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# Is Parliamentary approval required before the Brexit Article 50 notice is sent?

*The Queen (Gina Miller & Deir Tozetti dos Santos) v. Secretary of State for Exiting the European Union*
*High Court of Justice, Divisional Court Case no: CO/3809/2016*

## Article by David Bowden

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## Is Parliamentary approval required before the Brexit Article 50 notice is sent?

*The Queen (Gina Miller & Deir dos Santos) v. Secretary of State for Exiting the EU, Graham Pigney, AB/KK/PR and George Birnie - High Court, Divisional Court Case no: CO/3809/2016*

**The Divisional Court has heard over 3 days a challenge by way of judicial review in relation to the EU referendum held in June 2016 in which the UK people voted to leave the European Union. The court has reserved judgement and is expected to hand down judgment before Christmas 2016. Subject to funding and the grant of a 'leap frog' certificate, this case is highly likely to proceed to a final appeal to the Supreme Court. A similar case has been separately heard by the High Court in Belfast where judgement has been reserved. The applicants say that the referendum was an advisory one only and that only Parliament which is sovereign can vote on and take the decision to leave the EU. A number of significant concessions were made by the counsel for the UK Government at the hearing including that once an Article 50 notice is given it cannot be withdrawn and nor can it be given on a conditional basis.**

**Background papers show clearly that the 2016 referendum was to be held on the same basis as the 1975 referendum where the Government clearly stated that it was to be an advisory pre-legislative referendum only. Expatriates of the UK say not only were they deprived of a vote in the referendum but the consequence of the UK leaving the EU will be that they may have to relocate as they will lose their existing EU citizenship rights. Others claim a right to live in the UK by virtue of a family member or carer having the right to live in the EU and say that this fundamental right will be taken away from them. The applicants all maintain that a decision of this nature can only be taken by Parliament which is sovereign and that the Government is not able to take the decision to leave the EU by sending an Article 50 notice by exercising a Royal Prerogative power.**

*The Queen on the application of Gina Miller and Deir Tozetti dos Santos v. Secretary of State for Exiting the European Union with Grahame Pigney as representative of 'The People's Challenge' and AB, KK, PR & children as interested parties*
*George Birnie as representative of 'Fair Deal for Expats' as interveners*
*High Court of Justice, Queen's Bench Division, Divisional Court Case number: CO/3809/2016*
*The Lord Chief Justice of England and Wales (Lord John Thomas of Cwmgiedd), the Master of the Rolls (Sir Terence Etherton) and the Right Honourable Lord Justice Philip Sales*

**What are the facts?**
On 23 June 2016, in the EU Referendum the people of the UK voted by a clear majority to leave the EU. Prior to the referendum, the UK Government's policy was unequivocal that the outcome of the referendum would be respected. Parliament passed the EU Referendum Act 2015 ('EURA 2015') on this understanding. The British people expected to vote and voted on this understanding. The current Prime Minister has confirmed that the UK Government will give effect to the outcome of the EU referendum by bringing about the exit of the UK from the EU.

Article 50 of the TFEU sets out the procedure by which a Member State which has decided to withdraw from the EU achieves that result. That decision having been taken the next stage in the process is for the UK to notify the European Council of its intention to withdraw. The UK Government says it intends to give notification and to conduct the subsequent negotiations in exercise of prerogative powers to conclude and withdraw from international treaties, against the backdrop of the referendum result.

**Has permission been granted to bring this judicial review?**
No. This was a 'rolled up' hearing. The Divisional Court will firstly have to decide whether to grant permission at all.

**What were the grounds for seeking this judicial review? What issue(s) were before the court?**
Ms Gina Miller would like the UK to remain in the EU. Supported by the Interested Parties and Interveners, she brings this application for judicial review. Her claim would have the effect that the UK Government could not give effect to the will and decision of the people (as expressed in the referendum outcome) to withdraw from the EU without further primary legislation. It would then be necessary to subject the issue to a vote by Members of Parliament.

Her claim goes wider submitting that it is a legal and constitutional requirement that Article 50 notification can only be authorised by further primary legislation. She says that no other form of Parliamentary involvement would suffice. Señor dos Santos says that the central issue is:

> '*Who under the UK's constitutional requirements can lawfully take the decision that the UK is to withdraw from the European Union?*'

**What declaration was the court being ordered to make? How did this change?**
Ms Gina Miller in her Claim Form seeks a declaration in these terms:

> '*A declaration that it would be unlawful for the Defendant or the Prime Minister on behalf of Her Majesty's Government to issue a notification under Article 50 of the Treaty on European Union to withdraw the United Kingdom from the European Union without an Act of Parliament authorising such notification'.*

At the end of the hearing, Lord Pannick QC undertook to re-word this draft declaration to take into account a number of submissions and interventions in court over the 3 day hearing. However these were drafting points only rather than ones of substance.

**Who are the parties in this case?**
A wealthy Hedge Fund manager called Mrs Gina Miller has fronted the case. She founded the investment fund SCM Private – www.scmdirect.com. She was nominated the lead claimant to bring the challenge. Mrs Miller was chosen as a representative of litigants who are demanding a vote in Parliament before the UK government sends the Article 50 notice to the Council of the European Union. Mrs Miller would be happy that Parliamentary approval could not be obtained even if the effect of this would be the will of the British people as expressed in the June 2016 would be thwarted.

Señor dos Santos is separately represented. He is a hairdresser and was nominated as a representative of litigants who claim that the constitutional background is such that the EU referendum was advisory only and that a decision to take the UK out of the European Union can only be validly taken by Parliament and not by the Government of the UK.

Grahame Pigney is in charge of an unincorporated association called '*The People's Challenge'* ('TPC'). It claims as a matter of international treaty law, customary principles on constitutional law and the powers conferred on Parliament itself by the European Communities Act 1972 ('ECA') that the UK cannot serve an Article 50 notice without prior Parliamentary approval.

George Birnie is also separately represented. He was nominated on behalf of expatriates of the UK who now live elsewhere in the EU. These litigants claim that the UK Government does not have a prerogative power from Her Majesty the Queen to act to take the UK out of the EU.

AB, KK, PR and children are also separately represented. These are nominated as being representative of those whose immigration status could change when the UK leaves the EU because they have rights to remain in the UK only by reason of the UK being a member state of the EU at the moment.

**Which solicitors represented the parties?**
The Treasury Solicitor acts for the Secretary of State for Exiting the European Union. These firms of solicitors act for the other parties:

- Mishcon de Reya, London for Mrs Gina Miller,
- Edwin Coe, London for Señor dos Santos,
- Bindmans, London for Graham Pigney and TPC,
- Crofts, Cheltenham for George Birnie & the Expat Interveners, and
- Bhatia Best, Nottingham for AB, KK, PR & children.

**Which counsel represented the parties?**
The case on behalf of the Secretary of State for Exiting the European Union was presented jointly by Her Majesty's Attorney-General, the Right Honourable Jeremy Wright QC MP and by the First Treasury Counsel, Mr James Eadie QC of Blackstone Chambers. 3 counsel from 11 King's Bench Walk also assisted with the paperwork – Mr Jason Coppel QC, Tom Cross and Christopher Knight.

These counsel led for the other parties:

- Lord Pannick QC of Blackstone Chambers for Mrs Gina Miller,
- Mr Dominic Chambers QC of Maitland Chambers for Señor dos Santos,
- Miss Helen Mountfield QC of Matrix Chambers for Graham Pigney of TPC,
- Mr Patrick Green QC of Henderson Chambers for expatriate George Birnie, and

- Mr Manjit Gill QC of Number 5 Chambers in Birmingham for AB, KK, PR & children.

**How was this case funded?**
At the moment UK taxpayers are having to pay for the costs incurred by the Secretary of State for Exiting the European Union. It would seem that the über wealthy Mrs Miller is paying her own costs. As to who is funding Señor dos Santos is not clear.

Grahame Pigney on behalf of TPC is crowdfunded using the Crowd Justice portal - www.crowdjustice.org/case/parliament-should-decide . At the date of writing this piece TPC had raised £170,555 by way of pledged contributions from 4918 people. It is believed that expatriate George Birnie has also raised funding in this way but he has not raised as much as Mr Pigney. Finally, it is understood that public funding has been obtained in relation to the child litigants.

**Who held a watching brief on this case?**
Mr Martin Chamberlain QC of Brick Court Chambers was instructed by the Scottish Government to be in court with a watching brief and he was there for all 3 days of the hearing but made no submissions either oral or written. Mr Richard Gordon QC and Tom Pascoe (both also of Brick Court Chambers) were similarly instructed by the Welsh Assembly Government.

**What did Parliament provide about the EU Referendum?**
The European Union Referendum Act 2015 was short and provided:

> **'1. The referendum**
> (1) A referendum is to be held on whether the United Kingdom should remain a member of the European Union.
> (2) The Secretary of State must, by regulations, appoint the day on which the referendum is to be held.
> ….
> (4) The question that is to appear on the ballot papers is—
> *"Should the United Kingdom remain a member of the European Union or leave the European Union?" '*

**What do the EU treaties say the process is for leaving the EU?**
The Lisbon Treaty was finally ratified on 13 December 2007. For the first time in Article 49A it provided a mechanism for a member state to leave the EU **[2007] OJ C 306/01**. This was renumbered to Article 50 in the Treaty on the Functioning of the European Union 2012 but the text was not changed. It says:

> '**Article 50**
> *1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
> *2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 188 N(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*
> *3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*
> *4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.'*

**What was the common law position in the early 17th century in the *Case of Proclamations*?**
In the *Case of Proclamations* **[1610] 12 Co Rep 74** Sir Edward Coke, Chief Justice, recorded that he had been summoned to attend on the Lord Chancellor and others to answer these 2 questions:

- If the King by his proclamation may prohibit new buildings in and about London, and
- If the King may prohibit the making of starch or wheat.

The Chief Justice after consulting with the other judges ruled as follows:

> '*The King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm'*

He also ruled that:

> '*It was resolved that the King hath no prerogative but that which the law of the land allows* him'.

**Are there any other prior authorities of relevance?**

These authorities are relevant in this case:

*In the matter of Part Cargo ex Steamship Zamora* **[1916] UKPC 24** (Privy Council – Lords Parker, Sumner, Parmoor & Wrenbruy and Sir Arthur Channell)
The idea that the King in Council, or indeed any branch of the executive, has power to prescribe or alter the law to be administered by the courts of law in this country, is out of harmony with the principles of our constitution. It is true that under a number of modern statutes, various branches of the executive have power to make rules having the force of statute, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that prerogative involves any power to prescribe or alter the law administered in the courts of common law or equity.

*Attorney-General v. De Keyser's Royal Hotel Ltd* **[1920] AC 508** (House of Lords – Lords Dunedin, Parmoor, Arnold, Summers)
The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words or by necessary implication. Where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed. As far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced.

*Van Gen den Loos* **[1963] ECR 1** (European Court of Justice)
The Treaty of Rome 1957 is more than an agreement which merely creates mutual obligations between the contracting states. The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights. European Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

Blackburn v. Attorney-General **[1971] EWCA Civ 7, [1972] CMLR 882** (Court of Appeal – Lord Denning MR, Salmon and Stamp LJJ)
The treaty-making power of this country rests not in the courts, but in the Crown - that is Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treaty (even a treaty of such paramount importance as this proposed one) they act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts.

*Laker Airways v. Department of Trade* **[1977] QB 643** (Court of Appeal – Lord Denning MR, Roskill and Lawton LJJ)
Laker Airways was designated as an approved airline under the Bermuda Agreement 1946. This meant the US Government was obliged to grant it an operating permit. The Department of Trade withdrew the designation. The Civil Aviation Act 1971 did not refer to designated carriers. Denning MR held the Secretary of State had unlawfully used his royal prerogative powers. The 1971 Act's provisions could not be displaced by invoking a royal prerogative.

*Buttes Gas and Oil Co v. Hammer* **[1982] AC 888** (House of Lords – Lord Wilberforce)
The making of and withdrawal from treaties are matters exclusively for the Crown in the exercise of its prerogative powers and are not justiciable in the Courts. These are areas in which there are no judicial or manageable standards against which to judge the Crown.

*In re International Tin Council* **[1987] Ch 419** (High Court, Chancery, Millett J)
It is one thing to give effect to plain and unambiguous language in a statute. It is quite another to insist that general words must invariably be given their fullest meaning and applied to every object which falls within their literal scope, regardless of the probable intentions of Parliament.

*R v. SS for Foreign & Commonwealth Affairs* ex parte *Rees-Mogg* **[1994] QB 552** (QBD Divisional Court – Lloyd LJ, Mann LJ and Auld J)
In passing the ECA 1972, Parliament did <u>not</u> intend to curtail the use of the royal prerogative powers in relation to EU law. The Minister had no RP power to ratify the Social Policy Protocol to the Maastricht Treaty.

*R v. Home Office* ex parte *Fire Brigades Union* **[1995] 2 AC 513** (House of Lords – Lords Keith, Mustill, Browne-Wilkinson, Lloyds and Nicholls)
It was an abuse of the royal prerogative power for the Home Secretary to introduce a new criminal injuries compensation scheme when a different scheme had been approved by Parliament in a statute (even where that scheme had not yet been brought into force).

*Shindler v. Chancellor of the Duchy of Lancaster* **[2016] EWCA Civ 469** (Court of Appeal – Lord Dyson MR, Elias and King LJJ)

A challenge to the EU Referendum Act 2015 by expatriates excluded from voting in the referendum because they had lived outside the UK for over 15 years. The meaning of the phrase '*in accordance with its own constitutional requirements*' is not expanded upon in the *travaux préparatoires* to the Treaty of Lisbon which introduced Article 50. Article 50 has not been considered previously by either the UK courts or the CJEU. The referendum (if it supports a withdrawal) is an integral part of the process of deciding to withdraw from the EU. By passing the EURA 2015 Act, Parliament decided that one of the constitutional requirements that had to be satisfied as a condition of a withdrawal from the EU was a referendum. EU law can have no part to play in the decision whether a state chooses to remain in the EU.

**What arguments did the lead claimant, Mrs Miller, make?**

In her 35 page Skeleton Argument, Lord Pannick QC develops these 5 submissions:

- The UK Government has no statutory power to give an Article 50.2 notice of withdrawal from the EU. The referendum was advisory only. An Article 50.2 notice can only lawfully be given if the UK Government is validly exercising the Royal Prerogative ('RP'),
- The RP cannot be exercised where this would frustrate or undermine rights and duties established by prior Acts of the UK Parliament,
- To give an Article 50.2 notice would frustrate or undermine the ECA 1972 because it would extinguish or substantially reduce the rights and duties part of UK law by reason of the ECA 1972. Notification would pre-empt a decision of the UK Parliament as to whether to retain EU law rights or not,
- An Article 50.2 notification may only be validly authorised by a prior Act of the UK Parliament. A debate on leaving the EU in Parliament on a motion will not suffice, and
- This matter is justiciable before the courts which have a power to grant a declaration that an Article 50.2 notification may not lawfully be made without prior authorisation from the UK Parliament.

Lord Pannick said that there were 3 categories of rights given under EU law:

- **Category 1** rights are those rights which Parliament would be able to replace or replicate, if it wished to do so, after the UK's actual withdrawal from the EU such as employment law or equality rights,
- **Category 2** rights are rights which may be replaced or replicated by Parliament, depending on what deal emerges from the Article 50 withdrawal negotiations. These rights are not in Parliament's unilateral gift because they depend upon what the remaining 27 member states will agree to. Freedom of movement or the right to work in another EU state are examples, and
- **Category 3** rights are rights which by their very nature will be lost irreplaceably, when the UK withdraws from the EU such as the rights of UK citizens to stand for election to the European Parliament and to vote in those elections.

**What additional arguments did Señor dos Santos add?**

Dominic Chambers QC stresses at the outset that Señor dos Santos does not seek to challenge the outcome of the EU Referendum. He says his concern is to protect the fundamental doctrine of parliamentary sovereignty and he seeks the court's protection to ensure that, if he is to be deprived of his domestically enforceable EU legal rights, such rights are taken away from him in a constitutionally proper and lawful manner.

In his 18 page Skeleton Argument, Dominic Chambers QC develops these 5 submissions:

- Only the UK Parliament can lawfully take the decision that the UK withdraws from the EU. THE ECA 1972 is a constitutional statute which grants rights to UK citizens and only rights that Parliament has granted can Parliament remove or alter,
- The only way the people in a referendum could legally and constitutionally take the decision to withdraw from the EU were if Parliament had empowered this in the EURA 2015. It did not and the EU Referendum was 'advisory' only. Parliament chose not to legislate that the EU Referendum outcome should be binding. Parliament's agreement to hold a referendum was not a 'pre-approval' of a leave result,
- The UK Government is not able by use of the RP powers able to decide to withdraw from the EU and give the Article 50.2 notice without more,
- Once an Article 50.2 notice is given to the EU Council, the UK cannot withdraw it, and
- Parliament must decide whether, when and on what terms the UK leaves the EU. Parliament must decide which existing EU rights are retained or are modified or are repealed.

In his oral arguments on the first day of the hearing, Mr Chambers QC supplemented this in a number of important ways and by reference to a few key source materials. The full transcript is available here: www.judiciary.gov.uk/wp-content/uploads/2016/10/20161013-all-day.pdf but this is a summary of the most important points:

- Under the doctrine of parliamentary sovereignty, no person or body is recognised by the law as having the right to override or set aside the legislation of Parliament.
- A decision to withdraw from the EU under Article 50(1), combined with a notification of that decision under 50(2) will definitely when the withdrawal takes effect lead to a loss of rights granted by Parliament under domestic legislation.
- Parliament did not surrender its sovereignty to the people through the EU referendum. The referendum was at most a supplemental constitutional requirement for the purposes of Article 50.1.
- Article 1 of the Bill of Rights of 1688 is headed '*Suspending power*' and states '*The pretended power of suspending of laws, or the execution of laws by a legal authority without consent of Parliament, is illegal*.' The clause headed '*Late dispensing power'* provides that '*That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal*.'
- Dicey '*Introduction to the study of the law of the constitution'* (8th edition, 1915) states that '*no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. A law may, for our present purpose, be defined as any rule which would be enforced by the courts.'*
- Parliament itself could, without more, take the decision under Article 50(1) to withdraw. That would plainly satisfy the UK's constitutional requirements. Prior to any Article 50.2 notification, Parliament could approve a previous decision taken by the executive or by the people in a referendum to withdraw. Parliament could directly authorise a notification under Article 50.2 before that notification is given.

Professor Bogdanor was a member of the commission on the conduct of referendums which reported in 1996. In his book '*The New British Constitution'* chapter 7 entitled '*The referendum'* says:

> '*Until 1975, when Britain held her first and so far, only national referendum, the British constitution knew nothing of the people. The sovereignty of Parliament was seen as being incompatible with that of the people. Democracy in Britain was understood as being exclusively representative democracy….The experience of other democracies shows that contrary to what many in Britain feared in the 1970s, the referendum is not addictive, leading inevitably to the subversion of parliamentary government. … . The referendum serves not to replace the machinery of representative government, but only to supplement it. The machinery of representative government remains, but certain issues, either before or after they are scrutinised by the legislature, are put to the people for their approval. A measure still requires scrutiny by the legislature before it can become law, but where there is a provision for the referendum, the measure undergoes an extra measure of scrutiny before it reaches the statute book*.'

As to the 1975 referendum, in the Government White Paper issued before it paragraph 2.2 says: '*The government have agreed to be bound by the verdict of the British people, as expressed in the referendum result.*' Edward Short MP (then leader of the House of Commons) stated: *'This referendum is wholly consistent with parliamentary sovereignty. The government will be bound by its result but Parliament, of course, cannot be bound….Nor, if the decision is to come out of the Community, could that decision be made effective without further legislation. I do not, therefore, accept the sovereignty of Parliament is affected in any way by the referendum.'*

The EU Referendum Act 2015 is in materially identical terms to the Referendum Act 1975, which made provision for the 1975 referendum. Just as Parliament could not be bound by the result of the 1975 referendum similarly Parliament could not be bound by the result of the 2016 referendum. The legislation in 2011 for the 'alternative vote' referendum did expressly provide for what would happen in the event of a 'yes' vote. The House of Lords Constitution Committee reported in relation to referendums in the United Kingdom (12th report - 7 April 2010):

> '*In practice, however, the UK Parliament can square the circle by passing legislation which does not come into effect until a referendum is held or by agreeing to be bound by the result in enabling legislation. Professor Bogdanor thought it would be possible in the UK to frame a referendum provision by which legislation was required to come into effect with a yes vote and required to be repealed with a no vote, in other words, a mandatory referendum…..We recognise that because of the sovereignty of Parliament, referendums cannot be legally binding in the UK and are therefore advisory*.'

A government memorandum prepared for this Constitution Committee clearly states:

> '*We do not believe that a referendum result should bind a Parliament, unless that Parliament has previously agreed that it will. Were it do so, we consider that that would undermine the principle of representative democracy. Nevertheless, we would expect that the outcome of a referendum would have a significant influence on subsequent parliamentary consideration of an issue*.'

Mark Harper MP sets out each recommendation and then the government's response:

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

The UK Government briefing paper dated 3 June 2015 for the bill which led to the EURA 2015 stated:

> '*This bill requires a referendum to be held on the question of the UK's continued membership before the end of 2017. It does not contain any requirement for the UK government to implement the results of the referendum, nor set a time limit by which a vote to leave the EU should be implemented. Instead, this is a type of referendum known as a pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the government in its policy decisions.*'

**What additional arguments were advanced by counsel for Grahame Pigney and the People's Challenge?**

Helen Mountfield QC highlights at the outset that the litigation is not about whether or not the UK should decide to withdraw from the EU or how or when notification of any such decision should be given to the European Council. In her 26 page Skeleton Argument, she develops 3 submissions. She stresses that they are not cumulative and submits that if she succeeds on only 1 of them that the claim must succeed. These submissions are:

- The RP power is a residual power which has been 'abrogate' by domestic statutory provisions. The UK government does not have RP power to decide that that the UK should withdraw from the EU nor may ministers notify the European Council without prior Parliamentary approval,
- The RP power does not extend to modifying, abrogating or removing fundamental rights such as EU citizenship rights, and
- It would be an abuse of the RP power for the Secretary of State to decide that the UK will leave the EU without prior Parliamentary authorisation.

**What were the immigration arguments put forward by their representative litigants?**

Mr Manjit Gill QC had also submitted a skeleton argument and prepared a speaking note for the 2nd day of the hearing. His brief submissions were:

- An Article 50 notification cannot be given on a conditional basis,
- An Article 50 notice is irrevocable and once given this will lead the UK to leave the EU,
- A leave decision affects 3 categories of persons he is concerned with:
  - British citizens including expatriates,
  - EEA or EU nationals other than UK citizens,
  - Non-EU national family members who derive their rights of residence under EU law such as partners or extended family members who are in a relationship of dependency.

He was concerned the court took into account *Zambrano* carers **[2012] 2 WLR 886** who are either a British minor citizen or a disabled person who requires the presence of a non-EU national in this country to make that British child's rights to reside in the UK as a European citizen effective. The CJEU has ruled that these non-EU citizens as carers are also be entitled to remain in the EU.

He submitted that some people resident in the UK derived their right to remain from other UK or EU citizens but that once the UK leaves the EU, then their rights to remain in the UK will simply fall away exposing them to criminal liability unless or until their status is regularised under the Immigration Act 1971. He said there is no mechanism for these people to regularise their position.

**What were the arguments advanced on behalf of George Birnie and the other expatriates?**

In their 25 page Skeleton Argument, Patrick Green QC adopts the submissions made on behalf of Ms Miller but also seeks to develop these 5 alternative and additional submissions:

- The Northern Ireland Act 1998 in contrast to the Referendum Act 2015 requires steps to be taken by the Government to give effect to a referendum. The omission of such an express statutory power provides no support to the UK Government position that it can give an Article 50 notification without legislation,

- Rights enjoyed by UK citizens beyond British shores are so fundamental that legislation is required to take them away,
- Exercise of RP power is amenable to judicial review because it affects the rights of individuals in domestic law, affects British citizens' rights in other EU countries and it affects fundamental rights,
- The decision to give an Article 50 notification is flawed because the rights and interests of between 1 and 2 million expatriate British citizens have been excluded from consideration because they were excluded from voting in the EU referendum if they had lived outside the UK for 15 years or more, and
- Any Article 50 notification would also be flawed because it would be based on this flawed anterior decision to leave the EU.

**What were the written arguments advanced by the UK Government?**
It has to be noted that this Skeleton Argument is drafted in a hostile fashion which seeks to arrogantly brush away any challenge to Government action and in the process it uses language which is pejorative to the other parties. For example it says the arguments against the Government are '*repetitive of, parasitic upon or simply alternative ways of putting the same arguments*'. Unhelpfully it seeks to castigate the arguments it has to meet about Article 50 as '*merely camouflage'* and it brandishes the submissions of expatriates like Mr Birnie as '*unreal'*.

That aside, the fundamental basis of the UK government's case is to differentiate between Article 50.1 and Article 50.2. It says that the decision to withdraw from the EU under Article 50.1 is not '*expressly challenged*'. The UK Government case is that this judicial review is '*in substance if not in form a complaint that the Government cannot validly decide that the UK should leave the EU in implementation of the outcome of the referendum*'. In effect the UK Government says that having passed the Article 50.1 hurdle, it is now required to give the notification under Article 50.2 and says this can or has to be done using RP powers. However, this sadly misses the whole point of the judicial review which was substantially to establish what are the UK's '*own constitutional requirements'* under Article 50.1. It is only if these have been met can the court move on to consider the remainder of Article 50.

In their 28 page Skeleton Argument, the Attorney and First Treasury Counsel jointly develop these 5 submissions:

- It is constitutionally proper and lawful to rely upon RP powers to give effect to the outcome of the EU referendum,
- Use of the RP power is not precluded by or inconsistent with the purposes of statutes relating to EU law implementation in the UK because:
  - Parliament has not curtailed the use of the RP power,
  - Article 50.2 notification is not inconsistent with the ECA 1972, and
  - Prior case law supports this,
- The judicial review claim is not justiciable in a court,
- The relief sought is constitutionally impermissible, and
- The other points made by the Government's opponents are not good points including those relating to:
  - Section 18 of the European Union Act 2011,
  - Constitutional statutes and the principle of legality,
  - The 3 devolution statutes (schedule 5 of the Scotland Act 1988, scheduled 2 of the Northern Ireland Act 1998 and s108 and schedule 7 of the Government of Wales Act 2006),
  - International obligations especially the UN Convention on the Rights of the Child that Mr Manjit Gill QC relies on for the immigration litigants.

**What submissions did Her Majesty's Attorney-General personally advance in court?**
The Attorney took the court chronologically through all the statutes that the UK Parliament had enacted which related to its membership of the European Union. The point of this exercise was to attempt to show that if Parliament had intended to curtail in any way the use of the RP power by the UK Government in relation to the EU then it had had ample opportunity to legislate to curtail the RP power.

The Attorney's more ambitious submission was to turn this proposition on its head and to try and get the court to accept that Parliament had thereby authorised the use of the RP power to leave the EU under Article 50 without anything more than the 2016 Referendum and that there was correspondingly no loss of Parliamentary sovereignty. Specifically in relation to the 2008 Act which underpinned the Lisbon

Treaty in the UK, the Attorney said: '*So we submit Article 50 could not have gone unnoticed at that point by Parliament*.'

For completeness, the statutes the Attorney ran through were:

- ECA 1972 – no express scheme for leaving the EEC,
- European Parliament Act 1978 s6,
- European Communities (Amendment) Act 1986 s6(4),
- European Communities (Amendment) Act 1993 s1(2) (enacting Maastricht Treaty),
- EU Accession Act 1999 – accession of Austria, Norway, Finland & Sweden,
- European Communities (Amendment) Act 1998 (enacting Amsterdam Treaty),
- European Communities (Amendment) Act 2002 (enacting Nice Treaty),
- European Communities (Amendment) Act 2008 s.4 (enacting Lisbon Treaty),
- Constitutional Reform and Governance Act 2010 ('CRaG'),
- European Union Act 2011 sections 6 & 7, and
- European Union Referendum Act 2015.

**What submissions did the First Treasury Counsel personally advance in court?**

The Attorney (a criminal trial lawyer from Birmingham chambers who only recently took silk) left the heavy lifting in this case to Mr Eadie QC. His submissions expanded on these 4 themes:

- The key question is whether Parliament has left the relevant power in the hands of the executive, notwithstanding that this exercise may impact upon current statutory rights.
- The relevant principles for answering this key question are those found in the case law - *De Keyser's Royal Hotel* and *Rees-Mogg*. There is no broader principle asserted that the executive may never act, including in the field of foreign affairs, so as to cause interference with domestic legal rights.
- Far from that being a restriction upon the RP power, it is the standard position that, save where Parliament has otherwise provided, the Crown acts on the international plane, and the commitments which it enters into or has withdrawn from unless Parliament has decided otherwise, are where appropriate then given effect to in the domestic plane by Parliament.
- There are a number of features in this case which tend further against existing statutory rights operating as a restriction upon the prerogative to withdraw from these EU treaties.

**What new concessions or announcements about Brexit were made for the first time by the Government through its Attorney or First Treasury Counsel in court?**

On the 2nd day of the hearing and at the start of the 3rd day, following interventions from all 3 judges on the panel, these concessions were made by the UK Government through its leading counsel:

- A decision '*has been taken by the government to leave the European Union*' in accordance with the provisions of Article 50(1) but '*the doctrine of Parliamentary sovereignty prevents the government from doing that*' and '*only Parliament can take that decision'* (Attorney),
- An Article 50 notification is '*irrevocable*' (Attorney),
- The UK Government '*cannot give a* ***conditional*** *Article 50 Notice'* to the European Council (Attorney),
- Parliament will be '*intimately involved in this process'* including, inevitably, through the passage of primary legislation (FTC),
- Treaties are not self-executing (FTC),
- Parliament has advisedly decided not to abrogate the RP power, and if and to the extent that the step that would be taken by Article 50 notification '*would or might have an impact on to current legislative rights, Parliament will need to deal with that by legislating'* (FTC),
- Where a RP power has been exercised to create a the new international agreement, which if Parliament says: '*we don't like that'* which they would be constitutionally perfectly entitled to do because they are supreme - they do that afterwards (FTC),
- Parliament has decided not to have a '*call back'* power in relation to exercise of the Article 50 rights under the 2008 Act,
- he Article 50 notification is the formal invitation '*to begin the dance'* but during the course of those negotiations '*intermediate positions will be taken'* (FTC),
- The '*overwhelming and realistic likelihood'* is that when and if they get to it (and '*assuming that the Great Repeal Bill happens*' and everything becomes part of domestic law again) the '*overwhelming likelihood is that they will confront matters, negotiate it, or at the withdrawal point, area by area'* (FTC),

- Category 2 rights '*will be hollowed out or substantially hollowed out*' by the very act of leaving the EU (FTC),
- There will be some rights which at the end of the 2 year period '*will drop away'*. This will include the right to vote in European Parliamentary elections and '*no doubt some of those other ones'* but those '*categories aren't fixed'* (FTC),
- In the 2008 Act Parliament legislated for the '*lesser beast'* and was '*legislating for the least dangerous animal in the jungle*' and it was '*prepared to let the tiger roam free'* (FTC),
- There will be '*considerable further Parliamentary involvement in the future'* (FTC),
- **If** there was an Article 50(2) withdrawal agreement, that '*would be a treaty between the United Kingdom and the EU*' and *'it is likely that it will come within the procedures in CRAG'* (FTC),
- It is considered '*very likely'* that the Article 50 agreement, '*if entered into would be a treaty requiring ratification*' but that you cannot '*exclude the theoretical possibility that it wouldn't be'* (FTC), and
- The EURA 2015 does not provide the '*source of the power for the Government to give an Article 50 notification*' (FTC).

**What other submissions did Mr Coppel QC advance on behalf of the Brexit Secretary?**
Mr Coppel sought to dissemble the arguments made by the expatriate interveners in relation to loss of EU citizenship rights when the UK exits the EU and also whether the devolution settlement with Northern Ireland, Wales or Scotland made any difference. Rather oddly, given that the Referendum also covered Gibraltar and that Gibraltar's fate is tied to that of the UK, he failed to deal with Gibraltar at all.

Mr Coppel maintained that UK citizens have '*very few rights as EU citizens'* which are enjoyed as a result of the ECA 1972 Act. He submitted that none of these rights are '*directly affected'* by Article 50 notification and that '*all could be preserved upon withdrawal, should Parliament so choose'*. As to *Zambrano* carers Mr Coppel said these were '*within the category of a right which has been implemented into UK law'* and that notifying and then leaving the EU would have '*no effect on that legislation'*.

As to Lord Pannick's 3 categories of rights, Mr Coppel submitted that the UK Government's position was:

- **Category 1** – no change due to Article 50 notification or these rights can be transposed into domestic legislation. However he was not sure about directly applicable EU regulations (such as the General Data Protection Regulation) because he merely said '*I think this category particularly includes directly applicable regulations*'.
- **Category 2** – these are not within the gift of Parliament and this '*indicates that they were never actually conferred by Parliament in the first place*'.
- **Category 3 –** these are merely the rights to belong to and use the institutions of the club '*while you are a member of the club*'.

As to devolution, Mr Coppel submitted that the ECA 1972 '*is what it is'* and that '*it doesn't get any better when one looks at different manifestations*' of it in the Scotland Act 1998 or its Welsh or Northern Irish equivalents. These devolution statutes merely '*assume*' and don't '*require*' membership.

**What did Lord Pannick QC submit in reply on behalf of Mrs Miller to the Government's case?**
Lord Pannick made these submissions is reply:

- The Government accepts that a notification under Article 50(2) will inevitably result in the EU treaties no longer applying to this country. It won't happen immediately but it will happen either within two years or longer if there is a unanimous agreement to extend the time period.
- The consequence of the treaties no longer applying is that the rights conferred under ECA s2(1) are stripped away.
- Notification will inevitably cause some statutory rights enacted by Parliament to be destroyed. It will take the preservation of other statutory rights out of the hands of Parliament. There are 2 categories:
    - Rights which Parliament simply could not maintain. The RP power cannot be used in order to take away, destroy or abrogate a constitutional right that is recognised by statute.
    - Mrs Miller's right to seek to have her case referred to the CJEU for a ruling on the scope of her other rights derived from EU law.
- Mrs Miller loses the right to seek the assistance of the European Commission. If she had a competition complaint in this country against a rival business, at the moment she can go to the European Commission and seek its assistance in resolving the problem in this country. The consequence of notification is inevitably that this right is lost.

**What did Dominic Chambers QC submit in reply on behalf of Señor dos Santos to the Government's case?**
His reply was formulate around 4 of the concessions that had been wrung out of the Government at the hearing that A50 notification was irrevocable, cannot be conditional, that rights to vote in European Parliament elections would be lost and that the EURA 2015 was not the source of any power to give the A50 notice. His primary submission however was based on the doctrine of Parliamentary sovereignty itself which says that the executive cannot take action to override or set aside legislation enacted by Parliament.

He submitted that the RP power had been '*restrained*' in 1975 before that year's referendum and could not have '*somehow bounced back in 2008 or 2001'*. Article 50 has '*no impact at all on the doctrine of Parliamentary sovereignty*' as was stated by the Government in its evidence to the House of Lords Select Committee on the Constitution in 2008 whilst the Bill which led to the 2008 Act was being considered.

Parliament has pre-ordained the mechanism for amending the list of Treaties or ancillary treaties by enacting ECA 1972 s1(2) & 1(3). The mechanism for any changes to the treaties has already been pre-sanctioned by Parliament. Parliament has pre-determined that it must be involved in the mechanism for any changes to treaties.

**What did Helen Mountfield QC submit in reply on behalf of Graham Pigney and the People's Challenge to the Government's case?**
She said the Bill of Rights 1697 prevented the Government issuing an Article 50 notice without the prior approval of Parliament. A purported exercise of the RP power to trigger Article 50 is unlawful and would remain unlawful even if Parliament could step in and stop the process. There is strict 'dualism' in the English legal system – Government power to make foreign policy which co-exists with Parliamentary sovereignty. There is no RP power that extends to the removal of rights. On historical inquiry there is no prior example of an EU treaty having ever being ratified before Parliamentary authority has been given for doing so. Rather like a 'thermostat' Parliament has always said it wanted control of the system of EU law.

When Parliament passed the devolution statutes it had to balance who had power to do what within the 4 nations in the UK and there was an underlying assumption that '*fundamental features'* would not change by RP act '*given the sensitivity of those relationships'* – especially those with Scotland and Northern Ireland.

**What did Patrick Green QC submit in reply on behalf of George Birnie and the other expatriates?**
In addition to adopting the points made by other counsel opposing the Government's position he referenced events that were current in 1972 when the ECA 1972 was passing through Parliament. This was done to show a number of key matters which would have been upper most in Parliament's mind at that time and that it was through that prism that the ECA 1972 should be interpreted applying the '*informed interpretation'* rule. These comprise:

- 15 July 1964 - the judgment in *Costa v ENEL* with references to the unique legal order of unlimited duration and the permanent limitation of sovereignty of member states,
- 10 May 1971 Lord Denning's decision in *Blackburn*, where he doubted whether Parliament would able to repeal the ECA 1972,
- 23 May 1969 - signature of the Vienna Convention on the Law of Treaties in the form in which Article 56 now is, including by the United Kingdom,
- 25 June 1971 - ratification of the Vienna Convention by the UK on 25 June 1971
- January 1972 - signature by the UK of its accession treaty to the EEC, and
- 18 October 1972 - Royal Assent to the ECA 1972

The assumption in *Blackburn* that it would be Parliament that would decide is an assumption that persisted until 2015 in *Shindler*. The UK Government submission otherwise is '*wholly without precedent in any of the cases that I have been able to identify*'.

The House of Commons library briefing paper described the 2015 referendum as a '*pre-legislative or consultative referendum*' which enables the electorate to voice an opinion which then influences the government in its policy decision. The UK Government fails to distinguish in the '*constellation of statements*' relied upon by the Attorney-General between a government '*intention*' to bring forward a bill

and lay it before Parliament and achieve a policy objective, and the government having the '*power to take the decision itself without Parliament's involvement at all*'.

What EU citizens and British citizens have is freestanding EU rights. The fact that they are replicated in domestic law is not an answer to those rights being taken away. Parliament also obtained a competence through the EU treaties to confer on citizens of other EU member states upon whom it conferred nationality, certain rights under those treaties.

**What did Manjit Gill QC submit in reply on behalf of the representative litigants affected by immigration to the Government's case?**
He said the UK Government cannot have its cake and eat it – on the one hand proposing a Great Repeal Bill to replicate EU rights whilst also maintain that no rights will be taken away by the UK leaving the EU at the end of the Article 50 process. He urged the court to note that this Great Repeal Bill was only announced by the UK Government after all the skeleton arguments had been exchanged in this case.

Moreover he made an impassioned plea on behalf of those who had a right to reside in the UK at the moment which was derived solely from rights of another family member who did have the right to live in an EU member state. He said that once the Article 50 notice is given '*people's rights, people's expectations people's daily lives, dramatically change, because what that notice does is to signal*' that they '*have to pack up and go, because if you don't, at the point of withdrawal you will be going unless we change the law*'.

He illustrated this point by reference to the Citizen's Rights Directive **2004/38/EC** which provides a right for EU citizens and their family members to move and reside freely within the territory of the EU Member States. It came into force on 30 April 2004. It has been transposed into UK law by the Immigration (EEA) Regulations 2006 **SI 2006/1003**. These regulations were made under section 2 of the ECA 1972. Mr Gill's submission was at the point that the UK leaves the EU, rights derived under this Directive will, without more, simply fall away.

Finally he also noted that in theory the period between giving the Article 50 Notice and the European Council cutting a deal with a Government minister with a RP power could be very short indeed – perhaps only a few days

**Who had the last word?**
Mr Coppel was allowed the last word. The Lord Chief Justice decided to give him 5 minutes to address the court on the points made against the UK Government by Lord Pannick QC in relation to the *Witham* and *Pearson* cases. He submitted that in both these cases, the issue was whether a statutory power to make subordinate legislation (*Witham*) or to fix the tariff of a sentence (*Pearson*) was broad enough to allow action by the executive which interfered with fundamental common law rights. The answer, in accordance with the standard principle of legality, is only if the statute gave authority expressly or by necessary implication.

However, the door having been opened for him he tried to put the boot in one last time on Ms Miller's case. He said the Article 50 notification was not being challenged because notification does not repeal any domestic statute and that only Parliament can repeal statute and '*that is what will happen'.* Finally he quoted from Lord Denning in *McWhirter v. Attorney-General* **[1972] CMLR 882** on the scope of RP powers:

> *'Those provisions in the Bill of Rights deal with the vesting of the Crown in King William and Queen Mary and their successors. They affect the succession to the Crown. They do not touch the royal prerogatives of the Crown. They are preserved by the eighth clause which maintains in the Crown all honours, styles, titles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining. The result is that the Crown retained by statute as fully as ever the prerogative of the treaty-making power. That prerogative has succeeded from one generation to another. It is exercised on behalf of the Crown by the government of the day. It cannot be impugned in any way in these courts, either before or after a treaty is signed. Even though the Treaty of Rome has been signed, it has no effect, so far as these courts are concerned, until it is made an Act of Parliament. Once it is implemented by an Act of Parliament, these courts must go by the Act of Parliament.'*

**What interventions did the judges make? What seemed to be troubling them?**
The Lord Chief Justice was very clear on the last day that as far as he understood it '*justiciability is no longer an issue'*. This was a clear indication the court would rule against the UK Government on this point.

The Master of the Rolls kept asking about Category 2 rights particularly EU Regulations that are directly applicable in the UK and which did not need transposing legislation under s2 of the ECA 1972. None of the counsel seemed to be able to grasp the question he was asking let alone provide a satisfactory response.

Lord Justice Sales asked the most questions and was the most testing particularly asking what assistance the court could derive from earlier source or background materials when seeking to interpret Article 50 of the Lisbon Treaty given force by the 2008 Act.

**When will judgement be handed down in this case?**
At the end of the hearing the Lord Chief Justice said that the court will take time to consider the matter and give our judgments '*as quickly as possible'*.

**Is there any indication as to which way the Court will rule?**
Although the transcript refers to judgements in the plural, it seems likely that they will aim to write a judgement of the court. In this context it should be noted that Lord Justice Sales used to be the 1st Treasury Counsel and so has the most experience in this area. He does not have the other court management responsibilities that the other 2 judges have. It seems likely therefore that Sales LJ will write the first draft of the judgment and that the other 2 judges will amend or add to it as appropriate. In view of the relative urgency, it is expected that the judgment will be handed down this side of Christmas 2016 but that is not a guarantee.

After the 1st day, the overall feeling was that Dominic Chambers QC had done a good job and made a number of knock-out points very succinctly. However this had been drowned in a bloated opening by Lord Pannick who laboured a number of bad points and failed to deal with the judges' interventions effectively. By the end of the 2nd day, the Government had set out its stall and answered all the points made in the other parties' written skeleton arguments. Mr Eadie is an advocate at the top of his game and the feeling was the pendulum had swung the Government's way at the end of day 2.

However the submissions made by the other parties on the final day were very effective including drawing out the damaging admissions the UK Government had made in its oral argument the previous day. The Lord Chief Justice noted that the point about this case not being justiciable in an English court was not being maintained any longer. There is enough material for the court to rule either way.

**Has anyone had any thoughts about an appeal if they are dissatisfied with the ruling that the Divisional Court will eventually hand down?**
Section 12 of the Administration of Justice Act 1969 deals with 'leap frog' appeals from the High Court directly to the Supreme Court. It provides as follows:

> **'12. Grant of certificate by trial judge.**
> *(1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied—*
> *(a) that the relevant conditions are fulfilled in relation to his decision in those proceedings, and*
> *(b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal, and*
> *(c) that all the parties to the proceedings consent to the grant of a certificate under this section, the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.*
> *(2) This section applies to any civil proceedings in the High Court which are either—*
> *…*
> *(c)proceedings before a Divisional Court.*
> *….*
> *(4) Any application for a certificate under this section shall be made to the judge immediately after he gives judgment in the proceedings'*

First the Court has to decide whether to grant permission to bring this judicial review. Were the judgment to be favourable to the UK government, the court has the option of refusing permission to bring the judicial review at all. This will then leave open whether there could be a leap frog appeal at all noting the 1969 Act was passed prior to the 1981 Act which provided for judicial review in its modern form. If the Government loses, it is bound to ask for a leap frog certificate. Finally even if the Divisional Court grants a leap frog certificate, it may then decide that it should be for the Supreme Court itself to decide if permission to appeal should be granted on that certificate.

**When could the Supreme Court hear this case?**
The Supreme Court is likely to want to sit *en banc* to hear this. There are 2 gaps in the Supreme Court's diary in its Michaelmas term diary. They are:

- 7 and 8 December 2016, and
- 19 - 22 December 2016.

If the Government wins in the High Court then the other parties will face the issue of raising funds. Mr Pigney has crowd funded just over £170k. He will need to raise at least 3 times that figure to cover a Supreme Court appeal to cover his and adverse costs in both courts in the event that he loses.

**What is happening in the High Court in Belfast?**
Mr Justice Maguire in the High Court in Belfast started to hear a similar challenge brought by Mr Raymond McCord on 6 October 2016. The focus of that 2 day case related to the devolution settlement for Northern Ireland including what could happen in relation to the border with the Republic of Ireland. There was provision for this in the Good Friday agreement. Many if not all of the points made in the Divisional Court will also be made in the Belfast High Court.

The Attorney-General of Northern Ireland, Mr John Larkin QC, acts for the Government of Northern Ireland. Mr Tony McGleenan QC acts for the Stormont Assembly. Mr McCord has been granted legal aid to pursue his case and is represented by Mr Ronan Lavery QC. Mr David Scoffield QC represents Sinn Fein, the SDLP, Green Party and Alliance Party leader David Ford.

At the end of the hearing Mr Justice Maguire said that he will be giving his '*immediate consideration to the case'*. The Lord Chief Justice asked for a note from the Treasury Solicitor as to the position in Belfast. It is not clear who is going to hand down their ruling first. There is the possibility that draft judgments will be exchanged between with a view to trying to come to a common position. However in relation to the sensitive devolution settlement, the Maguire J is likely to want to keep a jealous hold on his ruling. Finally the AJA 1969's provisions on leap frog appeals does not extend to Northern Ireland.

**Is there anything else worth noting from the hearing?**
The UK Government position evolved considerably from the filing of its Detailed Grounds of Resistance on 2 September 2016, to the service of its Skeleton Argument on 30 September to the way it presented its case. The admissions and concessions the Government made on 17 October 2016 were legion and wide in their ambit. The UK government case in closing bore little resemblance to its hostile and irritated stance in its written case.

**What will be the significance of this case?**
It is fair to say that this is the most significant constitutional law case in the last 2 generations.

At its heart is who takes the decision to leave the EU. The June 2016 referendum saw a high turnout – much larger than in recent general elections. The vote to leave was by a 4% margin but was significant enough to be clear. Those who voted to leave, see this case as at attempt by wealthy litigants to use the courts or legal technicalities to frustrate and undermine the democratic will of the British people.

On the other hand, even some of those who voted to leave are unhappy about the process that is being followed with little democratic involvement in the fine detail. It is telling that both sides have had to go back over 400 years for a case on the scope of the Royal Prerogative power. The court will have to craft a judgment that comes to a clear conclusion but also provides enough crumbs of comfort in there for the losing side.

**20 October 2016**

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