no
19 compensation was payable at all.

20 The speeches are interesting because they indicate
21 the test which is to be applied in answering the
22 question whether the prerogative has been abrogated or
23 supplanted.

24 LADY HALE: Dot speeches proceed on the assumption that that
25 was correct, that the royal prerogative existed to

1 requisition property in the UK in war time without
2 paying compensation? Do they proceed on the assumption
3 that that is correct or do they discuss that?

4 MR EADIE: Well I think they do a bit of discussion of that.
5 My Lady is right to draw had he up. They do a bit of
6 discussion on that as it were in phase 1 of the analysis
7 and then phase 2 says assume for the sake of argument
8 that that is so, that the prerogative would otherwise
9 exist and it is the sort of question that was discussed
10 in the context of foreign requisitions in burdensome oil
11 as you will recall.

12 LADY HALE: That is why I am asking.

13 MR EADIE: Quite, but in relation to to this they do discuss
14 that question but go on to consider assume even that the
15 prerogative was ever of a nature that allowed
16 requisitioning without compensation, has that now been
17 subjected to conditions as a result of the introduction
18 of legislation?

19 So my Lady is right to draw me up on that but the
20 key part for our purposes is perhaps the second phase of
21 that analysis.

22 In the first of speeches by Lord Dunedin, and the
23 key passage, or passages, I am going to go on the MS
24 numbering, if I may, bottom of the page, 246 and you
25 will see about five or six lines up from the bottom of

1 the first full paragraph, a line beginning equally
2 certain, just to pick up that sentence there:

3 "Nonetheless it is equally certain that if the whole
4 ground."

5 LORD HODGE: I have circled whole ground] was something
6 which could be done by the prerogative could be done by
7 statute, it is the statute that rules on this."

8 On this point I think the observation of the learned
9 master of the rolls is unanswerable and then you see the
10 question that was unanswerable towards the end of that
11 paragraph. And then there is a definition of the
12 prerogative and then you see picking it up again three
13 lines up from the bottom -- perhaps you could read that
14 sentence about five lines up from the bottom of that
15 page:

16 "As much as the Crown is a party to every Act of
17 Parliament, it is logical enough to consider ... [my
18 Lady's question] and specifically empowers the Crown to
19 do the same thing, but subject to condition conditions
20 the Crown assents to that and by that act to the
21 prerogative being curtailed."

22 It is direct overlap, concentric circles, the whole
23 ground the same thing and that leads Lord Dunedin to his
24 conclusion which is that the act of 1842 which provided
25 for compensation and indeed the act of 1914, which was

1 neutral on the point did indeed cover the whole ground.
2 It allowed the requisitioning to take place, it
3 effectively said if you are going to requisition you
4 had better pay and you cannot get round that regime by
5 relying on prerogative power. You see his conclusion
6 most clearly expressed on this point at page 248, just
7 before the end of the long paragraph occupying most of
8 that page about seven lines up, :

9 "It is therefore impossible in my opinion ..."

10 THE PRESIDENT: Yes.

11 MR EADIE: Could I invite you to read from there to the end
12 of that paragraph:

13 (Pause)

14 That was Lord Dunedin. Lord axe, if you want it
15 there is a little bit explaining why the 1914 act does
16 not alter that but that on the next page about a third
17 of the way down but not central to the reasoning. Lord
18 Atkinson is next and the relevant parts of his speech
19 are really on page 259 to 260.

20 THE PRESIDENT: Thank you.

21 MR EADIE: And can I invite you to read again rather than my
22 reading them out, sorry it may be difficult to follow
23 for those just listening but it is about a page worth.

24 If you go to 259, if you go to the first full paragraph:

25 "I further concur with him ..." could you read from

1 there to the end of the full paragraph on the next page.

2 THE PRESIDENT: If you want to sit down while we do that,
3 you are welcome.

4 (Pause)

5 Thank you, so we have something on answer to Lord
6 Kerr's point there about why it is still in force.

7 MR EADIE: My Lord, yes, and the bits I was going to
8 particularly invite to you circle as it were, and the
9 only thing that changes is the precise description and
10 the fact it is sometimes plural and sometimes singular,
11 the first of the paragraphs I invited you to read the
12 one beginning "I further concur ..." and three lines up
13 from the bottom of that, the very things, and next
14 paragraph, six lines down, of the line beginning "of its
15 prerogative to do the very thing ..." two lines up from
16 the bottom of the page "Particular thing ..." which
17 becomes plural in the second line of the first full
18 paragraph of the next page "Particular things", but it
19 is all the same point.

20 THE PRESIDENT: All the same thing.

21 MR EADIE: It is. That is Lord Atkinson, Lord Metropolitan,
22 274, again a similar analysis, 274, the key bit is
23 probably the second full paragraph on page 274, asking
24 the question that it does in the final sentence, and
25 then essentially the same reasoning that we have just

1 seen in the remaining paragraph on that page.

2 THE PRESIDENT: Thank you.

3 MR EADIE: That is the relevant bit in him. Lord supple,
4 281, and again could I invite you just to read down the
5 first full paragraph, the only full paragraph, on that
6 page, 281, could you just cast an eye down to -- you can
7 stop at the word "Speed" three lines up from the bottom
8 of the page.

9 THE PRESIDENT: Right, thank you.

10 (Pause)

11 It is subject matter rather than thing.

12 MR EADIE: It is subject matter rather than thing but it
13 does still directly deal ^check.

14 THE PRESIDENT: Thank you. ^check "it is still directly
15 deal" ^check.

16 MR EADIE: It is essentially the same reasoning. And Lord
17 Palm, 295 to 296.

18 THE PRESIDENT: This the passage you quoted in your case.

19 MR EADIE: This is the passage we quoted in our case, you
20 perhaps don't need it but perhaps for your case there it
21 is.

22 LORD WILSON: An endless check.

23 MR EADIE: Subtly different ways but substantively the same
24 is the submission.

25 That is therefore De Keyser, laycan airways is in

1 the same volume of authorities behind tab 12 starting at
2 MS 307.

3 THE PRESIDENT: Thank you.

4 MR EADIE: Again the facts will be very familiar to
5 my Lords, this involved the Government effectively
6 trying to use the prerogative to give in effect
7 a direction to the civil aviation authority to frustrate
8 or terminate the ability of forehead laycan to run sky
9 train between Stansted and New York in circumstances
10 where there was an express legislative power which was
11 subject to conditions which could have been used. That
12 is the summary of the facts. Can I take it first try
13 and deal with it quickly, take it first in the judgment
14 of Lord Justice Roskill, 307 is the first of the pages,
15 Lord Justice Roskill at page 382.

16 THE PRESIDENT: Thank you.

17 MR EADIE: Where he identifies the issue. The letter G.
18 The sole question" do you see that by the letter G.

19 THE PRESIDENT: Yes.

20 MR EADIE: So that just frames the issue. Just that
21 sentence will do for that purpose.

22 THE PRESIDENT: Thank you.

23 MR EADIE: And then he sets out on the next page, 383, at
24 letter E what he describes as "the relevant principle
25 its: the relevant principles upon which the courts have

1 to determine when a prerogative power has been fettered
2 by statute were exhaustively considered by the House of
3 Lords."

4 He sets out lots of quotes which you have now seen.

5 THE PRESIDENT: We have read, yes, thank you.

6 MR EADIE: Principles to be applied plain, 385 at F and then
7 he proceeds to analyse on the particular facts of that
8 case why it is that the necessary implication arises, to
9 preclude the exercise of statutory power. And the key
10 reason that it might be thought is 386 between F, "In
11 short I do not think the Attorney General's argument on
12 prerogative power and the power for municipal law can
13 march side by side ^check right ..."

14 Can I just ask you to read from there to the bottom
15 of the page.

16 (Pause).

17 THE PRESIDENT: Yes.

18 MR EADIE: So it is simply an application of the principles
19 that he has taken and considers to be plain from the
20 House of Lords speech insist De Keyser but you will see
21 and it is not very difficult to understand how the
22 direction and the same thing, all of those principles
23 all of that approach is applying.

24 LORD MANCE: Is it quite along those lines? I thought this
25 was a slightly different application or possibly

1 principle. The fundamental reasoning was that, having
2 gone through all the necessary statutory hoops, the
3 airline had received a licence and this was then being
4 nullified by the Government by the Government by using
5 a power which it had to withdraw decision under
6 a Bermuda agreement with the United States, thereby, by
7 the back door, undermining what it wasn't -- what it had
8 done by the front door.

9 MR EADIE: My Lord, it is in part that, you are right. It
10 is a slightly more subtle, as it were, application of
11 the same thing. But it also had an element of direct
12 De Keyser, if I can put it that way, as you see on 386
13 between B and C because the relevant legislation did
14 indeed provide for power under the Secretary of State to
15 revoke the licence.

16 THE PRESIDENT: Under section 4, yes.

17 MR EADIE: Under section 4 and what was being done was the
18 power to exercise the prerogative power --

19 LORD MANCE: Only in certain circumstances.

20 MR EADIE: Exactly, subject to the limitations that
21 Parliament has imposed, so there is a bit of direct
22 De Keyser in that way and there is is a bit of the point
23 that my Lord put to me between F and G. I perhaps took
24 it a bit quickly, I should have taken you to between B
25 and C as well but you have a bit of both in there and

1 then Lord Justice Laughton, to similar effect, and you
2 probably ought to read between H on page 391 down to D
3 on page 392, just to get the essence of his reasoning.

4 (Pause).

5 You see in particular that between C and D, he is
6 centrally focused on what I call straight De Keyser.

7 ^check essentially focused ^check.

8 THE PRESIDENT: Necessary implication, yes.

9 MR EADIE: Necessary implication but also reliance
10 particularly and focus particularly on section 4.

11 THE PRESIDENT: I understand.

12 MR EADIE: Lord Denning, I don't know why I have come to him
13 last but I have.

14 LORD CARNWATH: I think A, of the passage on which the
15 respondents rely.

16 MR EADIE: Quite, that is why I invited you to read the
17 whole passage, it has to be read in context.

18 LORD CARNWATH: You cannot use the Crown powers to take away
19 the rights of citizens.

20 MR EADIE: In circumstances in which as we then see
21 section 4 requires the right to revoke the licence and
22 Parliament has subjected any such deprivation to
23 statutory control.

24 LORD MANCE: Presume lit the same reasoning would apply even
25 if there had not been a statutory right to revoke.

1 MR EADIE: You would be frustrating, cutting across.

2 LORD MANCE: You would be cutting across, so that is
3 an independent line of reasoning to the one you have
4 referred to under article 4.

5 MR EADIE: My Lord, it is but we respectfully submit it has
6 the same source and drive which is parliamentary
7 intervention in the field of scheme of regulation, and
8 so on. It is not, and I should have picked up directly,
9 my Lord is right, it is not simply as it were as
10 a freestanding principle the point between A and B.
11 That needs to be read properly in its context is our
12 submission about that.

13 THE PRESIDENT: You were going to take us to Lord Denning.

14 MR EADIE: I was going to take you to Lord Denning,.

15 LORD CARNWATH: Lord Denning was perhaps not in the majority
16 on this one.

17 MR EADIE: That may explain why I am taking you to him last.
18 I can't remember if it was quite on this point but the
19 essence of his reasoning was similar at least. 370 at
20 H, over to C on the next page.

21 (Pause).

22 We have back door and front door which is always
23 an attractive submission.

24 THE PRESIDENT: Yes.

25 MR EADIE: It might be thought to echo strongly in Lord

1 Denning's mind but one also has could he invoke the
2 statute by invoking the prerogative ^check.

3 Tab 15, MS 444 ^check case ^check this is also
4 subtly different in terms of the facts because you will
5 recall the way in which the issue arose. It is
6 really De Keyser by analogy rather than directly because
7 the legislation in question was not in force. But the
8 court was concerned with a situation where Parliament
9 had legislated for the way in which the Secretary of
10 State was to act in order to achieve a particular
11 objective, there sets up the criminal injuries
12 compensation scheme but the the Secretary of State had
13 sought to achieve different results through the exercise
14 of the prerogative and setting up an ex gratia or
15 slightly different tariff form of scheme and had then
16 deliberately as it were decided as it were not to bring
17 in the relevant legislative provisions.

18 I perhaps only need a custom short bits from fire
19 brigades, 483, using the MS numbering in the speech of
20 Lord Brown Wilkinson, 483, it is really the bit between
21 D and that paragraph beginning by the letter D on
22 page 483, culminating in the citation of De Keyser.

23 (Pause).

24 THE PRESIDENT: Yes.

25 LORD MANCE: Again it is a different principle, or certainly

1 a different ambit to De Keyser's principle. They
2 actually say, don't they, two of the majority, Lord
3 brown Wilkinson and Lord Lloyd that De Keyser's royal
4 hotel does not help in this case, the case has been
5 decided on a different principle, if you look at 553 G
6 and 573 C. 573 C.

7 MR EADIE: My Lord, yes, but that is because the statutory
8 provisions are not at that point in force, so it is by
9 necessitate as it were De Keyser by analogy but the
10 reason I took you to the passage between D and F on 483
11 is because he is there citing the basic approach in
12 De Keyser and setting on the the principle that applies.

13 Of course the position is here that the legislation
14 is not in force.

15 LORD MANCE: The principle being implied is that you cannot
16 use the prerogative power to undermine a right or
17 an obligation, isn't it? In this case it was
18 an obligation to consider bringing into force the
19 legislation.

20 MR EADIE: My Lord ultimately if the legislation had been in
21 force, or if the legislation was in force it would be
22 direct De Keyser, so you cannot imine, you cannot use
23 the prerogative to unmine the law of the land, that is
24 the general principle and everyone accepts that, that is
25 uncontroversial but the question is how it applies. You

1 can do, see Lord Oliver which if there is
2 a parliamentary intervention as he put it.

3 So -- but the reason I keep going back to 48 3D it F
4 is because it sets out what De Keyser's does stand for,
5 which is where you have got (Inaudible) in place, the
6 test is expressly or as he puts it here, by implication.

7 LORD WILSON: Are these three cases anything more than
8 interesting example of the application of the necessary
9 implications test ^check.

10 MR EADIE: My Lord I respectfully submit not. I am sorry it
11 has taken a long while to get to that point but it is
12 expressly by necessary implication of the scheme and
13 then everything else flows from that, you can at a it by
14 analogy from then on or ^check but in the end it is the
15 same thing, the same beast, the same principle and the
16 vice it might be thought in Fire Brigades Union ^check
17 and the reason Lord Browne-Wilkinson decides as he does
18 one sees 485 and G and H, that is really the nub of the
19 objection, the last two sentences of that paragraph, by
20 introducing the tariff scheme he debars himself and so
21 on, that is the essence of it.

22 And we see that also from, in terms of the final
23 here from Lord Nickals at 509 between E and F. Perhaps
24 we could pick it up at the line beginning:

25 "The insapable conclusion is that the home secretary

1 has effectively written off ..."

2 (Pause).

3 Ejection party Rees-Mogg then if I may, same bundle,
4 tab 14, MS 424. And you see the context from the
5 headnote, I would just invite you to cast an eye down
6 there to get -- this is all about Maastricht and whether
7 or not there was powers to sign up to various protocols
8 that were part of the Maastricht treaty and the key
9 passages for our purposes are on -- start on page 439.

10 THE PRESIDENT: 439.

11 MR EADIE: 439 electronic, under the second issue.

12 THE PRESIDENT: Yes.

13 MR EADIE: Just so you see it, can I invite you to read that
14 page and a half, or a bit more than a page and a half
15 under the second issue before you get to the third issue
16 on the next page.

17 (Pause).

18 THE PRESIDENT: Thank you. Yes.

19 MR EADIE: So we respectfully submit that the key paragraph
20 for present purposes, which is the primary basis for
21 rejecting the argument is the paragraph at the bottom of
22 page 439. They were unable to accept the argument that
23 Lord Pannick was mounting.

24 LORD SUMPTION: Do you submit that means there is

25 a difference between the test to be applied depending on

1 whether we are talking about the prerogative to make
2 treaties or unmake them, or other aspects of the
3 prerogative, as we have seen in the cases you have just
4 cited, in general, it is an implicit displacement by
5 statutory intervention in the relevant field but is it
6 your submission that there is a tougher test to be
7 applied for this particular prerogative power?

8 MR EADIE: My Lord, there is a tougher test to be applied in
9 accordance with this reasoning, not so much bus it is
10 treaty power, although it was treaty power there, but
11 because Parliament had intervened in the area in which
12 the prerogative was exercised, to impose a whole series
13 of controls already. And that carried with it, as it
14 were, a the implication that if it was going to
15 intervene to control that sort of action, it would do so
16 expressly, so it is almost an aspect --

17 LORD SUMPTION: It is a sort of ex exclusia(?) --

18 MR EADIE: It is sort of that. It does say you have gone in
19 there, designed the scheme of control, having gone there
20 and designed the scheme of control, you can draw the
21 inference if you will that if Parliament is going to
22 control, it can do so expressly and that is the sort of
23 thing one would expect if you are dealing with a beast
24 that requires decisions to be made of a legislative kind
25 around things as basic as what should the mechanisms of

1 control be, should there they be primarily legislation,
2 affirmative resolution, motions to which Parliament
3 consents ^check and so on, that is the point being made.
4 And my learned friend below and I think the divisional
5 court accepted this, said no, no, you can pretty much
6 bypass that paragraph with that reasoning in it because
7 as they ultimately go on to conclude, the protocol on
8 social policy, and this is the remaining part of the
9 analysis under the second issue, they then conclude that
10 that protocol would not in any event become part of
11 domestic law, so where is the worry?

12 But my respectful submission is that is a second
13 strand, a distinct strand of reasoning and it doesn't
14 touch, because it provides simply a distinct reason for
15 reaching the same conclusion, it doesn't touch the
16 reasoning that one sees in the final -- which it might
17 thought is self-evident -- one sees in the final
18 paragraph on page 439.

19 LORD CARNWATH: Just to clarify, it is not your case that
20 the treaty making prerogative is subject to a different
21 principle?

22 MR EADIE: It is not my case that treaty making prerogative
23 is different just because it is treaty making
24 prerogative ^check subject to different rules on the
25 back of this paragraph.

1 LORD CARNWATH: Generally.

2 MR EADIE: Generally, and I will come to develop that
3 argument, well I will come to develop that argument but
4 the point that is being made here is not dependent upon
5 it being a treaty but is dependent upon the fact that
6 Parliament has chosen to intervene in the way that it
7 already has. It is that that creates the inference that
8 if it is going to do so again, it will do so expressly
9 because it will be altering the nuanced scheme that it
10 has already designed.

11 LORD SUMPTION: Can I just ask you where this fits into the
12 scheme of your submissions as a whole? Does one not
13 have to ask first what is the nature of the prerogative
14 power? Is it a prerogative power which authorises one
15 to do things on the international plane which do not
16 have the effect of altering domestic law or is it
17 a general prerogative power? The reason why that
18 matters is that, if the prerogative power never did
19 extend to doing something that altered the domestic law,
20 then no question of abrogation arises. You arrive at
21 a situation where it et cetera exercise would alter
22 domestic law and you cannot do it, not by virtue of any
23 implied statute or express statutory provision but
24 simply because of the conditionality of the prerogative
25 right one is talking about.

1 MR EADIE: My Lord, yes. I think the way I would answer
2 that is that there are two different beasts in play in
3 our particular context. The first of them asks what is
4 the usual way in which the courts and what are the
5 principles on the basis of which the courts seek to
6 answer the question whether or not the prerogative power
7 has been abrogated and the second of them asks what is
8 the nature of the 1972 Act to which I will come and the
9 way in which it has set matters up so that effects on
10 the international plane are directly and automatically
11 introduced into domestic law.

12 LORD SUMPTION: Before you get to that, you surely have to
13 ask what are the limits if any of the prerogative power
14 to make and unmake treaties, if the position is that the
15 prerogative power is only as broad as it is, because the
16 assumption is being made that it does not alter domestic
17 legal rights, then you know, one may well arrive at
18 a situation in which you just never get to the question
19 of what the statute says, unless it is being suggested
20 that it actually confers the prerogative right to change
21 the law which would not otherwise exist.

22 MR EADIE: My Lord, I see that as a prior question but we
23 respectfully submit that the prerogative power in the
24 field of making of treaties ratification of treaties and
25 withdrawal from treaties is and always has been

1 a general power, untrammelled by any such implication
2 which can have and I will develop this in a variety of
3 ways, impacts into domestic law through any or awful the
4 varying models we have analysed our in our cases, I see
5 the force in asking that as a prior question ^check we
6 respectfully submit that is a question that has to be
7 answered recognising A it is a general untrammelled
8 power ordinarily, and if you get to the stage that says
9 it is an is there a freestanding protocol that control
10 in in limine ^check you have to answer it in the context
11 in which it arises and recognising that exercises of
12 prerogative power can and do have impacts into domestic
13 law. That is not to say you don't still go back to the
14 statutory scheme to see whether there are limits on that
15 which Parliament has imposed.

16 LORD SUMPTION: What do you mean by impacts on domestic law?

17 Do you mean actually changing the content of domestic
18 law or do you mean simply altering the facts to which
19 an existing principle of domestic law applies.

20 MR EADIE: It could be either or both. Opposes --

21 LORD SUMPTION: They are very different things.

22 MR EADIE: They are very different things but they could be
23 either or both which is why the ambulatory scheme and
24 how the act works are important ^check I accept one is
25 not necessarily dealing with the same beast when one is

1 considering opposes radio or matters of that kind. Or
2 even in the argument that my Lord advanced in JH Rayner
3 which was fundamentally premised on during that
4 distinction between factual matters that sound in
5 international or international legal facts as it were
6 and other matters.

7 LORD CARNWATH: This is the fundamental distinction between
8 you and the other side, isn't it? Do you start from the
9 proposition that there is is a well recognised power to
10 make and unmake treaties and the only questions are is
11 it subject to any statutory restriction express or
12 implied or subject to some common law such as
13 (Inaudible) of power, and alternatively as my Lord puts
14 to you, you ask is there actually such a power at all if
15 it has the effects on domestic rights.

16 MR EADIE: And one answers that question by looking at the
17 way in which prerogative power has operated in --

18 LORD CARNWATH: I understand how you answer it. But there
19 is obviously an alternative view which is indictmentically
20 opposed.

21 MR EADIE: My Lord that, is Rees-Mogg. Unless anyone wants
22 more on Rees-Mogg. Just before the short adjournment,
23 can I deal with just by way of mention only, I am not
24 going to take you to them, but if you still have the
25 will to look at other authorities on the basic approach

1 to abrogation brogs of the prerogative, nump ^check all
2 about police ordering various bits of equipment, that is
3 perhaps worth a read, it is in authorities tab,
4 bundle 8, tab 77 at MS 3059 and a recent case which
5 involves the exercise of prerogative powers by the home
6 secretary to remove people's passports, council's
7 withdrawal of passports ^check Ex H, currently we only
8 have the judgment in the divisional court and I am
9 threatened with the Court of Appeal next week
10 compromising inter alia the master of the rolls and Lord
11 Justice Sales who will no doubt be familiar with the
12 basic De Keyser principles, but that also is of some
13 interest at least in analysing that.

14 THE PRESIDENT: Where is that.

15 MR EADIE: Core authorities, bundle 4, tab 66, 2781.

16 THE PRESIDENT: You say it is of some interest, do they take
17 this any further forward or are they more of the same.

18 MR EADIE: It is application. It is an application in
19 a different context, I hesitate to take you to it
20 because my Lord Lord Wilson raise as fair point one can
21 go to all these cases but it is a difference in approach
22 and principle ^check it is an interesting analysis there
23 and it contains, if you want it in a convenient place,
24 Lord Hobhouse in Morgan Grenfell but the relevant
25 paragraphs for present purposes are really for 39 to the

1 early 50s.

2 52 I think.

3 THE PRESIDENT: Do I get the impression this is a convenient
4 moment Mr Eadie.

5 MR EADIE: My Lord, it may be a convenient moment. I was
6 going to go to a principle of the legality.

7 THE PRESIDENT: Let's leave the principle of legality for
8 2.00.

9 We will rise now and we will resume at 2.00. The
10 court is now adjourned.

11 (1.00 pm)

12 (The Luncheon Adjournment)

13 (2.00 pm)

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