IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2016/196**
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (DIVISIONAL COURT)
BETWEEN:-

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

Respondents

-and-

THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Appellant

SUPPLEMENTARY SUBMISSION
ON BEHALF OF LAWYERS FOR
BRITAIN LIMITED

Introduction

The Fifth Intervener ("*LFBL*") respectfully asks the Court for permission briefly to supplement its existing written submission, to enable it to address two points raised in argument.

First point: section 6 of the 2008 Act

1. Counsel for R1 stated that:

> "*Article 48.6 […] of the TEU, provided a simplified revision procedure. It was obviously thought in Brussels that it should be easier to amend the treaties and Parliament responded to that [...] in section 6(1) and (2) of the 2008 Act*.' (Day 2, p 196, line 1)

2. Section 6 of the 2008 Act subjected various powers the UK might exercise under the Lisbon Treaty to a requirement to obtain prior Parliamentary approval by resolution. LFBL in its Submissions at §17ff [MS 12689] submits this is inconsistent with the Respondents' case that the prerogative could not be used to modify and (inter alia) to "*destroy*" rights. For it shows Parliament legislating on the clear assumption that the prerogative *could* be so used and thus needed, in some contexts but not others, to be subjected to controls. In particular, as explained at §20 [MS 12690], amendments supported by the Crown under art. 48(6) TEU in

the exercise of the prerogative could alter or eliminate rights under the internal market and free movement provisions, without the need for a new treaty. The logic of the Respondents' case is that for the Crown so to act was *already impossible* without legislation, because of the supposed rule about the prerogative not being available to nullify rights. But Parliament would not have needed to introduce a regime of Parliamentary approval by resolution if this were so.

3. The Respondents' answer to this argument now appears to be this:

> "*[…] Parliament's response was to say, if the simplified amendment procedure was used, then you didn't any longer need primary legislation to bring that change into domestic law. It was sufficient to have a motion in both Houses. But nevertheless you still needed Parliament to act and it was because Parliament thought that a motion sufficed that this change occurred*." (*Ib*., line 9).

In other words, that this was a deliberate *relaxing* by Parliament of the inhibitions on what the Crown might do. This assertion was not supported by any evidence.

4. It is submitted that the Respondents are plainly wrong. First, since changes brought about under the simplified revision procedure would have been changes *within* the treaties to which direct effect was given by the ECA 1972 and not arising by an outside mechanism or new treaty, such changes would have directly affected rights and obligations in domestic UK law without the need for any amending treaty to be inserted by Parliament within the list of treaties in s.1(2) or designated by Order in Council under s.1(3).

5. Secondly, the Parliamentary material shows that Parliament was conscious that it was introducing control where there had been none before, and contains no support whatever for the suggestion by R1's counsel that Parliament intended to *relax* any existing inhibition of the Crown's powers. The HL Select Committee on the Constitution[1] said:

> *"22. Clauses 5 and 6 of the European Union (Amendment) Bill would impose new requirements for prior parliamentary approval before the Government formally binds the UK to agree to amendments made under the ordinary revision procedure, the simplified revision procedure or the* passerelles[2]*."* …
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> *"30. In addition to the constraints on the use of the simplified revision procedure contained in the Treaty on European Union, the European Union (Amendment) Bill would provide further controls within the UK. Clause 6 provides that "a Minister of the*

[1] 6th Report of 19 March 2008, at MS Pages 5927 and 5929.

[2] A passerelle dilutes the veto power which each Member State, and so specifically the UK minister, can exercise. Exercise of the passerelles is controlled by s. 6(1)(b) to (i) of the 2008 Act.

Crown may not vote in favour or otherwise support a decision" relating to the use of the simplified revision procedure powers under either Article 48(6) or 48(7) "unless Parliamentary approval has been given". … "

6. The Foreign Secretary (David Miliband), moving the Bill's Second Reading, said that:

"*Clause 6, for the first time, gives Parliament the power to veto amending measures, covering any move to qualified majority voting, co-decision and the so-called simplified revision procedure—[…] The so-called passerelles are provisions in the treaty allowing for amendment without an intergovernmental conference. They have been around since Margaret Thatcher's Single European Act. It is not just the case that changes can come into force only if they are agreed by all Governments; this is the first time that Parliament has been given power to veto their use*."[3]

Second point: open to the Government not to ratify the Treaty of Accession?

7. The President asked whether it would have been open to the Government not to ratify the Treaty of Accession ("*the Treaty*") once the ECA 1972 had been passed (Day 3, p 71, line 23). Counsel for R2 suggested not, by analogy with *ex p Fire Brigades Union* [MS 444] (p 73, line 9).

8. It is submitted that R2 is wrong. One can test it by considering what actually happened on 17 October 1972, the date of Royal Assent. The Prime Minister was due to attend an EEC Summit in Paris. The Opposition used an adjournment debate to criticise the terms of entry. The Leader of the Opposition (Mr Wilson) said:

"*The Prime Minister will speak in Paris manifestly without the authority of the British people. We recall his reference to the need for the '… full-hearted consent of the Parliament and peoples of the new member countries …'. On […] 27th May, he said '[…] no British Government could possibly take this country into the Common Market against the wish of the British people.' He has not secured that consent: his action is against the wish of the British people. […]*"[4]

9. The Government won the division by 31 votes[5] and timed the deposit of the instrument of ratification to coincide with Mr Heath's trip to Paris the next day. But what if they had lost, and had decided to respect the changed political will of the Commons (as compared to the resolution of 28 October 1971 [MS 5787]) by not ratifying the Treaty after all? Would this have been unlawful?

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[3] HC Deb 21 January 2008, col 1244.
[4] HC Deb 17 October 1972, cols 58-59.
[5] *Ib.*, col 168.

10. The answer is "no". The question of whether to ratify the Treaty was well understood to be a matter for the Crown in the exercise of the prerogative. That is how the text of the ECA 1972 leaves it. There is no provision about ratification.

11. The Parliamentary materials confirm this. The Minister had explained on 15 February 1972, when moving the Second Reading of the Bill for the ECA 1972, that "*on 20th January this year the House approved the procedure to be followed for signature of the treaty and its implementation.*"[6] This was a reference to a debate on that date on an opposition motion asking for the draft Treaty to be laid before the House before signature. The Minister had explained on that occasion that this was "*a debate […] about the constitutional procedures,*"[7] that "*in the United Kingdom the treaty-making power resides in the Crown,*"[8] and that

> "*a proper balance has been established between a Government's responsibility to conduct our foreign affairs in an effective way, and in due course to lay the text of the treaty before Parliament where that is appropriate; and Parliament's right to be kept informed […] and to exercise its power to make necessary changes in our law to give effect to treaties.*"[9]

12. A decision not to ratify the Treaty would surely have amounted to what Lord Keith in *ex p Fire Brigades Union* called '*a decision of a political and administrative character quite unsuitable to be the subject of review by a court of law*' [MS 475, F-G].

13. Thus it is clear, it is submitted, that Parliament *in its role as the legislature* had no intent to bind the Crown either way on the question of whether the Crown should cause the UK to ratify the Treaty. This was left for the Crown to determine in the exercise of the prerogative, subject to scrutiny by Parliament at the political level. Parliament made its intent known *in political terms* by the 28 October 1971 resolution.

14. If this is right, R1's contention that '*the clear implication from [the ECA 1972] is that Parliament intended that the Crown did not have prerogative power to take action on the international plane to destroy that which Parliament was creating*' (Day 3, p 2, line 12) cannot be right. Quite apart from whether it is accurate to speak unqualifiedly of *Parliament* as the creator when it was ultimately for the Crown to decide whether the UK should join the Communities or not, it is hard to see why one should imply a Parliamentary legislative intent

[6] HC Deb 15 February 1972, col 269.
[7] HC Deb 20 January 1972, col 695.
[8] *Ib.*, col 696.
[9] *Ib.*, col 700.

to *preserve* a state of affairs as to whose *creation* in the first place Parliament had no legislative intent.

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