IN THE HIGH COURT OF JUSTICE **CO/3809/2016; CO/3281/2016**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N :-

R on the application of

(1) GINA MILLER

(2) DEIR TOZETTI DOS SANTOS

Claimant

– and –

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Defendant

– and –

(1) AB, KK, PR & CHILDREN

(2) GRAHAME PIGNEY & OTHERS

Interested Parties

– and –

MR GEORGE BIRNIE & OTHERS

Interveners

SKELETON ARGUMENT FOR THE EXPAT INTERVENERS

KEY SUBMISSIONS

(A) SUBMISSIONS IN SUPPORT

1. The Expat Interveners' primary submission is that legislation is required to authorise the Defendant to give notification under Art. 50(2) TEU of a decision by the UK to leave the EU taken in accordance with Art. 50(1).

2. The Expat Interveners respectfully adopt the submissions made, *inter alia*, in the Skeleton Argument of the Lead Claimant (Gina Miller), as follows:-

   (1) **No statutory authority:** The Defendant has no statutory authority to give notification under Art. 50(2).[1]

   (2) **No lawful prerogative power:** It would not be a valid or lawful exercise of prerogative powers for the Defendant to give such notification, as this would:

      (a) "*frustrate or substantially undermine*"[2] Acts of Parliament (most obviously the 1972 Act) and rights and duties established thereunder;

      (b) "*be inconsistent with [the] object and purpose*" of the 1972 Act; and

      (c) "*pre-empt*"[3] the decision of Parliament whether or not to continue with a statutory scheme.

   (3) **Need for legislation:** *"Constitutional"* statutes (in the *Thoburn* sense) may not be impliedly repealed – and fundamental rights (such as citizenship) may not be removed without clear words.[4]

   (4) **No trespass**: The relief sought would not trespass upon the powers or sovereignty or Parliament.[5]

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1 Skeleton Argument for the Lead Claimant, Gina Miller: §§ 5(1).

2 "*Frustrating or substantially undermining*": §§ 5(2) and (3); 9; 11(3); 21; 29; 37; 40(1); 41(2) and (3); 42(4), (6) and (7); 43; 46(2); 47(2); 48(1) and (2); 49(1); 50(1) and (3); and 51(2).

3 "*Pre-empting*": §§ 5(2) and (3); 29; 37; 40(1); 41(2) and (3); 42(6); 43; 46(3); 47(2); 49(1); 50(1); and 51(2).

4 Constitutional statutes and fundamental rights: §§20 and 21.

3. The Expat Interveners would respectfully add the following further submissions in support of those above:-

(1) **Absence of statutory power**: The Northern Ireland Act 1998, in contrast to the Referendum Act 2015 ('**the 2015 Act**'), requires steps to be taken by the Government to give effect to a referendum. The omission of such a requirement, indeed the omission of any express statutory power, in the 2015 Act, to take such steps provides no support for the Defendant's contention that he is entitled to notify under Art. 50(2) without legislation.

(2) **Rights outside the UK**: The rights enjoyed by British citizens affected beyond these shores[6] are so fundamental that legislation is required to take them away and they can only be overridden by express language or necessary implication therein.[7]

(B) FURTHER OR ALTERNATIVE SUBMISSIONS

4. If, contrary to the Lead Claimant's case and the Expat Interveners' primary case (and submissions above), legislation is not required, the sources of power available to the Defendant could only be:

(a) existing statutory authority; or

(b) prerogative power.

5. The Defendant has sought to bifurcate his role into two distinct administrative acts: the decision to leave the EU and the act of notification (including a decision as to when to do so). That does not assist the Defendant, not least since both acts would be amenable to review. There is no decision to leave the EU for the purposes of Art. 50(1) recognisable in public law and any such decision would be flawed.

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5 No "*trespass*" – Skeleton Argument for the Lead Claimant: §§ 5(5); and 51(2).

6 Cf. The Lead Claimant's focus is understandably upon "*EU law rights and duties ceasing to apply in the United Kingdom under section 2 of the 1972 Act*" e.g. Lead Claimant's Skeleton Argument, at §42(1), p.20.

7 *Ahmed and others v Her Majesty's Treasury (JUSTICE intervening) (Nos 1 and 2)* [2010] UKSC 2; [2010] 2 AC 534.

6. Even if either of the above sources of power were available to the Defendant in respect of the two distinct administrative acts he relies upon:

(1) **Statutory power:** There can be no doubt that such an exercise of power would be amenable to judicial review. On such a review, the Court would hold it unlawful for the reasons at (3) to (5) below.

(2) **Prerogative power:** The exercise of the prerogative would be amenable to judicial review because:

(a) the relevant subject matter is not (confined to) foreign affairs *simpliciter*;

(b) the acts in question affect the rights of individuals in domestic law;

(c) they also affect the rights of British citizens in other EU countries; and

(d) the rights in question include fundamental rights.

(3) **No decision:** There is no identifiable decision having legal effect that could be recognised as a decision of the UK to leave the EU,[8] nor can one be adequately discerned from the Defendant's case: the Defendant's case does not identify the decision (e.g. "*articulated in the referendum result*"[9]), when it was made, by whom or on what basis.

(4) **Decision flawed:** Even if there were any decision recognisable in public law, it would be vitiated by the absence of any stated basis for it, and the failure to have regard to plainly material considerations including nature of rights being removed and the effect (including on British citizens overseas and those excluded from the vote in particular) of removing those rights.

(5) **Notification flawed:** The act of notification would plainly be logically and legally dependent upon a lawful anterior decision to leave the EU.

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[8] The Expat Interveners' letter of 20.7.16 asked the Defendant about any "*policy or […] decision that the Referendum result should be followed automatically*". No response was received.

[9] At §5(2), p.2 and §9, p.5.

Contents

INTRODUCTION

7. This skeleton argument is filed on behalf of the individuals named as 'Expat Interveners' in the Order made at the directions hearing on 19 July 2016 (the "**Order**"), who have been given permission to participate in these proceedings pursuant to CPR r.54.17 under paragraph 5 of the Order.

8. As Sir Brian Leveson noted at the directions hearing, the Expat Interveners have a '*distinct interest*' in the matters in issue. They reside or have family, personal, business or other interests in other EU countries.[10]

9. Following the directions hearing, by letter dated 20 July 2016, the Expat Interveners requested that the Defendant clarify "*...whether the Government has a policy or has made a decision that the Referendum result should be followed automatically (subject of course to timing and other matters).*" The Expat Interveners also asked: "*If so, please state clearly what the policy of decision is and when it was adopted or made.*" The Defendant failed to respond to that request. That issue now appears to loom large in the Defendant's case, as identified above and amplified at paragraphs 33 to 34 below.

The Expat Interveners

10. The Expat Interveners are British nationals who, in exercise of their rights as Citizens of the Union pursuant to Art. 20 TFEU, reside or have acquired interests in another Member State of the EU.

11. The UK's future relationship with the EU and, in particular, the extent to which the Expat Interveners may be able to continue to enjoy or exercise rights of Union citizenship, or negotiated rights akin to those rights, touches upon almost every aspect of their lives. (An illustrative list of their affected rights is set out in Annex 1 hereto.)

[10] As reflected in the evidence filed with the Court.

12. The Expat Interveners are concerned to ensure that any decision to leave the EU by notice under Art. 50 TEU is taken lawfully, in accordance with constitutional requirements (of which the referendum forms only one part) and such regard for those affected as the law may require. They do not shrink from saying that they would prefer the UK not to leave the EU, but that is not a question for them, nor one before this Court. The only question is what the law requires.

Fair Deal for Expats

13. The Expat Interveners are each members of a voluntary association, *Fair Deal For Expats* ("***Fair Deal***"), registered as a non-profit association in France,[11] further details of which are set out in the statement of Mr. John Shaw, Chairman of Fair Deal.

14. Fair Deal's membership now extends to individuals in Austria, Belgium, Czech Republic, France, Germany, Greece, Italy, Luxembourg, the Netherlands and Spain. The estimated British-born populations of these states alone total some 780,000, and it is estimated of the total number of British citizens that are living, working or with relevant interests in the 27 other Member States is between 1 and 2 million.[12]

Real rather than assumed facts

15. As foreshadowed in their application pursuant to CPR r.54.17 made by letter to the Court dated 15 July 2016 (the "**Application**"), the Expat Interveners have filed and served evidence in the form of written witness statements.

16. Sir Brian Leveson observed at the directions hearing that some factual context might assist the Court. It is hoped that the evidence filed by the Expat Interveners[13] will provide helpful illustrative background, from direct personal perspectives.

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11 Registered pursuant to the French Non-Profit Organizations Law of 1901, under number W472001988.

12 Figures from (a) February 2016 Cabinet Office policy paper entitled *The Process for Withdrawing from the European Union* (Cmd 9216) in which it is estimated that 2 million UK Citizens are living, working or travelling in the 27 other Member States of the EU; and, for convenience only (b) Briefing Paper MW364, published by *Migration Watch UK*, which draws on multiple sources and estimates that 1.2 million British born nationals reside in other EU Member States. Both are exhibited to the Statement of Mr Shaw.

13 Mr John Shaw; Mr Mark Pennington; Mrs Margaret Morton; and Ms Susan O'Rourke.

(A) SUBMISSIONS IN SUPPORT

No statutory authority

17. The distinction between the 2015 Act and other legislation is instructive:

    (a) as identified on behalf of Ms Miller, the 2015 Act is distinct in this regard from legislation expressly making such provision: not only the Parliamentary Voting System and Constituencies Act 2011,[14] but also the Northern Ireland Act 1998, which requires steps to be taken by the Government to give effect to a referendum;[15] and

    (b) had Parliament intended that a binding decision to leave the EU would arise from the referendum, or that the Government was to act in a certain way in the light of the outcome, clear words would have been used - particularly on an issue of such fundamental constitutional importance.

18. Further, in *Shindler v Chancellor of The Duchy of Lancaster & another*,[16] the Court of Appeal accepted that the 2015 Act contains (only) "*part of the constitutional requirements of the UK as to how it may decide to withdraw from the EU*"[17] (emphasis added) and in passing it Parliament determined that those requirements *included* a referendum.[18]

> *"19. I accept that Parliament is sovereign and that it does not need the mandate of a referendum to give it the power to withdraw from the EU. But by passing the 2015 Act, Parliament has decided that it will not withdraw from*

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[14] Pursuant to section 8 of which the 5 May 2011 alternative voting referendum was to result in implementation of certain provisions, depending upon the outcome, thus: "*The Minister must make an order bringing into force section 9, Schedule 10 and Part 1 of Schedule 12... if (a) more votes are cast in the referendum in favour of the answer "Yes" than in favour of the answer "No", and (b) the draft of an Order in Council laid before Parliament... has been submitted to Her Majesty in Council...".*

[15] Section 1 of the Northern Ireland Act 1998 requires that the Secretary of State lay before Parliament such proposals as are agreed between UK Government and the Government of the Republic of Ireland in the event there is a referendum result in favour of Northern Ireland becoming part of a united Ireland.

[16] [2016] EWCA Civ 469; and UKSC 2016/0105.

[17] *Shindler*, per Lord Dyson MR at §[13].

[18] per Lord Dyson MR.

> *the EU unless a withdrawal is supported by referendum. In theory, Parliament could decide to withdraw without waiting for the result of the referendum despite the passing of the 2015 Act. But this is no more than a theoretical possibility. The reality is that it has decided that it will withdraw only if that course is sanctioned by the referendum that it has set in train. In other words, the referendum (if it supports a withdrawal) is an integral part of the process of deciding to withdraw from the EU. In short, by passing the 2015 Act, Parliament decided that one of the constitutional requirements that had to be satisfied as a condition of a withdrawal from the EU was a referendum.*"

19. There is no implicit statutory power (should that hint in the Defendant's Grounds find expression in a submission at the hearing) conferred by the 2015 Act, whether or not regard is had to the '*understanding*' relied upon.[19]

Rights outside the UK

20. The rights enjoyed by British citizens affected beyond these shores[20] are so fundamental that legislation should be required to take them away and they can only be overridden by express language or necessary implication therein.[21] Those rights (as set out in Annex A) include fundamental rights such as citizenship of the EU and rights guaranteed under the Charter of Fundamental Rights (the "**Charter**").[22]

21. This is not a submission that EU law rights prevent or govern the domestic procedure by which the UK decides to leave the EU – as rejected in *Shindler*[23]. This is a

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19 The constitutional implications of 'understandings' or undertakings by politicians are uncertain in practice. See the observations as to the Scottish independence referendum by Stephen Sedley, *The Royal Prerogative*, *Lions Under the Throne: Essays on the History of English Public Law* (Cambridge, 2015), at p.133.

20 Cf. The Lead Claimant's focus is understandably upon "*EU law rights and duties ceasing to apply in the United Kingdom under section 2 of the 1972 Act*" e.g. Lead Claimant's Skeleton Argument, at §42(1), p.20.

21 *Ahmed and others v Her Majesty's Treasury (JUSTICE intervening) (Nos 1 and 2)* [2010] UKSC 2; [2010] 2 AC 534.

22 Charter of Fundamental Rights of the European Union, 2000/C 364/01.

23 At [58] *per Elias LJ* and at [20] per Lord Dyson MR: "*… I would hold that the 2015 Act does not fall within the scope of EU law and that the claim fails at the first hurdle.*"

submission as to the proper qualitative characterisation of the relevant rights affected, for the purpose of appraising their materiality to the decision in question. The fundamental nature of those rights, rather than their source, is the core of the submission.

(B) FURTHER AND ALTERNATIVE SUBMISSIONS

22. In the event that – contrary to the Lead Claimant's case and the Expat Interveners' primary case (and submissions above) – legislation is not required, the sources of power available to the Defendant could only be:

    (a) existing statutory authority; or

    (b) prerogative power.

23. The Defendant has sought to bifurcate his role into two distinct administrative acts: the decision to leave the EU and the act of notification (including a decision as to when to do so). That does not assist the Defendant, not least since both acts would be amenable to review, there is no recognisable decision to leave the EU in accordance with the UK's constitutional requirements before the Court and any such decision would be flawed as a matter of public law, as explained below.

24. Even if either of the above sources of power were available to the Defendant in respect of the two distinct administrative acts he relies upon, the decision relied would be flawed and unlawful, as explained below.

Statutory power

25. There can be no doubt that such an exercise of power would be amenable to judicial review. On such a review, the Court would hold it unlawful for the reasons at paragraphs 40 to 46 below.

Prerogative power

26. The exercise of the prerogative would be amenable to judicial review because:

(a) the relevant subject matter is not (confined to) the conduct of foreign affairs *simpliciter*;

(b) the acts in question affect the rights of individuals in domestic law;

(c) they also affect the rights of British citizens in other EU countries; and

(d) the rights in question include fundamental rights.

27. As accepted by the House of Lords, there is no principled reason why exercise of the royal prerogative so as to affect rights of citizens is not amenable to judicial review. As held by Lord Roskill in the well-known passage in *CCSU:*

> *"If the executive instead of acting under a statutory power acts under a prerogative power… so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory."*[24]

28. Since that case, Lord Roskill's "*excluded categories"* (including foreign affairs and the making of treaties[25]) have been the subject of considerable judicial consideration and development.[26] So too has the principle that the right of challenge is not unqualified but must *"depend upon the subject matter of the prerogative power"*.

29. The short answer is that the exercise of the prerogative power would be amenable to judicial review as the Defendant concedes[27] and/or for the reasons advanced by the Lead Claimant. However, for the avoidance of doubt, it would be amenable to review even if the *statutory* source of the rights in issue were disregarded.

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[24] *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6, [1985] AC 374, per Lord Roskill at 417-418.

[25] Such as "*those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others*".

[26] And indeed, extra-judicial commentary, e.g. Experience may require those categories to be re-thought: Sir Stephen Sedley, The Royal Prerogative, *Lions Under the Throne: Essays on the History of English Public Law* (Cambridge, 2015), at p.141.

[27] Defendant's Detailed Grounds of Resistance, at §10.

30. To that end, the result is that, for present purposes:

(a) a careful analysis of the true subject matter of the prerogative power (with a keen eye on reality) is necessarily anterior to a decision as to whether or not the prerogative is amenable to review;

(b) the once "*excluded*" categories, as such, are questionable and, for example, abuse of powers of Orders in Council granted by prerogative for the governance of colonies is justiciable;[28]

(c) in the context of treaty making, this is to be approached on a case by case basis;[29] and

(d) for example, support for accession of another state to the Treaties was found by the Court of Appeal to be justiciable where it engaged a question of domestic UK law.[30]

31. Undertaking any realistic analysis of the true subject matter of the acts in issue necessarily entails recognising the following:

(a) in so far as they can be bifurcated as the Defendant contends, the act of notification is dependent upon any prior act in the form of a decision by the UK to leave the EU;

(b) the acts (whether taken together or considered separately but realistically) are intended[31] to take away individual domestic rights;

(c) the acts are therefore not merely the exercise of Crown treaty-making powers, *simpliciter*;[32] and

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28 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61, at §[46].

29 *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (admin) at §[55].

30 *R v Secretary of State for Foreign and Commonwealth Affairs, ex p British Council of Turkish Cypriot Associations* [1998] COD 336.

31 *Laker Airways v Department of Trade* [1977] QB 463, esp. *per* Lawton LJ *"in reality, if not in form"* at p.728A-B.

(d) the nature and quality of the individual rights at stake (extending to the rights of British citizens in other EU countries) accentuates their relevance to the necessary appraisal of the subject matter over which the prerogative power purports to be exercised.

No decision

32. There is no distinct, identifiable or recognisable decision of the UK to leave the EU[33] – at least not one recognisable in public law. Nor can one be adequately discerned from the Defendant's case: the Defendant's case does not identify the decision, when it was made, by whom or on what basis.

The Defendant's case

33. For the first time, in its Detailed Grounds of Resistance, the Defendant avers that:[34]

(a) the decision to be notified under Art. 50 TEU is "*…the UK's decision to leave the EU, as articulated in the referendum result*"; and

(b) this is so because the Government's policy, prior to the Referendum, was "*unequivocal*" that the outcome of the referendum would be respected. This is said to have been "*expressly and plainly stated*" by Baroness Anelay of St Johns on the floor of the House of Lords on 23 November 2015.[35]

34. The Defendant also contends as follows:

(a) the next stage in the process is for the UK to notify the EU Council of its intention to withdraw;[36]

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32 Cf. *Blackburn v Attorney General* [1971] 1 WLR 1037, at 1040 *per* Lord Denning MR – see: Defendant's Detailed Grounds of Resistance, at §14, p.8.

33 The non-binding Referendum is pregnant with anticipation of a further step.

34 Detailed Grounds of Resistance, paragraphs 2, 5(2) and 9.

35 Detailed Grounds of Resistance, paragraph 12(1) (at note 1).

36 At §2, at p.2.

(b) "*The key decision is not the procedural step of notification under Article 50(2) but the decision contemplated by Article 50(1) that the UK should withdraw from the EU*";[37]

(c) "*the Government has made it clear that it respects the outcome of the statutory referendum and sees no legal basis to prevent it from giving effect to this by taking the procedural step under Article 50(2) …*";[38]

(d) "*the clear understanding was that the Government would give effect to its outcome. That was also the basis on which the electorate voted*";[39]

(e) "*The characterisation of the referendum as merely 'advisory' is incomplete and inappropriate when using that term (as the Claimant does) to imply lack of Parliamentary permission to give effect to the result*";[40] and

(f) "*the claim conflates the process of notification with the decision notified*".[41]

35. These contentions and the bifurcation of the Defendant's role, form a central part of the Defendant's case. However, this only serves to throw into sharper focus the ethereal, if not wholly unreal, nature of the first '*decision*' said to have been taken to leave the EU, which is neither consistently described nor clearly identified.

36. It is therefore difficult to discern the Defendant's case or indeed the key public law indicia of the decision itself, from the above.

Speeches and manifestos

37. It is correct to acknowledge that the referendum took place in the context of political statements that the Government would act on its result.[42] However, the

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37 At §9, at p.5.

38 At §10, at p.5.

39 At §12(1) – statement by Baroness Anelay of St Johns (HL Hansard, 23.11.15, Minister of State, FCO).

40 At §12(2), p.6.

41 At §5(2), at p.2.

combination of a non-binding referendum and what the Defendant describes as an "*understanding*" derived from at least one statement in the House (and/or from the Conservative Party's manifesto) that the government would respect or give effect to the outcome, does not amount to a decision by the UK to leave the EU of the nature contemplated in Art. 50(1).

38. Speeches by government ministers, even when expressed in apparently mandatory terms, cannot be treated as a formulated policy statement or as a decision, for the purposes of public law.[43] Nor can a manifesto commitment.[44]

39. Further as noted above, and in any event, the referendum itself gave rise to no legally binding effect: it formed part of the *'constitutional requirements*' to be complied with in respect of a notifiable decision under Art. 50 TEU: *Shindler*.

Decision flawed

40. Even if there were any decision recognisable in public law, it would be vitiated by the absence of any stated or identifiable basis for it, and the failure to give necessary and operative consideration to plainly material considerations in taking the decision.

41. Those considerations would include, at a minimum:

(a) the situation, rights and interests of between 1 and 2 million British citizens. By deciding automatically to follow the Referendum result, the Defendant *ex hypothesi* excluded from consideration the situation, rights and interests of

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[42] Such as (a) Conservative Party manifesto for the 2015 general election, (b) Speech by the Prime Minister on Europe, Chatham House, 10 November 2015, setting out the case for EU reform, available at https://www.gov.uk/government/speeches/prime-ministers-speech-on-europe.

[43] *Bobb v Manning* [2006] UKPC 22, per Lord Bingham at §[16].

[44] A manifesto commitment cannot be relied upon, for example, as giving rise to a legitimate expectation as regards the delivery of the promise after elected even if it is addressed at specific categories of persons: *R v Department for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115.

those who had no vote[45], which could not find expression in the Referendum itself;

(b) the fundamental nature of the rights in issue,[46] both domestically and in the case of those outside the United Kingdom (perhaps especially in the case of those without a vote).

42. Many in the position of the Expat Interveners[47] were excluded from the franchise and were unable to vote in the Referendum, by s.2 of the 2015 Act, having lived outside the UK and not been on the electoral register for more than 15 years (the "**15-year rule**").[48]

43. If there was a decision to follow the Referendum result[49] (which appears to form a central part of the Defendants' argument that the UK has taken a decision to leave the EU), then the decision was taken regardless of any margin by which the Referendum was determined or, indeed, turnout. That would be a surprising result and would invite the question as to whether the UK would have been necessarily taken to have decided to leave the EU if there had been a boycott of the vote and only 41 people had voted in total, of whom 20 had voted to remain, leaving a margin of one. It is not clear if the Defendant's case is that this would have amounted, without more, to a decision of the UK to leave the EU.

44. The tenor of the decision in *Shindler* is that Parliament is sovereign and able to ask any question, by way of a referendum, *a fortiori* a non-binding one. Primary

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45 Mrs Margaret Morton, and Mr Mark Pennington, whose witness statements are before the Court.

46 A "*high place*" must be given to fundamental rights in the decision-making process: *Chesterfield Properties v Secretary of State for the Environment* [1998] JPL 568, 579-580 per Laws J and where a decision has unfairly and unreasonably given insufficient weight to fundamental rights, the Court will intervene: *R (Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139 at 39 per Dyson LJ.

47 Including Mrs Morton.

48 That exclusion from the Referendum was held not to be an unlawful restriction on the rights of free movement conferred by EU law: the Court of Appeal rejected a challenge to that aspect of the European Union Referendum Act 2015 and the Supreme Court refused permission to appeal from that decision in *Shindler v Chancellor of The Duchy of Lancaster & another* [2016] EWCA Civ 469; and UKSC 2016/0105.

49 See footnote 9, above.

legislation could not have been impugned if only residents of (say) Wales could vote in a referendum on EU membership. Indeed, the basis of the Scottish independence referendum was not impugned for having excluded (by use of an Order in Council[50] followed by Scottish legislation) the populations of the rest of the United Kingdom, including Scots, whilst allowing the English living in Scotland to vote.[51]

45. The Expat Interveners respectfully submit that, for the Court to hold that the constellation of statements relied upon by the Defendant, taken together with the Referendum result, amounts to a recognisable decision in public law (in accordance with the UK's constitutional requirements) for the UK to leave the EU, would set a precedent of uncertain scope and effect, in a sensitive area of constitutional law.

Notification flawed

46. The act of notification is plainly logically and legally dependent upon a lawful anterior decision to leave the EU. The two supposedly distinct acts stand or fall together.

47. The defects in any such anterior decision are plain, as set out above.

CONCLUSION

48. For the reasons set out above, the Expat Interveners respectfully submit that:

(a) a decision to give notification under Art. 50 TEU may only be lawfully made if the Defendant or Government is authorised to do so by legislation; and

(b) no lawful decision has yet been taken by the UK to leave the EU, in accordance with the United Kingdom's constitutional requirements.

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50 2013/242 made under section 30 of the Scotland Act.

51 In his book, *Lions under the Throne* (referred to in footnote 19 above), at p.133, Sir Stephen Sedley questions whether Parliament would have proceeded, without more, to repeal the Union with Scotland Act 1706 – on the basis of prior undertakings by the leaders of all three main parties.

49. The Expat Interveners respectfully invite the Court to grant the declaratory relief sought by the Lead Claimant, Ms Miller, and such other declaratory relief as the Court may think fit.

PATRICK GREEN QC

HENRY WARWICK

PAUL SKINNER

MATTHIEU GRÉGOIRE

21 September 2016

ANNEX 1

1. The Expat Interveners rely upon and enjoy rights of EU Citizenship under Art. 20(1) TFEU, and, of particular importance to them, of free movement under Art. 21 TFEU, which are given further expression by Directive 2004/38/EC (the "**Directive**"). The Directive applies to Union citizens who move to or reside in a Member State other than that of which they are a national, to their family members and to certain other individuals.[52] Specifically, the Expat Interveners rely upon their rights to:[53]

   (a) enter another Member State, as may family members (whether Union citizens or not) without requiring an exit or entry visa;

   (b) live in another host Member State for up to 3 months without any conditions or formalities;

   (c) live in another host Member State for longer than 3 months subject to certain conditions, depending on their status in the host country;

   (d) be entitled to permanent residence if they have lived legally in another Member State for a continuous period of 5 years (this also applies to family members); and

   (e) to be treated on an equal footing to host Member State nationals.[54]

2. The Expat Interveners, and others in their position, are particularly reliant upon the fundamental rights guaranteed to them under the Charter of Fundamental Rights (the "**Charter**"),[55] which include, without limitation, rights:

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[52] Pursuant to Art.2(2) of the Directive each host Member State is obliged, in accordance with its national legislation, to facilitate entry and residence for other family members who are dependants or require personal care from the Union citizen on serious health grounds, and to the partner of a Union citizen.

[53] Rights arising pursuant to Art.3 and 4, and Chapters III, IV and V Directive 2004/38/EC which are subject to the restrictions further set out in the Directive; the list provided is in summary form only and does not purport to be exhaustive.

[54] Host authorities are not obliged to grant benefits to Union Citizens not working for payment during the first 3 months of their stay.

(a) to respect for their private and family life, home and communications, pursuant to which a right not to be separated from one's family has been recognised;[56]

(b) to education and to access to vocational and continuing training, including the possibility of receiving free compulsory education;[57]

(c) to engage in work and to pursue a freely chosen or accepted occupation, and to seek employment, to work, to exercise the right of establishment and to provide services in any Member State;[58]

(d) in the case of nationals of third countries authorised to work in the territories of the Member States, to working conditions equivalent to those of citizens of the Union;[59]

(e) to protection from collective expulsion;[60]

(f) to freedom from discrimination on the grounds of nationality;[61]

(g) to social security and social assistance, and to access to preventative health care and medical treatment under the conditions established by national law and practices;[62]

(h) to move and reside freely within the territory of Union.[63]

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55 Charter of Fundamental Rights of the European Union, 2000/C 364/01.

56 Art. 7; see also Case C-413/99, *Baumbast and R v Secretary of State for the Home Dept* [2002] ECR I-709, at para. 73 to 75.

57 Art. 14(1) and (2).

58 Art. 15(1) and (3).

59 Art. 15(3).

60 Art. 19(1).

61 Art. 21(2).

62 Art. 34 and 35.

63 Art. 45.

3. By reason of their particular reliance upon rights of EU citizenship, they have distinct interests from other 'concerned' British citizens who are party to these proceedings, which are relevant to the issues identified in the Grounds filed and served on behalf of the Claimants and Interested Parties. They are affected by the outcome of these proceedings, and by the grant or refusal of the relief sought.

4. The rights of the Expat Interveners are at risk. For the reasons set out more extensively below (out of an abundance of caution):

   (a) The position as to whether British nationals who reside in other EU Member States may continue to enjoy those rights were notice to be given under Art. 50 TEU is doubtful and in any event gives rise to considerable uncertainty. [64]

   (b) The Government's position is that the status of these rights in the future is at large, being a matter for negotiation.

   (c) An analysis (below) of the relevant principles of EU and public international law serves only to confirm the uncertainties above.

Position under EU law

5. The Expat Interveners' rights are summarised above. They derive in large part from Art.20(1) and 20(2)(a) TFEU, which provide, respectively:

> "*Citizenship of the Union is hereby established. Every person holding nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*"
>
> ...
>
> "*Citizens of the Union shall enjoy rights and be subject to the duties provided under the Treaties. They shall have, inter alia... (a) the right to move and reside freely within the territory of the Member States... These rights shall be*

[64] As identified by the House of Lords European Union Committee: see '*The Process of Withdrawing from the EU*', 4 May 2016: "*One of the most important aspects of the withdrawal negotiations would be determining the acquired rights of the two million or so UK citizens living in other Member States, and equally of EU citizens living in the UK. This would be a complex and daunting task*".

exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

6. Pursuant to Art. 50 TEU, the Treaties will cease to apply to the UK.

7. Art. 50 TEU does not state in express terms whether rights already exercised by citizens will be preserved in the event that the Treaties cease to apply to the UK. On the ordinary meaning of its text (read with Art. 218(3) TFEU) Art. 50 TEU provides that such rights are a matter for negotiation either as part either of any terms of withdrawal that are agreed pursuant to Art. 50(2), or "*the framework for its future relationship with the Union*". If agreement on citizenship rights is not agreed then (absent an extension of time under Art. 50(3)) Art. 20 TFEU will no longer be binding in respect of British citizens.

8. That the remaining 27 Member States will continue to be bound by the Treaties and the Charter, for example, prohibits collective expulsion of foreign nationals.[65] But notwithstanding the European Court of Justice's observation that the Community legal order confers rights upon citizens that are "*part of their legal heritage*"[66] there is no general principle of EU law specifically protecting acquired rights of individuals.

9. While it may be that the principle of legal certainty (as recognised as a general principle by the ECJ) could have specific applications (such as non-retroactivity and legitimate expectations), it is suggested as unlikely that EU general principles of law could protect acquired rights within either UK courts or those in another Member State.[67]

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65 Art. 19, Charter of Fundamental Freedoms, Art.19; see also Art. 3, Protocol 4, European Convention on Human Rights 1950.

66 Case 26/62 NV *Algemene Transporten Expeditie Onderneming van Gen en Loos v Netherlands Asministratie der Bleastingen* [1963] ECR 1, p. 12; the contrary view that there may be horizontally and vertically enforceable rights (see, e.g. Jochum Herbst, *Observations on the Right to Withdraw from the European Union: Who are the 'Masters of the Treaties'?*, German Law Journal (6:2005), p1755) is a minority view.

67 S. Douglas-Scott, *What Happens to 'Acquired Rights' in the Event of a Brexit?*, U.K. Const. L. Blog (16th May 2016) (available at https://ukconstitutionallaw.org/).

Public International Law

10. Art. 70 of the Vienna Convention[68] provides as follows:

> *"1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:*
>
> *(a) releases the parties from any obligation further to perform the treaty;*
>
> *(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.*
>
> *2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."*

11. The position under Art. 70 of the Vienna Convention provides no guarantee as to vested or acquired rights of those in the position of the Expat Interveners.[69] Art. 70 governs the rights upon termination of the contracting parties to a treaty and the International Law Commission, in its commentary upon the scope of Art. 70.1(b) (which was identically worded), rejected the view this extends to acquired rights of individuals.[70] The Vienna Convention is operative on the international law plane and it is therefore unclear on what basis it could be enforced in the domestic courts of Member States.

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68 Vienna Convention on the Law of Treaties, signed in Vienna 23 May 1969.

69 *See*, generally, S. Douglas-Scott, *What Happens to 'Acquired Rights' in the Event of a Brexit?*, U.K. Const. L. Blog (16th May 2016) (available at https://ukconstitutionallaw.org/).

70 In relation to then Art. 66, the ILC stated that *'… by the words "any right, obligation or legal situation of the parties created through the execution of the treaty", the Commission wished to make it clear that paragraph l(b) relates only to the right, obligation or legal situation of the States parties to the treaties created through the execution, and is not in any way concerned with the question of the "vested interests" of individuals.'* (ILC Draft Articles on the Law of Treaties with commentaries (1966), page 265); see also Aust, *Modern Treaty Law and Practice* (Cambridge University Press (2013), at p.266.

12. The position in customary international law is unclear: to the extent that acquired rights are recognised,[71] their scope appears to be narrow.[72] It is clear that international law does not treat all rights as worthy of respect as acquired rights: it is suggested a distinction exists[73] between property and contractual rights (which would usually be protected as acquired rights) and other rights (such as residence, healthcare and other benefits, as well as the freedom to work and trade), whose status is uncertain.

13. Accordingly, the Expat Interveners and those in their position can have no guarantee that their EU citizenship rights may be assured, given the wording of Art. 50(2) TEU (which is in mandatory terms) expressly requiring that structured negotiation take place as to arrangements for withdrawal, and requiring that account also be taken "*of the framework for its future relationship with the Union*" (Art. 50(2)).

14. However, as explained by Professor Vaughan Lowe QC to the EU Justice Sub-Committee of Parliament "*it very unlikely that the international law doctrine of acquired rights will play a significant role in the legal processes arising from the implementation of Brexit*".[74]

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[71] As may be inferred from the ICJ's statement in German Interests in Polish Upper Silesia (Germ. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7 (May 25) that "*the principle of respect for vested rights … forms part of generally accepted international law*" (at §133).

[72] *See*, for example, Oliver Dörr and Kristen Schmalenbach, Vienna Convention On The Law Of Treaties, A Commentary, Springer-Verlag Berlin Heidelberg, (2012), at p.1207, where the authors note that:

> "*Essentially the doctrine of acquired rights is confined in practice to private rights of individuals accrued under the municipal law and almost invariably occurred in the doctrine of State succession, investment law apart. Its extension to other rights of individuals is highly doubtful. For example, it cannot generally be said that rights occurring under treaties concerning the protection of human rights confer acquired rights to individuals that continue to exist even if the treaty is denounced"*.

Other authors have argued that human rights treaties can bind successor States (Rein Mullerson, International Law, Rights and Politics, Routledge (1994), at p. 154).

[73] See Pierre Lalive, *'The Doctrine of Acquired Rights'*, in *Rights and duties of private investors abroad - International and Comparative Law Center*, Bender (1965), at p.166, where it is suggested that:

> *"However solemnly confirmed in international case law, notably by decisions of the World Court, the principle of respect for acquired rights in case of a cession of territory is subject to important limitations. First, the principle covers only certain rights, mainly individual private rights… As for subjective rights of a public or political character, they usually do not enjoy the protection granted to acquired rights. This is true, at least, in general international law".*

[74] Professor Vaughan Lowe QC, Written Evidence before the EU Justice Sub-Committee (AQR0002). He went on to explain that:

Position of the Government

15. The position of the Government is that there can be no guarantee that such rights will continue to exist. In a report *The Process for Withdrawing from the European Union*, presented to Parliament in February 2016,[75] the Government acknowledged that UK citizens living, working and travelling in the other 27 Member States of the EU:

> *"...all currently enjoy a range of specific rights to live, to work and access to pensions, health care and public services that are only guaranteed because of EU law. There would be no requirement under EU law for these rights to be maintained if the UK left the EU. Should an agreement be reached to maintain these rights, the expectation must be that this would have to be reciprocated for EU citizens in the UK."*

16. The position adopted by the Defendant in pre-action correspondence in these proceedings is that:

> *"…the giving of notification under Art 50(2) would not by itself take away any legal rights from British citizens and residents, as you claim. Following notification, the UK will remain a member of the European Union and all EU law will remain fully in force until the UK leaves the EU and subject to the outcome of negotiations with the other Member States of the EU. It would remain a matter for negotiation with the other Member States which of the*

"*In principle, a State may legislate as it chooses to create, modify or abrogate the rights of persons (whether individuals or corporations) within its territory or having its nationality. A State's freedom of action in that respect may be limited by treaty: human rights treaties and investment protection treaties are the most prominent examples of such treaties. Aside from such treaties, international law in any event protects 'acquired rights'. 'Acquired rights' are certain rights acquired under the municipal ('domestic' or 'internal') law of a State; and no State may abrogate those rights except for a public purpose and against prompt, adequate and effective compensation. There is, however, general agreement that the category of 'acquired rights' does not extend beyond property rights and certain contractual rights. Rights to live, work, receive medical care and retire in an EU Member State other than one's own (or for companies, the right of establishment) would not be included within that category*".

[75] *The Process for Withdrawing from the European Union* (Cm 9216, February 2016), presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs.

rights currently created by or arising under the EU Treaties UK citizens and residents would continue to enjoy after the UK has withdrawn from the EU."[76]

17. The recent view expressed by the Constitutional Committee of the House of Lords is:

"In our representative democracy, it is constitutionally appropriate that Parliament should take the decision to act following the referendum. This means that Parliament should take a central role in the decision to trigger the Article 50 process, in the subsequent negotiation process, and in approving or otherwise the final terms under which the UK leaves the EU."[77]

18. British nationals who reside elsewhere in the EU should have the opportunity for their rights and interests to be given due consideration. That *may* have no effect on the ultimate outcome as to whether notification is given under Art. 50; however, it would ensure that any decision of the type advanced by the Defendant was taken lawfully.

PATRICK GREEN QC

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PAUL SKINNER

MATTHIEU GRÉGOIRE

21 September 2016

[76] Pre-action Protocol Letter of Response from the GLD to Mischcon de Reya LLP dated 25 July 2016.

[77] *The Invoking of Article 50*, Select Committee on the Constitution, 4th Report of Session 2016-17 (HL Paper 44), at §27.

CO/3809/2016; CO/3281/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
B E T W E E N :-

R on the application of
(1) GINA MILLER
(2) DEIR TOZETTI DOS SANTOS

Claimants

– and –

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Defendant

– and –

(1) AB, KK, PR & CHILDREN
(2) GRAHAME PIGNEY & OTHERS

Interested Parties

– and –

MR GEORGE BIRNIE & OTHERS

Interveners

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