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What is the summary of everyone's written case in the Brexit appeal for the Supreme Court?

The Queen (Gina Miller & Deir Tozetti dos Santos) v. Secretary of State for Exiting the European Union
Supreme Court of the United Kingdom - UKSC 2016/0196, UKSC 2016/201 and UKSC 2016/205

Article by David Bowden

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Executive speed read summary

All 11 judges of the Supreme Court of the United Kingdom will sit for 4 days starting on Monday 5 December 2016 to hear 3 final appeals in relation to Brexit.

The Divisional Court in London heard 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. On 3 November 2016 it granted permission for judicial review and granted the claimants a declaration that it is *'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'.* The Divisional Court ruled that the 2016 referendum was an advisory pre-legislative referendum only and that only Parliament which is sovereign can vote on and take the decision to leave the EU. The High Court ruled 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 UK Government was granted a leapfrog certificate and the Supreme Court granted permission to appeal.

In the High Court in Belfast, Mr Justice Maguire refused an application to Mr McCord for judicial review based on limited grounds relating to the devolution settlement in Northern Ireland under the Good Friday Agreement. Mr McCord appealed this decision to HM Court of Appeal in Northern Ireland who transferred his appeal to the Supreme Court. In another case in Belfast, the Attorney-General for Northern Ireland was made a notice party under the Northern Ireland Act 1998, and he was appointed by the Stormont Government to make its case.

The UK Government has submitted its printed case saying that on the international plane it can enter into treaties under its Royal Prerogative power. It is supported by the Attorney-General for Northern Ireland who says there is no other impediment under the Northern Ireland Act 1998 by which the Stormont Assembly needs to give its approval before the Article 50 notice is sent. Lawyers for Britain Limited has intervened making damaging written submissions supporting the UK Government's case on the pretext of wishing to work constructively to make sure the exit process is carried out in the best interests of the UK.

The Scottish and Welsh Governments take diametrically opposite views to the UK Government. They say that not only does the UK Parliament has to approve any decision to trigger Article 50 but that under their devolution settlements reflected in the Sewell Convention, approval is also required of the Scottish Parliament and Welsh Assembly. That view is also held by the Independent Workers Union of Great Britain who has been allowed to intervene and make points supportive of the Scottish Government.

Mrs Miller says that her rights cannot be taken away by exercise of the Royal Prerogative power and that the Divisional Court came to the right decision for the right reasons. Señor dos Santos agrees adding that Parliament's agreement to hold a referendum was not a '*pre-approval*' of a leave result. The Peoples Challenge (who have raised over £170k to fight this case) also agree with Mrs Miller adding that a historical inquiry into the existence and effect of the Royal Prerogative power to dispense with domestic statutes implementing EU law leads to the conclusion that an A50 notice cannot be given using these powers.

A number of children or carers whose right to remain in the UK is dependant on other family members who are EU members also support Mrs Miller. They say that the removal or curtailment of their UK residence rights will expose them at the point of EU withdrawal to potential criminal liability and summary removal as persons present without leave under the Immigration Act 1971.

Finally Mr Birnie makes a case supporting Mrs Miller on behalf of those UK citizens who reside elsewhere in the EU many of whom were denied a vote in the referendum and who may be forced to move back to the UK if it leaves the EU. By enacting the EURA 2015, Parliament did not intentionally '*leave the field unoccupied*' on the understanding that Royal Prerogative power would be used to implement a 'leave' vote in the referendum. They also say that no decision has yet been taken for the purposes of Article 50 and any such decision would be flawed.

Judgement will be reserved and is not likely to appear until January or February 2017.

What is the summary of everyone's written case in the Brexit appeal for the Supreme Court?
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UKSC 2016/0196
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
The Governments of Scotland and Wales also intervening
Lawyers for Britain Limited and Independent Workers Union of Great Britain – additional intervenors in the Supreme Court only
Supreme Court of the United Kingdom - UKSC 2016/0196

UKSC 2016/201
Agnew, Eastwood, Ford, O'Dowd, Donnelly, Purvis, Wilson, Committee on Administration of Justice and Human Rights Consortium v. Her Majesty's Government, Secretary of State for Northern Ireland and Secretary of State for Exiting the European Union
Attorney-General for Northern Ireland – Notice Party
Supreme Court of the United Kingdom - UKSC 2016/201

UKSC 2016/205
Reference by Her Majesty's Court of Appeal in Northern Ireland under paragraph 7 of Schedule 10 to the Northern Ireland Act 1998
In the matter of an application by Raymond McCord for Judicial Review
UKSC 2016/0205
Supreme Court of the United Kingdom - UKSC 2016/205

Our piece on the Divisional Court hearing is here: http://ewriter.eu/articles/BrexitHearing.pdf
Our piece on the Divisional Court judgment is here: http://ewriter.eu/articles/BrexitAdminCtOutcome.pdf

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.

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 brought 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. 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?
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'.*

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Who are the parties in these 3 combined cases?

- Mrs Gina Miller She is a wealthy law graduate Hedge Fund manager and daughter of a former Attorney-General of Guyana who is spearheading the case. She 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 He is a hairdresser and 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 He 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 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 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.
- Raymond McCord He brought a similar judicial review to Mrs Miller in the High Court in Belfast.
- Her Majesty's Attorney General for Northern Ireland He has been appointed to stand on behalf of the McCord litigants in the Supreme Court. He also has the task of dealing with the devolution issues under the Good Friday agreement for the Government of Northern Ireland.
- Scottish Government It had a watching brief in the Divisional Court. It has intervened to argue devolution issues under the Scotland Act 1998 claiming that the UK Government cannot trigger Article 50 without the prior agreement of the Scottish Government.
- Welsh Assembly Government It too held a watching brief in the Divisional Court. It has also intervened to argue its devolution issues under the Government of Wales Act 1998. It relies on the Sewel Convention which is a convention which operates between the Westminster Parliament and the Welsh Assembly whereby there is dialogue between the 2 legislatures. It claims the UK Government does not have the power to short-circuit the Sewel Convention through the use of the RP.
- Lawyers for Britain Limited It is a group of lawyers, legal academics, retired judges and constitutional specialists who came together to campaign for a Leave vote in the referendum. It now says it wishes to work constructively to make sure the exit process is carried out in the best interests of the UK
- Independent Worker's Union of Great Britain The IWGB is an independent registered trade union founded in 2012 whose members are predominantly low paid British and EU migrant workers. It is intervening on behalf of its members and the other 3.3 million EU citizens who have relied upon their EU free movement rights to move to the UK to live and work.

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 non-governmental parties:

- James Libson of Mishcon de Reya, London for Mrs Gina Miller,
- David Greene of Edwin Coe, London for Señor dos Santos,
- John Halford of Bindmans, London for Graham Pigney and TPC,
- Crofts, Cheltenham for George Birnie & the Expat Interveners,
- Bhatia Best, Nottingham for AB, KK, PR & children,
- Richard Stein of Leigh Day, London for the Independent Workers Union of Great Britain,
- Clive Thorne of Wedlake Bell, London for Lawyers for Britain,
- Ciaran O'Hare of McIvor Farrell, Belfast for Mr McCord, and
- Fiona Cassidy of Jones Cassidy Brett, Belfast for Agnew.

Which counsel represent the parties?
The case on behalf of Governments will be presented by these counsel:

- The Secretary of State for Exiting the European Union - jointly by Her Majesty's Attorney-General, the Right Honourable Jeremy Wright QC MP and the First Treasury Counsel, Mr James Eadie QC of Blackstone Chambers,
- The Government of Northern Ireland - Her Majesty's Attorney-General for Northern Ireland, Mr John Larkin QC,
- The Scottish Government – jointly by the Lord Advocate, the Right Honourable James Wolffe QC and Mr Martin Chamberlain QC of Brick Court Chambers, and
- The Welsh Assembly Government – Mr Richard Gordon QC of Brick Court Chambers.

These counsel lead for the non-governmental 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,
- Mr Manjit Gill QC of Number 5 Chambers in Birmingham for AB, KK, PR & children,
- Mr Martin Howe QC of 8 New Square, Lincoln's Inn for Lawyers for Britain,
- Aidan O'Neill QC (Scotland) of Matrix Chambers & the Advocate's Library, Edinburgh for IWGB,
- Ronan Lavery QC (NI) of the Bar Library Belfast for Mr Mc Cord, and
- David Scoffield QC (NI) of the Bar Library Belfast for Agnew.

These academics specialising in public international or constitutional law have been retained to assist:

- Professor Dan Sarooshi, The Queen's College, Oxford University for Mrs Gina Miller,
- Professor Robert McCorquodale, Director of the British Institute for International and Comparative Law, University of London for the Peoples Challenge,
- Professor Christopher McCrudden, Queen's University Belfast for Agnew,
- Emeritus Professor John Finnis FBA, University of Oxford (his published work is relied on by the UK Government in its written case), and
- Emeritus Professor Sir Jeffrey Jowell QC, University College London (his published work is relied on by Mrs Miller in her written case).

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.'*

Which prior authorities are particularly relevant in the Supreme Court?
These 4 authorities are the most relevant but a large number of bundles of authorities have been produced for the hearing:

Case of Proclamations **[1610] 12 Co Rep 74 (**Sir Edward Coke, Chief Justice)
He recorded that he had been summoned to attend on the Lord Chancellor and others to answer 2 questions: (1) If the King by his proclamation may prohibit new buildings in and about London, and (2) If the King may prohibit the making of starch or wheat. The Chief Justice after consulting with the other judges ruled: '*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'* and also: *'It was resolved that the King hath no prerogative but that which the law of the land allows him*'.

In the matter of Part Cargo ex Steamship Zamora **[1916] UKPC 24** (Privy Council – Lords Parker, Sumner, Parmoor & Wrenbruy and Sir Arthur Channell) ('**The Zamora'**)
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) ('**De Keyser'**)
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.

Blackburn v. Attorney-General **[1971] EWCA Civ 7, [1972] CMLR 882** (Court of Appeal – Lord Denning MR, Salmon and Stamp LJJ) (**'Blackburn'**)
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.

What is the written case advanced by the UK Government?
The printed case is not drafted in as hostile a manner as was its skeleton argument in the Divisional Court but you can still detect tremendous irritation that Mrs Miller has had the temerity to challenge the UK Government. The UK Government says there is a '*dualist*' approach under our unwritten constitution – although perhaps the homonym '*duellist*' may fit the bill equally well. It says that sovereign states have powers to contract with each other on the '*international plane'*. However it concedes that treaties are not '*self-executing'* and individual rights or obligations created under an international treaty '*must be allowed into domestic law by Parliament*'.

In relation to the category 3 rights identified by Mrs Miller such as the right to vote in elections to or stand for election to the European Parliament, it says these rights are rights that only exist whilst the UK was a member of the 'club' of the EU. As the UK voted to leave the EU in the referendum it was taken to have voted to no longer enjoy and benefits that membership of the club offered.

As to *De Keyser* it says that '*having regard to the long established and vital nature of the prerogative powers relating to the conduct of foreign affairs'* that the principle to be applied is '*whether Parliament has evinced an intention to do so*' and it claims that Parliament has not evinced any intention that RP powers are to removed. This argument ignores the fact that both *De Keyser* and the *Zamora* were war time cases during a time of grave national emergency. This will mean that the Supreme Court has to decide if De Keyser should be limited in that way, or that it can no longer stand or perhaps that it does

represent a principle of wide standing that needs no further amplification for the 21st century. There is some thin support for the UK Government's position by reference to the Constitutional Reform and Governance Act 2010 ('CRAG'), which argument was rejected by the Divisional Court, but it can draw no support from the EU Referendum Act 2015 ('EURA 2015') itself.

The Divisional Court said it didn't matter whether it looked at the matter under A50.1 or A50.2 because it came to the same result. The UK Government seeks to twist this by saying that this has a 'surprising consequence' claiming that '*if the outcome of the referendum is to be implemented, Parliament must decide to confer a new legal power on the Government' to take the A50.1 decision. The UK Government claims, in an attempt to divert the Supreme Court from its true enquiry, means 'Parliament must be asked to answer precisely the same question which was put by Parliament to the electorate and has been answered in the referendum'*. Of course this is nonsense, because the question which Parliament must answer is not whether or not the UK should leave the EU (as that has been answered in the referendum) but how, when, and or what terms including seeking any necessary transitional arrangements or protections for UK citizens and businesses.

It has done some comparative research in other common law jurisdictions and claims that in Australia, Canada and New Zealand treaty making powers rests with the Government, withdrawal from treaties is entirely a matter for the Government but concedes that Parliament '*has some degree of legislative oversight of treaty ratification*'. It says that giving the A50 notice 'does not sit in constitutional isolation' and recites the Conservative 2015 election manifesto.

There are 2 new arguments that the UK government seeks to make that it did not make below:

- In the field of foreign affairs, the legitimate exercise of the RP power can have both a direct and indirect effect om the content of domestic law and on the extent of individual rights or obligations under domestic law, and
- Section 2(1) of the European Communities Act 1972 ('ECA1972') provides a mechanism for the UK to incorporate EU rules in UK domestic law (which it confusingly labels '*the ambulatory model*') but the UK Government ambitiously claims that legal rights or obligations arising from international law '*have no existence independent of the international legal rules from which they derive*' and that these rights are '*always conditional upon the existence of the underlying international rights and obligations'*.

Finally it has to be noted that the UK Government has abandoned completely any argument that this case is not justiciable which formed a central plank of its resistance in the Divisional Court.

What is the written case for the lead claimant, Mrs Miller, in response?
She says that the Divisional Court reached the right result for the right reasons. She asks the Supreme Court to dismiss the appeal for these 2 reasons:

- The ECA 1972 properly interpreted means that only Parliament itself could defeat the statutory rights that it created. It did not intend that rights it has created could be created or frustrated by the actions of Government ministers purporting to exercise RP powers, and
- Where Parliament has created statutory rights in the ECA 1972, the European Parliamentary Elections Act 2002 or at common law, the UK Government has no RP power to take action which will defeat those rights. Clear statutory authority is needed to do this and there is none.

Her printed case amplifies what was said below and develops these 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.

What additional written arguments does Señor dos Santos add?
He too says that the Divisional Court reached the right result for the right reasons. He asks the Supreme Court to dismiss the appeal for these 2 reasons:

- By reason of the fundamental constitutional principle of Parliamentary sovereignty only the Queen in Parliament can sanction:
  - the effect that a decision to withdraw and notify under A50 would bring about on rights granted in the ECA 1972,
  - the reversal of the significant constitutional change wrought by the ECA 1972

  Until Parliament has given such sanction notification under A50.2 may not be lawfully given by anyone
- There is no RP power to give A50.2 notification.

His printed case amplifies what was said below and develops these 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.

What additional written arguments do Grahame Pigney and the People's Challenge advance?
TPC too say that the Divisional Court reached the right result for the right reasons. TPC ask the Supreme Court to dismiss the appeal for these 2 reasons:

- A historical inquiry into the existence and effect of a foreign relations RP power to dispense with domestic statutes implementing EU law leads to the conclusion that an A50 notice cannot be given using RP powers, and
- The nature of the rights that the UK Government proposes to dispense with using RP powers include a wide range of domestic law rights that are fundamental in nature and could not be replicated by Parliament even if it wished to do so.

The Printed Case contains an 11 page annex of legislation which it labels '*fundamental and non-replicable EU citizenship rights*' including those derived from the Citizen's Directive **2004/38/EC** and the EU Charter of Fundamental Rights. It misses the target somewhat for 2 reasons. Firstly it focuses on the right to seek a remedy from the CJEU or rights to the EU single market but of course these will inevitably go as these are only available to members of the EU club and the consequence of the 'leave' vote in the referendum was that these would no longer apply. Secondly there is a disappointing focus on individual rights such as those under the Mutual Recognition of Qualifications Directive rather than those which are more important to businesses such as the ability to seek assistance from the European Commission in relation to competition law infringements.

The TPC printed case amplifies what was said below and develops these submissions:

- The RP power is a residual power which has been 'abrogated' 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 is the written case submitted by the immigration representative litigants?
These submit that in the absence of prior express authority given by an Act of Parliament, the UK Government may not lawfully use the RP power to give A50.2 notification which adversely impacts on the fundamental rights or the best interests of affected children. This cannot be done which results in either the removal or curtailment of the rights of residence enjoyed by EEA nationals and their family members in the UK because it will expose them at the point of withdrawal from the EU to potential criminal liability and summary removal as persons present without leave under the Immigration Act 1971.

Their printed case amplifies what was said below and develops these submissions:

- 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.

The court must take 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 ensure that a British child's rights to reside in the UK as a European citizen are effective. The CJEU has ruled that these non-EU citizens as carers are also be entitled to remain in the EU.

Some people resident in the UK derive 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.

What is the written case made by George Birnie and the other expatriates?
They too say that the Divisional Court reached the right result for the right reasons. They ask the Supreme Court to dismiss the appeal for these 6 reasons:

- In enacting ECA 1972, Parliament surrendered aspects of its legislative sovereignty and conferred these upon the EU institutions. Such conferral cannot be undone by the purported exercise of a RP power even on the international plane without prior Parliamentary consent,
- An informed interpretation of the ECA 1972 does not contemplate the absence of rights and obligations of the nature referred to in it by reason of the UK's withdrawal from the EU Treaties without Parliament's prior consent,
- The effect of the A50.2 notification is to destroy fundamental rights relied on by the expatriate interveners outside the UK jurisdiction. Rights enjoyed by UK citizens beyond British shores are so fundamental that legislation is required to take them away,
- If the RP power now contended for by the UK Government was not abrogated by the ECA 1972, it was abrogated by EU Act 2011,
- In enacting the EURA 2015, Parliament did not intentionally '*leave the field unoccupied*' on the understanding that RP powers would be used to implement a 'leave' vote in the referendum, and
- No decision has yet been taken for the purposes of A50.1 and any such decision would be legally flawed. 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.

What happened in the High Court in Belfast?
Mr Justice Maguire in the High Court in Belfast heard a similar challenge brought by Mr Raymond McCord on 6 October 2016. The focus of that case related only to the devolution settlement for Northern Ireland including what could happen in relation to the border with the Republic of Ireland noting that there was express provision for this in the Good Friday agreement. It did not deal with the RP powers challenge with had been argued only in the (English) Divisional Court. On 28 October 2016, Maguire J handed down his reserved judgment **[2016] NIQB 85** dismissing the judicial review.

Was there an appeal in Northern Ireland?
Yes. Mr McCord having lost his judicial review sought to appeal to the Court of Appeal in Northern Ireland. There is no provision for a leap frog appeal from the Belfast High Court that exists for decisions

of the High Court in England & Wales. The Court of Appeal in Northern Ireland then transferred the appeal to the Supreme Court so it could be heard at the same time. The Attorney-General for Northern Ireland has now been appointed to represent the interests of those Ulster citizens in Mr McCord's position.

What is the route taken so that the Supreme Court has 2 cases from Northern Ireland?
In addition to the *McCord* appeal being transferred to the Supreme Court, the Attorney General for Northern Ireland made a separate reference to the Supreme Court regarding devolution issues under paragraph 7 of Schedule 10 to the Northern Ireland Act 1998 ('NIA').

What are the written arguments advanced by the Government of Northern Ireland?
It says there are 4 devolution issues for the Supreme Court to address:

- Does any provision of the NIA read together with the Belfast Agreement (or Good Friday Agreement) and the British-Irish Agreement have the effect that an Act of Parliament is required before notice can be validly given to the European Council under A50.2?
- If the answer to this question is 'yes', is the consent of the Stormont Assembly required before that Act is passed?
- If the answer to this question is 'no', does nay provision of the NIA read with the Good Friday agreement operate as a restriction on the exercise of RP power to give A50.2 notice?
- Does section 75 of the NIA prevent the RP power being exercised in the absence of compliance by the Northern Ireland Office with its obligations under that section?

The Attorney-General for Northern Ireland submits that the answers to these 4 questions referred to the Supreme Court by the Maguire J in the High Court in Belfast is:

- No,
- Not applicable,
- No, and
- No.

In *McCord* HM Court of Appeal in Northern Ireland referred this question under paragraph 7 of Schedule 10 to the NIA:

> '*Whether the triggering or A50 by the exercise of RP power without the consent on the people of Northern Ireland impedes the operation of the NIA?*'

Again the Attorney limply answers this question 'No'.

The Attorney says that the NIA is '*in effect a constitution' but that the Good Friday Agreement is not a statute but rather 'is a political text*' and that it does not '*trump*' what are the '*otherwise clear words of the NIA*'. He says that international obligations are not '*entrenched*' by section 14 of the NIA. He refers to the October 2013 Memorandum of Understanding between the governments of the UK and Northern Ireland (and others) where it says:

> '*14. The UK Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government*.'

Finally he says that standing orders of the Stormont Assembly cannot be relied on to give a contrary view to the interpretation of the NIA.

What are the written arguments advanced by the Government of Wales?
The truth is that the Attorney-General for Northern Ireland correctly sets out the position not just for Ulster but for Scotland and Wales as well given that the NIA is in similar terms to the other 2 devolution statutes. However in an act of grandstanding, the Welsh Assembly Government ('WAG') tries to argue that A50 cannot be triggered without the consent of the Welsh Assembly. In outline it says:

- Giving notification will modify the competence of the Welsh Assembly and WAG under the Government of Wales 2006 Act ('GoWA'). The RP power cannot be used to dispense with statutory provisions in this way, and

- Any modification to the legislative competences of the Assembly will engage the Sewel Convention. The Sewel Convention operates between the Westminster Parliament and WAG. The UK Government does not have the power to short-circuit it through the use of the RP.

WAG says that '*the direction of travel for devolution in the United Kingdom is undoubtedly one of widening and deepening empowerment'* and cites 5 specific (but quite weak) examples of devolved functions of WAG which derive from EU law which will be lost on Brexit. WAG says that the RP is '*not only a narrow, residual power'* but that it '*is subject to specific constraints, such as the Ponsonby rule, to control its use*'. WAG says it supports the Divisional Court's finding that RP '*powers cannot be used to remove domestic law rights*' but it claims that '*the constitutional principle at stake is wider and does not permit the prerogative to dispense with primary legislation'* and relies on the *Zamora* and the *Case of Proclamations*.

WAG submits that triggering A50 would dispense with these 3 provisions under GoWA:

- the requirement that WAG may not legislate incompatibly with EU law [section 108(6)(c)],
- it will override the specific process for changing the WAG's competence by Order in Council (section 109), and
- it will dispense with the requirement for the Welsh Ministers to comply with EU law (section 80).

WAG submits there is no RP power to circumvent the Sewell Convention. This is named after Lord Sewell who during the passage of the bill through the Westminster Parliament that led to the Scotland Act 1998 ('SA') stated in broadly similar terms what is in the MoU referred to in the Northern Ireland Government's case above. WAG says the Sewell Convention '*requires a dialogue between legislatures'*. In stark contrast to the Northern Ireland Attorney-General's approach, WAG says that that under the Welsh Assembly's Standing Order 29, a member of the Welsh Government must lay a Legislative Consent Memorandum in relation to any '*relevant Bill'* under consideration in the UK Parliament. Finally it says that the Sewel Convention '*requires the Westminster Parliament to consider on a case-by-case basis whether to seek the consent of the Assembly' and that the 'convention is that it will normally do so'*.

What are the written arguments advanced by the Scottish Government?
Not surprisingly given the successes by the Scottish National Party in recent elections to both the Scottish and Westminster Parliaments, this has emboldened the Scottish Government in its written case to claim a far greater right to hold the UK Government to ransom that even WAG dares to claim in its case. It says the Divisional Court was correct in its ruling and that the Supreme Court should dismiss the appeal for these 6 main reasons:

- The decision to withdraw from the EU must be made in accordance with the UK's constitutional requirements with include both legal ones and constitutional conventions,
- Laws cannot be amended or repealed by an exercise of RP powers alone as a matter on constitutional principle. This is reflected in the Claim of Right 1689 and Article XVIII of the Acts of Union of 1706 and 1707,
- Withdrawing from the EU would effect a fundamental alteration in the constitution of the UK which cannot be lawfully effected by an act of the Crown exercising the RP without the authority of an Act of Parliament,
- Withdrawal from the EU would
  - Change the legislative competence of the Scottish Parliament,
  - Disapply or disable laws which currently apply in Scotland being those EU laws which are directly effective in policy fields which are not reserved to the UK Government,
  - Disable or disapply domestic laws which depend for their effect on membership of the EU
- Changes to the legislative competence of the Scottish Parliament or Government may not be effected by an act of the executive alone. The SA 1998 contains a statutory mechanism for altering legislative or executive competence by an Order in Council approved by **both** Houses of Parliament **as well as** the Scottish Parliament. The UK Government would not change the legislative competence of the Scottish Parliament without its consent, and
- The effects of withdrawal from the EU on devolved matters are such as to engage the Sewell Convention. The '*constitutional requirements'* under A50.1 include **both** the legal requirement for an Act of the (Westminster) Parliament **as well as** adherence to the Sewell Convention.

The Scottish Government rejects the 2 new arguments put forward by the UK Government which were not before the Divisional Court.

On what basis was Lawyers for Britain granted permission to intervene in this case in the Supreme Court?
It was granted permission to file written submissions only and will not be allowed to address the court orally.

What are the written arguments advanced by Lawyers for Britain?
Its printed case settled by 5 QCs and 3 juniors makes 2 broad submissions:

- The first in relation to the European Union (Amendment) Act 2008 and the European Union Act 2011, and
- The 2nd in relation to the EURA 2015.

In relation to the 2008 and 2011 Acts, it controversially claims that:

- The ECA 1972 '*did not create rights*',
- Parliamentary intention behind the ECA 1972 is not '*decisive*' of this case,
- The 2008 enacting the Lisbon Treaty with the A50 procedure had these consequences:
  - the EU Treaties explicitly acknowledge for the first time that membership of the EU was not necessarily permanent,
  - as Article 50 was included within EU Treaties recognised under the ECA 1972, Parliament must be taken to have had A50 in contemplation when stipulating in section 2(1) [as amended by the 2008 Act] that 'All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties … as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law',
  - the Crown generally has authority under its RP power to cause the UK to exercise its rights under international treaties, and
  - the operation by the Crown on the UK's behalf of A.50 will extinguish EU rights given by ECA 1972 but this is no different in principle (only in scale) from the process under which EU rights may be both created and extinguished by EU member states including the UK exercising RP powers through the operation of other articles of the EU treaties.

The submissions in relation to what can be inferred by way of Parliamentary intention when the Lisbon Treaty was enacted in the 2008 Act was unsuccessfully made in oral argument by Mr Eadie QC on behalf of the UK Government in the Divisional Court. As to the EURA 2015 it claims:

- It is to be '*read in the historical context of the situation which led to its enactment',*
- It contained (like the 1975 Act) no express provision for implementation of the referendum's result,
- The background to it shows that the legislative object was to provide for a '*final and decisive result*', and
- It is unrealistic to suppose that Parliament in passing EURA 2015 Act intended that an unstated restriction now held to be implicit in ECA 1972 Act should mean that the Government could not lawfully implement the result of the referendum by giving an A50 notice.

On what basis was the Independent Workers Union granted permission to intervene in this case in the Supreme Court?
IWGB was granted permission to intervene so that it could address in its written case the relevance of points of Scots Law (insofar as they do not also form part of the law of England and Wales) to the determination of the appeal.

What are the written arguments advanced by the Independent Workers Union?
Disappointingly given that this Union claims to represent workers throughout Great Britain it serves up only a Spartan tartan dish of haggis, whisky and porridge. It submits that the decision of the Divisional Court is correct and the appeal should be dismissed for these 5 reasons:

- The Supreme Court as the UK's constitutional court must take into account the Scottish constitutional tradition in deciding this appeal,

- Scottish constitutional law on the RP powers requires the court to conclude that the UK Government cannot unilaterally give A50.2 notification because it has not (yet) been authorised to do so by the legislatures of the UK,
- The Scotland Acts 1998 and 2016 have caused profound change in the balance in and structure of the UK constitution which must be reflected by this court,
- Scottish constitutional law requires that any decision to withdraw the UK from the EU has to be made with the consent of all 4 of the democratically elected legislatures of the UK, and
- These 5 points are made which demonstrate how the UK Government's claim to rely upon the RP Power to give A50.2 notification without prior legislative authorisation are untenable
    - entering Treaties is not the same as exiting them,
    - the RP power cannot be used to deprive individuals of their rights,
    - Finnis' natural law theory of EU law rights does not reflect the UK constitution,
    - the UK Government is not the British State, nor is international law the preserve of States, and
    - the UK Government is not the EU legislature.

Which other organisations tried and failed to intervene?
These 2 organizations were refused permission to intervene:

- 4A Law, and
- New Europeans

Decisions on allowing interventions are made based on the standing of those applying in relation to the case with particular weight given to applications from public interest bodies. If a proposed intervener is only going to raise points already being covered by other parties, the Supreme Court will not be assisted by an intervention.

Are there any striking omissions in the parties' written cases?
No party has addressed the special position of Gibraltar.

It has to be remembered that the June 2016 referendum was directed to the entire population not just of the UK but also to Gibraltar as well. Gibraltar is tagged on to the seat of South West England in the European Parliament. Gibraltar voted overwhelmingly by 95.9% on a 83.5% turnout to stay in the EU in the referendum.

The Treaty of Utrecht was negotiated between the Crowns of Great Britain and Spain to settle the issue of disputed sovereignty over the Rock and was signed on 13 July 1713. This treaty was signed after the Crowns of Scotland and England were merged in the Act of Union of 1707. The concluding words of the Treaty say:

> '*And in case it shall hereafter seem meet to the Crown of Great Britain to grant, sell or by any means to alienate therefrom the propriety of the said town of Gibraltar, it is hereby agreed and concluded that the preference of having the sale shall always be given to the Crown of Spain before any others*.'

There is a discrete issue as to whether service of an Article 50 notice would be regarded as 'alienating' Gibraltar such that Spain could then exercise its rights of first refusal to buy Gibraltar back from Great Britain. This would then leave the status of Gibraltarians unclear – whilst they have almost identical rights to UK citizens as British Overseas Territory citizens - they would be taken in Spanish control against their wishes and with the Gibraltar Government having no say.

What about costs? Are there any restrictions in the Supreme Court?
Costs in the Supreme Court are governed principally by its own Practice Direction 7. Paragraph 15.15 provides that its costs officers have '*no discretion to allow the fees of more than two counsel unless the Court has ordered otherwise*'. Paragraph 15.11 states that '*Counsel for an appellant generally commands a higher fee than counsel for a respondent*'. Paragraph 15.9 lays out in table form the '*guideline figures'* which are used in '*assessing payments to counsel at the appeal stage*'. The maximum guideline brief fee figure for a QC (based on a 2 day hearing) is £20,000 + VAT with a daily refresher of £3250. The corresponding figures for junior counsel are £10,000 and £1625 + VAT.

Lord Pannick's brief fee is rumoured to be well into 6 figures. Even if Mrs Miller is successful, then she is likely to recover only a fraction of her costs from the UK Government. This will of course cut both ways meaning Mrs Miller's liability for adverse costs will be similarly limited if she loses. Orders were made at a case management conference in the Divisional Court as to the terms on which the other non-governmental parties could either intervene or be an interested party including orders either capping costs or (in the case of the legally aided children) that no costs would be sought in the event of an adverse outcome.

Under rule 15 of the Supreme Court Rules 2009 **SI 2009/1603** where permission is granted to intervene the right is to make written submissions. As to interveners, the general rule is that they bear their own costs – rule 46(3). Even if an intervener's submissions assist a party to win, it will not recover its costs from a losing party but *'such orders may be made if the Court considers it just to do so'*. Similarly an intervener will not usually have liability for an adverse costs order against a main party.

Who will hear this case?
For the first time since it was created the UK Supreme Court will sit *en banc*. As Lord Toulson retired in the summer, this conveniently means that all the remaining 11 justices will hear the case. There is the strong possibility that they will not be unanimous.

Of the justices on the panel, the following are likely to be the most sympathetic to allowing the appeal in part and finding for the UK Government: Lord Neuberger PSC and Lords Mance, Reed, Hughes, Hodge and Wilson JJSC. On the other hand these justices on the panel are more likely to side with Gina Miller, dismiss the appeal and/or dissent: Lady Hale DPSC and Lords Kerr, Clarke, Sumption and Carnwath JJSC

When will the case be heard?
It will be heard over 4 days starting on Monday 5 December 2016.

When will judgement be handed down in this case?
Judgement will inevitably be reserved and will not appear until January or February of 2018.

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.

2 December 2016

David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.