Neutral Citation Number: [2026] EWHC 91 (Admin)

Case No: AC-2025-LON-000033

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2026

Before:

LORD JUSTICE MALES
-and-
MR JUSTICE BOURNE

- -

Between:

THE KING
(ON THE APPLICATION OF)
1) THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA
2) SCREEN ACTORS' GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS
3-8) THE TRUSTEES OF THE AFM AND SAG-AFTRA INTELLECTUAL PROPERTY RIGHTS DISTRIBUTION FUND
9) SOUNDEXCHANGE, INC — **Claimants**

- and -

THE SECRETARY OF STATE FOR SCIENCE, INNOVATION AND TECHNOLOGY — **Defendant**

-and –

(1) PHONOGRAPHIC PERFORMANCE LIMITED

(2) BPI (BRITISH RECORDED MUSIC INDUSTRY) LIMITED — **Interested Parties**

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Marie Demetriou KC, Martin Howe KC, Iona Berkeley & Emma Mockford (instructed by **Reed Smith LLP**) for the **Claimants**
Ewan West KC, Ravi Mehta, Will Perry & Will Bordell (instructed by the **Government Legal Department**) for the **Defendants**
Tom Cleaver (instructed by **Seddons GSC LLP**) for the **1st Interested Party**
Mark Vinall (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **2nd Interested Party**

Hearing dates: 2, 3 & 4 December 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 21 January 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

1. This is a claim made on behalf of musicians in the United States to quash The Copyright and Performances (Application to Other Countries) (Amendment) (No. 2) Order 2024 (SI 2024/1124) ('**the 2024 Order**'), principally on the ground that it is inconsistent with the United Kingdom's international law obligations. Those obligations are contained in three unincorporated treaties which govern the rights of performers whose performances are embodied in commercially published sound recordings, referred to in the treaties as 'phonograms'. The effect of the 2024 Order is that, because United States law does not grant equivalent rights to UK performers, US performers are not entitled to receive the 'equitable remuneration' to which they would otherwise be entitled.

2. The defendant, the Secretary of State for Science, Innovation and Technology, contends that the 2024 Order is consistent with the UK's international law obligations. However, because the treaties on which the claimants rely have not been incorporated into UK domestic law, a prior question arises, which is whether the claimants' claim is justiciable. The defendant relies on the long standing rule that domestic courts have no jurisdiction to interpret or apply treaties which have not been incorporated into national law, the corollary of which is that such treaties are not a source of rights or obligations in domestic law.

3. The claimants say in addition that the 2024 Order is *ultra vires* its enabling legislation, which is a more conventional public law claim. They also seek permission to add a new ground of challenge, contending that the consultation process which led to the 2024 Order was unfair.

4. I have concluded that the claim to quash the 2024 Order on the ground that it is inconsistent with the treaties is not justiciable in a domestic court; that the 2024 Order was *intra vires*; and that permission to challenge the lawfulness of the consultation process should be refused.

The parties

5. The 1st to 8th claimants are either labour unions and collective management organisations representing US performers, or trustees of a fund which collects and distributes money to US performers who are members of these labour unions. Between them, the 1st and 2nd claimants ('**AFM**' and '**SAG-AFTRA**') represent over 230,000 performers, including recording artists, singers and performers in backing bands, clubs and theatres. They are responsible to their members for collecting any sums due to the members as a result of their musical performances, including any royalties or other remuneration arising under any domestic or foreign law. The fund of which the 3rd to 8th claimants are trustees is a non-profit trust fund whose purpose is the receipt and distribution of payments to members of AFM and SAG-AFTRA.

6. The 9th claimant, SoundExchange, is a non-profit organisation of performers which collects and distributes to its members royalties and other remuneration due to them for exploitation of sound recordings, including by broadcast, public performance or other communication to the public, both within and outside the US. It currently collects and distributes payments on behalf of some 700,000 musicians.

7. The membership of AFM and SAG-AFTRA largely consists of non-featured performers (e.g. backup musicians), while SoundExchange more typically represents primary or 'featured' performers, who are named when a recorded performance is produced. Non-featured performers in the US are typically paid only relatively modest fees. Their bargaining power is such that they have not been able to negotiate contractual terms with record producers which would entitle them to receive a share of the remuneration earned by such producers from the subsequent exploitation of the recordings on which they perform. The same is true of featured performers in many cases, unless they are particularly well known or well advised.

8. The defendant Secretary of State is responsible for the Intellectual Property Office ('**the IPO**'), an Executive Agency operationally independent of the Department for Science, Innovation and Technology, but legally accountable to the Secretary of State.

The treaties

9. The unincorporated treaties on which the claimants rely are the Rome Convention of 1961 (whose long title is the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome, 26th October 1961), the WPPT (the WIPO Performances and Phonograms Treaty, done at Geneva, 20th December 1996), and the CPTPP (the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, done at Santiago, 8th March 2018). Although I have concluded that the claimants' claims are non-justiciable and that these treaties create no rights for the claimants in domestic UK law, it is necessary to summarise the relevant provisions of the treaties and to explain briefly the way in which the claimants put their case in order to put the discussion of justiciability which follows into context and to set the scene for the *ultra vires* issue and the challenge to the consultation process.

10. The defendant denies that the 2024 Order puts the UK in breach of its obligations under the treaties. We received detailed submissions on these issues from both parties, as well as from BPI (British Recorded Music Industry) Ltd as an Interested Party, but in view of my conclusion that the claims are non-justiciable it will not be necessary to lengthen this judgment by exploring these issues.

The Rome Convention

11. The first treaty on which the claimants rely is the Rome Convention. The UK signed the Convention on has been a Contracting State since 26th October 1961. It ratified the Convention on 30th October 1963 and the Convention entered into force for the UK on 18th May 1964. The US is not a Contracting State. There are currently 99 states which are parties to the Convention.

12. The Convention provides for a right of 'national treatment' to be given to producers and performers, whereby those producers and performers who qualify under the Convention are entitled to the same treatment as is accorded to producers and performers who are nationals of the Contracting State concerned (Article 2(1)). This means, for example, that if UK law entitles performers who are its nationals to receive payment when their performances are broadcast to the public, qualifying performers who are nationals of other states should have a similar entitlement. However, the right of national treatment is expressly subject to the limitations provided for in the Convention (Article 2(2)).

13. The producers and performers who qualify for national treatment are defined, not by their nationality, but by 'points of attachment'. For producers, the points of attachment under Article 5(1) are (a) nationality, (b) the place of 'fixation', which is normally the recording studio, and (c) 'first publication' in another Contracting State. As it was entitled to do by Article 5(3), the UK opted out of fixation as a point of attachment, so that for producers only their nationality or the country of first publication are relevant points of attachment.

14. For performers, one of the points of attachment, and the most relevant in the present case, is that the performance is incorporated in a phonogram which is protected under Article 5 (Article 4(b)). There is a point of attachment, therefore, if the phonogram is first published in another Contracting State. That is so regardless of the nationality of the performers (who may be, as for example in the case of a choir or an orchestra, of various nationalities).

15. The concept of first publication is expanded by Article 5(2) so that it extends not only to the country in which the phonogram is actually first published, but also to any Contracting State in which the phonogram is published within 30 days of its actual first publication. In practice this extension applies to all or almost all phonograms which are commercially published in the US. Thus a phonogram produced by a US producer in the US will always or almost always be published in multiple Rome Convention Contracting States at the same time as, or at any rate within 30 days of, its first publication in the US with a view to ensuring that the producer is entitled to national treatment within Rome Convention Contracting States – subject however, to the limitations of the right to national treatment for which the Convention provides.

16. Article 12 of the Convention provides for payment of what is known as a 'single equitable remuneration':

> 'If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.'

17. The claimants' position is that the effect of the national treatment obligations in Articles 4 and 5, read with Article 12, is that the remuneration payable must be shared between foreign producers and performers entitled under a Rome Convention point of attachment in the same way as such remuneration is shared between domestic producers and performers. That is their position despite the fact that, as it appears, the contractual arrangements between US producers and performers are to the effect that the equitable remuneration to be paid by the user will be retained by the producers.

18. Contracting States are entitled to derogate from Article 12. Article 16 provides that:

> 'Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification

> deposited with the Secretary-General of the United Nations, declare that:
>
> (a) as regards Article 12:
>
> (i) it will not apply the provisions of that Article;
>
> (ii) it will not apply the provisions of that Article in respect of certain uses;
>
> (iii) as regards phonograms the producer of which is not a national of another Contracting State, it will not apply that Article; …'

19. Notifications made after the date of accession become effective six months after they have been deposited (Article 16(2)).

20. Thus a Contracting State would be entitled to say that in the case of phonograms produced in the US, which is not a Contracting State, it will not require the equitable remuneration for which Article 12 provides to be paid.

21. The UK made a declaration under Article 16 in 1963. It was in the following terms:

> '(3) … (b) [A]s regards phonograms the producer of which is not a national of another Contracting State …, the United Kingdom will not grant the protection provided for by Article 12, unless, in either event, the phonogram has been first published in a Contracting State which has made no such declaration.'

22. The claimants say that the effect of the concluding words ('unless … the phonogram has been first published …') was that broadcasts in the UK of phonograms produced in the US qualified for equitable remuneration by virtue of their publication in another Contracting State simultaneously with or within 30 days of their first publication in the US.

23. Article 30 of the Convention provides for any dispute between two or more Contracting States which is not settled by negotiation to be referred to the International Court of Justice for decision, unless the parties agree to another mode of settlement. Article 32 provides for the establishment of an Intergovernmental Committee to study questions concerning the application and operation of the Convention and to collect proposals and prepare documentation for possible revision of the Convention.

24. It is the claimants' case that, since 1963, the UK has been obliged by the Rome Convention to provide for payment of equitable remuneration to US national performers whenever a phonogram carrying their performances is published in a Contracting State within 30 days of its first publication, regardless of the fact that the US is not a party to the Convention and regardless of the fact that US law provides for no equivalent right to UK performers when phonograms carrying their performances are broadcast or played to the public in the US.

The WPPT

25. Next in time is the WPPT. The UK signed the WPPT on 13th February 1997 and ratified the treaty on 14th December 2009. It entered into force for the UK on 14th March 2010. Currently 114 states are parties. At all material times the US and the European Union have also been Contracting Parties. The WPPT is the only one of the three treaties on which the claimants rely to which the US is a party.

26. Article 1(1) of the WPPT provides that nothing in the treaty shall derogate from existing obligations that Contracting Parties have to each other under the Rome Convention.

27. The producers and performers who are entitled to the protection provided under the treaty are defined by Article 3. Article 3(1) describes these as 'nationals of other Contracting Parties', but that concept is itself defined by Article 3(2):

> 'The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting parties to this Treaty Contracting States of that Convention. …'

28. Article 4(1) provides that each Contracting Party 'shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals[1] with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty'. However, under Article 4(2), the 'national treatment' obligation in Article 4(1) does not apply 'to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty'.

29. Article 15(1) provides that:

> 'Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public'.

30. Article 15(2) provides that:

> 'Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.'

31. However, under Article 15(3), any Contracting Party may, in a notification deposited with the Director General of WIPO, 'declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in

[1] It is common ground that the reference to 'its own nationals' in this Article refers to the actual nationals of the Contracting Party concerned and not to the extended definition in Article 3(2).

some other way, or that it will not apply these provisions at all'. The US has made a notification under Article 15(3) in the following terms:

> 'Pursuant to Article 15(3) … the United States will apply the provisions of Article 15(1) … only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law.'

32. The UK has not made any notification under Article 15(3).

33. Article 24 makes provision for an Assembly of Contracting Parties to deal, among other matters, with the application and operation of the treaty.

34. The claimants' case is that the effect of these provisions is that when a phonogram is first published in a WPPT country other than the US, the producers and performers of that phonogram are entitled under Article 15(1) to equitable remuneration across the full range of uses by virtue of that publication, even if they are US nationals; and that such equitable remuneration must be shared as set out in Article 15(2).

The CPTPP

35. Finally, the claimants rely on the CPTPP, a free trade agreement signed on 8th March 2018 by 11 countries. The UK acceded to the treaty on 15th December 2024. The US is not a party. Chapter 18 of the treaty relates to intellectual property.

36. Article 18.8 provides for a right of national treatment whereby each Party 'shall accord to nationals of another Party treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property rights'. 'National' is a defined term which, by Article 18.1.2, means 'a person of a Party that would meet the criteria for eligibility for protection' provided for in certain agreements including the WPPT.

37. The claimants' case is that it follows from this that the obligation to afford equal treatment to performers as 'nationals' of the CPTPP parties extends to US performers when the phonogram on which they have performed is first published in another Contracting State, including by simultaneous publication, regardless of the actual nationality of the performer concerned.

38. Article 28 requires the parties to make every attempt to settle disputes cooperatively and provides for a formal consultation mechanism.

The Copyright, Designs and Patents Act 1988

39. Part 2 of the Copyright, Designs and Patents Act 1988 ('**the 1988 Act**') is the UK domestic law statute concerned with 'Rights in Performances'. At this stage I describe the provisions of the Act as they stood before the amendments introduced by the Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Act 2024 ('**the 2024 Act**').

40. Section 182D provided for a right to equitable remuneration:

> '**Right to equitable remuneration for exploitation of sound recording.**
>
> (1) Where a commercially published sound recording of the whole or any substantial part of a qualifying performance—
>
> (a) is played in public, or
>
> (b) is communicated to the public otherwise than by its being made available to the public in the way mentioned in section 182CA(1),
>
> the performer is entitled to equitable remuneration from the owner of the copyright in the sound recording or, where copyright in the sound recording has expired …, from a person who plays the sound recording in public or communicates the sound recording to the public.'

41. A qualifying performance was defined by section 181 as a performance given by a qualifying individual or which takes place in a qualifying country. Section 206(1) defines 'qualifying country' as the UK, the Channel Islands, the Isle of Man, Gibraltar, a country which is a party to the Rome Convention, or a country designated under section 208 'as enjoying reciprocal protection'. A 'qualifying individual' is defined as a citizen or subject of, or an individual resident in, a qualifying country. The claimants' case is that the imposition of this nationality requirement on individual performers who qualify for protection is contrary to the provisions of the Rome Convention and the subsequent treaties which have adopted its approach.

42. Section 206 of the 1988 Act enables the definition of qualifying country to be amended by Order in Council to add a country that is not a party to the Rome Convention, while section 208 provides that an Order in Council may be made designating a Convention country as enjoying reciprocal protection. 'Convention country' is defined to include 'a country which is a party to a Convention relating to performers' rights to which the United Kingdom is also a party' and therefore includes the US as a result of the fact that both the UK and the US are parties to the WPPT.

43. The power to make subordinate legislation was exercised in 2016 when the Copyright and Performances (Application to Other Countries) Order 2016 (SI 2016/1219) ('**the 2016 Order**') was made. Among other things this Order provided by Article 11 that countries which are party to the WPPT but not the Rome Convention (i.e. countries including the US) were designated as enjoying reciprocal protection under Part 2 of the 1988 Act. Article 11(4) provided:

> 'Where a country to which this article applies has made a declaration under Article 15(3) of the WPPT that—
>
> (a) it will apply the provisions of Article 15(1) of the WPPT (which confers on performers and producers of phonograms a right to remuneration for broadcasting and communication to the public) only in respect of certain uses,

> (b) it will limit the application of the provisions of Article 15(1) of the WPPT in some other way, or
>
> (c) it will not apply the provisions of Article 15(1) of the WPPT at all,
>
> the provisions of Part 2 of the Act shall not apply to protect the rights provided for in Article 15(1) of the WPPT to the extent that the declaration is in force in the law of that country in relation to British performances.'

44. The result of this legislation was that, because the terms of the US's reservation to the WPPT means that there is no right to equitable remuneration for British performers in US law, and because of the nationality requirement in the definition of 'qualifying individual', a US performer was not entitled to equitable remuneration across most of the range of uses to which their performance might be put. The claimants' case is that, as a result, UK law was not compliant with the Rome Convention or the WPPT because it did not confer a right to equitable remuneration on a performer from a non-Rome Convention country such as the US even though the recording was simultaneously published in another Rome Convention or WPPT country.[2]

45. In contrast, US producers did receive payment under UK law because they were entitled to sound recording copyright under Part 1 of the 1988 Act. It is open to those producers to share the payments they receive with the performers on their sound recordings, but US law does not require them to do so and, for the most part, they do not.

The 2024 Act

46. The 2024 Act (whose long title was 'An Act to enable the implementation of, and the making of other provision in connection with, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership') was passed by Parliament on 20th March 2024 and (so far as relevant) came into force on the day on which the CPTPP entered into force for the UK, which was 15th December 2024.

47. Section 5(2) of the Act amended the definition of qualifying performance in section 181 of the 1988 Act as follows:

> '(1) A performance is a qualifying performance for the purposes of this Part if it meets any of Conditions A to D.
>
> (2) Condition A is that the performance is given by a qualifying individual.
>
> (3) Condition B is that the performance takes place in a qualifying country.
>
> (4) Condition C is that the performance is included in a sound recording and—

[2] In separate litigation, referred to below, the claimants say also that this legislative regime was contrary to EU law.

> (a) the producer of that sound recording is a qualifying individual or a body incorporated under the law of a qualifying country, or
>
> (b) that sound recording is—
>
> (i) first published in a qualifying country, or
>
> (ii) published in a qualifying country within the period of 30 days beginning with the day on which it is first published.
>
> …
>
> (6) Condition D is that—
>
> (a) the performance has not been included in a sound recording,
>
> (b) the performance is broadcast, and
>
> (c) the broadcast is—
>
> (i) made from a qualifying country, or
>
> (ii) made by a broadcasting organisation the headquarters of which are situated in a qualifying country. …'

48. Conditions A and B replicate the existing law while Conditions C and D are new. The Explanatory Notes to the 2024 Act explain that:

> '13. In relation to copyright and related rights, each CPTPP Party is required to provide certain rights to performers and producers who meet the eligibility criteria for protection as specified in the CPTPP. Article 18.62.1 of the Intellectual Property Chapter sets out that CPTPP Parties are required to afford rights to:
>
> (a) performers and producers of phonograms that are nationals of another CPTPP Party; and
>
> (b) performances or phonograms first published or fixed in the territory of another CPTPP Party.
>
> 14. The eligibility criteria under the CPTPP by which performers can qualify for rights in their performances is wider than the criteria currently provided for in UK law. This means that some performers who should qualify for protection under the CPTPP when it enters into force for the UK would not get this. The Act therefore expands the eligibility criteria by which performers can qualify for rights in their performances in the UK.'

49. So far as relevant to the present case, the effect of the new eligibility criteria, if matters ended there, would be that the performances of US performers whose phonograms are first published in the territory of another CPTPP Party would qualify as qualifying performances, so that those performers would be entitled to equitable remuneration under domestic UK law.

50. However, section 5(3) of the 2024 Act also inserted a new paragraph (za) into section 206(4) of the 1988 Act as follows:

> 'Her Majesty may by Order in Council—
>
> > (za) make provision for the application of this Part to a country by virtue of paragraph (a) or (ba) of the definition of "qualifying country" in subsection (1) to be subject to specified restrictions, but those restrictions may only relate to rights which would otherwise apply as a result of—
> >
> > > (i) a performance being a qualifying performance because it meets Condition C or Condition D in section 181, and
> > >
> > > (ii) that condition being met by way of a connection to such a country; …'

51. It was pursuant to this provision that the 2024 Order which is the subject of the claimants' judicial review claim was made.

The consultation

52. Before the 2024 Act came into force, on 15th January 2024 the IPO launched a consultation, stating that the government 'intends to change how certain rights are extended to foreign nationals, to ensure UK law works for both creators and users and is consistent with the UK's international commitments'. The consultation document sought views on how this should be done. It recorded that under the current law, most producers of recorded music would qualify for copyright protection in the UK, even where the producer's own country did not provide performance rights to UK nationals, and noted that different eligibility criteria applied to performers, where (among other things) the principle of 'material reciprocity' applied. The consultation document stated that while the international treaties on copyright allowed parties to apply material reciprocity in respect of performance rights, 'they require greater consistency between the treatment of performers and producers than UK law currently provides'.

53. The consultation document identified three policy objectives:

> '30. The government is seeking to:
>
> - ensure that UK law is consistent with the international treaties on copyright and related rights to which the UK is party

> - reduce costs to UK broadcasters and other users of foreign music, if this can be done without significant costs to the UK creative industries or UK consumers
>
> - increase revenues for the UK creative industries, if this can be done without significant costs to UK users and consumers.'

54. The consultation document identified several options on which views were sought. These were:

(1) Option 0: maintain the *status quo*. The IPO said that it did not intend to take this option forward because it believed that the international treaties required greater consistency in how countries provide performance rights to foreign producers and performers than would be the case under this option. However, it invited views on whether consultees agreed with this assessment, and said that it might revisit this option in light of such views.

(2) Option 1: the rights currently enjoyed by foreign producers would be extended to performers, so that performers would be entitled to remuneration whenever their recordings were broadcast or played in public. At this stage of the consultation, the IPO's view was that this would reduce the remuneration paid to US and other foreign producers, as their remuneration would have to be shared with performers, but would have minimal impact in the UK.

(3) Option 2: provide performance rights to producers and performers on material reciprocity terms, i.e. only where and to the extent that the producer's country of nationality provides such rights for UK nationals. The IPO noted that this would result in a significant narrowing of foreign producers' eligibility for performance rights in the UK.

(4) Option 3: apply Option 1 to pre-existing recordings and Option 2 to new recordings.

55. The IPO said that Options 1, 2 and 3 would be consistent with the Rome Convention and the WPPT. It said that it was currently considering Options 1 and 3 and wanted to understand better the impact of each option on UK users and the UK creative industries.

56. The claimants responded to the consultation. Their position was that only Option 1 was consistent with the UK's international obligations. However, some consultees, including BPI, contended that the existing position (i.e. Option 0) was in accordance with the UK's obligations under the treaties and that no change was necessary.

57. It appears that the IPO's view remained that existing law was incompatible with the UK's international obligations. This was acknowledged in a ministerial submission dated 12th August 2024 which went on, referring to the options in the consultation document, to say that:

> 'Each option could require the UK to make new declarations under the treaties. These declarations can take several months to take effect. This means we may continue to be technically non-compliant for a limited period after we legislate.'

58. A further ministerial submission, dated 20th September 2024, referred to the course which the defendant decided to take forward (known as Option 0A: see below) in the following terms:

> 'This option requires that the UK makes new declarations under the multilateral treaties on copyright, and we will work with the FCDO [Foreign, Commonwealth and Development Office] to prepare these. …'

59. The IPO's response to the consultation was published on 5th November 2024. The IPO announced that the government had developed and decided to implement a new option, described as Option 0A, which involved a limited change to the way in which foreign performers qualified for performance rights and no change to the position of foreign producers. It explained that there were two reasons for having explored potential changes to the law, the first of which was that 'the rules on how performers qualify for PPR were not consistent with the requirements of the treaties on copyright' because some performers who should qualify under the treaties were not entitled to performance rights in UK law. The other reason was that a significant proportion of licence fees paid by UK broadcasters and public venues related to music from countries which do not provide performance rights to UK producers or performers.

60. The IPO noted the differing views of consultees as to whether the existing law was consistent with the UK's international obligations. While respondents representing performers had tended to believe that UK law was not consistent with those obligations, others (especially those representing record labels) had argued that it was.

61. The IPO said that it had changed its mind about the impact of Option 1 on the UK. It now estimated that Option 1 would reduce the revenue available to UK record labels, and that this would be likely to have some effect on these labels' abilities to invest in new British music and artists, and could undermine the quality or quantity of British music enjoyed by the public. That was largely because, in practice, payments to which foreign (especially US) producers were entitled under the existing law were often retained by their UK affiliates and invested in British artists and music. That investment would be lost if Option 1 were adopted.

62. In the light of this, the IPO had identified a new option, Option 0A, which would mean continuing to provide performance rights to producers of sound recordings on the same terms as at present, and providing some additional rights to performers. Its conclusion was:

> '52. In light of these points, the evidence received at and after consultation, and our revised assessments of the options, we intend to adopt Option 0A. This will allow the UK to satisfy its international commitments, while mitigating or avoiding the costs and disruption that would otherwise arise under the other options under consideration. This approach should not significantly undermine the continued investment by UK record labels into new British music and artists (as is a risk under the other options). It should also have no significant impact on users or consumers. We believe this approach best balances the interests of performers, rights holders, users and the public.'

63. The IPO said that Option 0A would be implemented by secondary legislation:

> '54. In practice, this will mean restricting how some of the changes to the [1988 Act] made by the [2024 Act] applied to eligibility for PPR for performance. The [2024 Act] amends section 181 of the [1988 Act] to introduce new grounds on which a performance may qualify for protection (such as a performance being included on a sound recording that was first published in certain countries). Our implementing legislation will provide that some of these grounds for qualification do not apply, or only apply in some cases, in relation to PPR for performers.'

The 2024 Order

64. The implementing legislation which gave effect to Option 0A was the 2024 Order, which came into force on the same day as the 2024 Act. The Order included the following provisions which replaced equivalent provisions of the 2016 Order:

> '**Restriction on the application of Part 2 of the Copyright, Designs and Patents Act 1988 to the United Kingdom, the Channel Islands, the Isle of Man, Gibraltar and countries which are party to the Rome Convention**
>
> 9. (1) This article applies to—
>
> (a) the United Kingdom;
>
> (b) the Channel Islands, the Isle of Man and Gibraltar; and
>
> (c) a country which is a party to the Rome Convention.
>
> (2) Where this article applies, Part 2 of this Act applies subject to the modification set out in paragraph (3).
>
> (3) In section 182D(1) (right to equitable remuneration for exploitation of sound recording), the reference to a qualifying performance shall be construed as a reference only to a performance which is a qualifying performance because it meets—
>
> (a) Condition A or Condition B in Section 181, or
>
> (b) Condition C in that section by virtue of paragraph (a) of that Condition.'
>
> '**Restriction on the application of Part 2 of the Copyright, Designs and Patents Act 1988 to countries which are party to WPPT but are not party to the Rome Convention**
>
> 5. In article 11 (application of Part 2 of the Act to WPPT countries not party to the Rome Convention), after paragraph (3)(a) insert—

> (aa) in section 182D(1) (right to equitable remuneration for exploitation of sound recording), the reference to a qualifying performance shall be construed as a reference only to a performance which is a qualifying performance because it meets Condition A or Condition B in section 181;".'

65. Although the drafting is convoluted, its effect (for the purpose of this claim) is clear and is not disputed. It means that US performers will not have any right to equitable remuneration under Condition C(b) in the new section 181 of the 1988 Act (as amended by the 2024 Act) on the basis of first or simultaneous publication in a Rome Convention or WPPT country.

The UK's new reservation

66. On 28th March 2025, after the 2024 Act and the 2024 Order had already been in force for over three months, the UK deposited a new declaration with the Secretary-General of the United Nations pursuant to Article 16(1)(a)(iii) of the Rome Convention. This new reservation, which had not been foreshadowed in the consultation process, was that:

> 'As regards phonograms the producer of which is not a national of another Contracting State, the United Kingdom will not apply Article 12.
>
> As regards the United Kingdom and the territories of the Isle of Man, Gibraltar and Bermuda this new declaration replaces the existing declaration made under Article 16(1)(a)(iii) and (iv) upon the United Kingdom's ratification (namely declaration (3)(b)). As regards the territories of the Bailiwick of Jersey and the Bailiwick of Guernsey, the existing declaration made under Article 16(1)(a)(iii) and (iv) upon the United Kingdom's ratification (namely declaration (3)(b)) continues to apply.'

67. The new reservation omitted the following words which were in the previous reservation:

> '… unless, in either event, the phonogram has been first published in a Contracting State which has made no such declaration.'

68. The defendant's position (which the claimants dispute) is that the effect of this new reservation in international law is that performers on phonograms, the producer of which is not a national of a state which is party to the Rome Convention, (i.e. including US performers) are not entitled to equitable remuneration, this being a legitimate reservation envisaged by Article 16(1)(a)(iii) of the Rome Convention and a limitation specifically provided for in the Convention within the meaning of Article 2(2), which therefore disapplies what would otherwise be the right of national treatment for such performers.

Summary of the position in UK law

69. There is no doubt, and it is common ground, that the effect of these provisions in domestic UK law is that US performers, including those represented by the claimants, are not entitled to equitable remuneration when the sound recordings on which they have performed are broadcast or otherwise played to the public in the UK. Such remuneration (or its equivalent in the form of royalties) is paid to the producers of such recordings. That is the result of a policy choice that foreign performers will only be eligible for equitable remuneration where their home state offers reciprocal rights to UK performers. Thus the reason why US performers receive no such remuneration is that US law does not provide equivalent rights to UK performers. The position would be different if US law were to provide for reciprocity in this respect; or if the performers or their representatives (i.e. the claimants) were able to negotiate contractual terms with the producers by whom they are employed for a share of the remuneration paid to the producers.

70. The defendant says that this represented a lawful policy choice which was the result of weighing up sociocultural, economic and geopolitical considerations in addition to the wish to ensure that UK domestic law was consistent with the UK's international obligations. She says also that the difference in the treatment afforded to producers and performers is the result of a decision that it is in the cultural and economic interests of the UK, including its creative industry and those engaged in that industry, for foreign producers to be paid equitable remuneration notwithstanding the lack of reciprocity for UK producers. That is because of the fact that in practice, even though not as a matter of obligation, much of the remuneration paid to US producers is retained in the UK where it is used to invest in UK musical talent, thereby promoting the development of the UK creative industry. The defendant says that the treaties permit states to make policy choices of this kind, and in particular to narrow the scope of the 'national treatment' obligations which they create for legitimate reasons of 'material reciprocity'; and that the process of giving effect to the UK's international commitments on the international plane, while also pursuing legitimate policy objectives, is not apt for judicial review except in a narrow category of cases of which this is not one.

The claimants' grounds of challenge

71. The claimants have permission to challenge the lawfulness of the 2024 Order on five grounds. They say that:

(1) Article 4 of the 2024 Order is incompatible with the Rome Convention because it treats US performers less favourably than UK performers by denying equitable remuneration to the former while providing it for the latter, contrary to the right to national treatment in Article 4 of the Rome Convention, read in conjunction with Article 5 of the Rome Convention.

(2) Article 5 of the 2024 Order is incompatible with the WPPT because it denies equitable remuneration to US performers despite the fact that they qualify as 'nationals of other Contracting Parties' within the meaning of the WPPT by virtue of phonograms on which they have performed being published in a WPPT state within 30 days of their first publication.

(3) Articles 4 and 5 of the 2024 Order are incompatible with the WPPT because of their unequal treatment of US producers and performers in circumstances where the US's

own reservation applies equally to both producers and performers (i.e. by denying equitable remuneration to both).

(4) Articles 4 and 5 of the 2024 Order are incompatible with the CPTPP, which requires equitable remuneration to be provided to performances or phonograms first published or first fixed in the territory of another party regardless of their nationality.

(5) The 2024 Order is *ultra vires*, first because the specific purpose of the 2024 Act was to implement the CPTPP, from which it follows that the Order is *ultra vires* if it is incompatible with the CPTPP; and second because the effect of Articles 4 and 5 of the Order is to disapply the primary legislation in section 181 of the 2024 Act.

72. As can be seen from this summary, grounds 1 to 4, and ground 5 to some extent, would require this court to interpret the unincorporated treaties on which the claimants rely and to treat them as conferring rights on the claimants enforceable in domestic UK law.

73. A sixth ground of challenge, which the claimants need permission to advance, is that the consultation process which led to the 2024 Order was unfair to the point of unlawfulness because the IPO failed to disclose that it was contemplated that the UK's international law obligations would be altered by the new reservation to the Rome Convention.

Justiciability

74. International treaties concluded by the UK do not become part of UK domestic law unless they are incorporated into domestic law by Parliament. If it were otherwise, the executive would be able to make law without parliamentary scrutiny by concluding a treaty, thereby undermining the sovereignty of Parliament. It is well established that, as a result, a domestic court has no jurisdiction to interpret or apply an unincorporated treaty.

75. The defendant submits that, applying this fundamental constitutional principle, the claimants' claim (or at any rate grounds 1 to 4 and part of ground 5) is not justiciable in a domestic court, and that none of the circumstances in which the court will interpret or apply an unincorporated treaty is applicable in the present case. The claimants accept the basic principle, but say that the lawfulness of the 2024 Order is justiciable on conventional public law grounds of rationality because a central purpose of the Order, and the public consultation which preceded it, was to make domestic law consistent with the requirements of the international treaties to which the UK is a party; and that if on analysis the 2024 Order failed to achieve this purpose, it is irrational and must be quashed. It is apparent, however, that even framing the claimants' challenge as a rationality challenge would require the court to interpret and give effect to the treaties in domestic law.

The claimants' submissions on justiciability

76. The claimants submit that the issues of interpretation of the treaties which arise in the present case are justiciable for eight overlapping reasons. In summary, these are as follows.

77. First, they say that the 2024 Order is the product of a public consultation exercise the very purpose of which was to amend domestic law so as to 'ensure that UK law is consistent with the international treaties on copyright and related rights to which the UK is party', citing the consultation document. They refer to the stated view of the government in the consultation response published on 5th November 2024 that the pre-existing law was inconsistent with some of the UK's international obligations (albeit that the inconsistencies were not identified) and to the fact that the selection of Option 0A was made on the basis that it 'would enable us to ensure UK law is consistent with the requirements of the treaties'. To similar effect, the Explanatory Memorandum to the 2024 Order stated that the Order would make 'a limited change in order to comply with the Rome Convention' and would allow the UK 'to fulfil its international commitments while mitigating or avoiding the costs and disruption arising under the other options' which had been the subject of the consultation. All this, the claimants say, entitles the court to scrutinise the defendant's interpretation of the treaties in accordance with the *Launder* line of cases (*R v Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839) and/or created a legitimate expectation on which they can rely.

78. Second, the claimants submit that this is not a case where there has been no incorporation of the relevant provisions of international law. On the contrary, there has been a large measure of such incorporation stretching back over many years.

79. Third, the claimants say that it would be unsatisfactory for this court to decide that the claim is non-justiciable when materially the same issues will have to be determined in other litigation in the High Court. That is a reference to litigation in which the 1st to 8th claimants have sued the defendant in relation to what they contend is the historic non-compliance of domestic law with EU law. On 22nd December 2022 the 1st to 8th claimants issued claims against the defendant seeking damages for the UK's failure to provide for equitable remuneration as required, so the claimants say, by Article 8 of Directive 2006/115/EC which imports provisions of the Rome Convention into EU law. The damages are claimed in accordance with the *Francovich* principle of state responsibility in EU law (*Francovich v Italy* [1991] ECR I-5357).

80. Fourth, the claimants submit that the issues raised by their claim are 'intrinsically justiciable', in that they prescribe detailed and hard-edged rules which are capable of being interpreted by the court, as distinct from international law commitments which are essentially political or aspirational in character. Moreover, in contrast with cases such as *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Admin), *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756 and *R (Al-Haq) v Secretary of State for Business and Trade* [2025] EWHC 1615 (Admin), this case does not involve questions of high policy, such as matters of national or international security or the conduct of foreign affairs, in which the court might be particularly inclined to defer to the view of the executive.

81. Fifth, the claimants submit that, as in *Heathrow Airport Ltd v HM Treasury* [2021] EWCA Civ 783, [2021] STC 1203, the defendant is seeking to rely on her interpretation of the treaties 'to change or affect the nature of domestic rights and responsibilities or the status of individuals' because the 2024 Order has the effect of disentitling US performers from remuneration to which they would otherwise be entitled under the 1988 Act as amended by the 2024 Act.

82. Sixth, the claimants say that the essential reasoning in *Launder* and the Council of Europe Convention on Action against Trafficking in Human Beings ('**ECAT**') cases such as *R (KTT) v Secretary of State for the Home Department* [2021] EWHC 2722 (Admin), [2022] 1 WLR 1312 and *R (EOG) v Secretary of State for the Home Department* [2022] EWCA Civ 307, [2023] QB 351 extends to any government policy which is intended to achieve compliance with, or give effect to, international law.

83. Seventh, the claimants say that the representations made by the defendant in relation to her intention to comply with international law were sufficiently clear, unambiguous and devoid of relevant qualification to found a substantive legitimate expectation that domestic law relating to performers' rights would be made compliant with the international law treaties in this area to which the UK is a party.

84. Finally, the claimants say that there is a domestic *vires* point in relation to the 2024 Order which is parasitic on the compatibility of the Order with the CPTPP, which will therefore require the court to decide whether the 2024 Order is compatible with the CPTTP.

The legal framework

85. The basic rule of non-justiciability and the circumstances in which it will not apply were considered by this court recently and in some detail in *R (Al-Haq) v Secretary of State for Business and Trade* [2025] EWHC 1615 (Admin), where it was alleged (among other things) that the sale of components of F-35 aircraft which might ultimately be supplied to Israel was unlawful because it was contrary to various unincorporated international treaties concerned with war crimes, the arms trade and genocide. This court held that the claim was not justiciable. Permission to appeal from that decision has been refused by the Court of Appeal [2025] EWCA Civ 1433. In the present case the defendant relies on the analysis in *Al-Haq* and the claimants do not challenge its correctness, albeit submitting that this is a different case.

86. I can therefore summarise the legal framework applicable to the present claim more shortly than might otherwise be necessary, drawing extensively on the judgment in *Al-Haq*.

The basic rule of non-justiciability

87. The basic rule is that unincorporated treaties are not part of domestic law and that domestic courts are not competent to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. As it was put in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, a treaty is not part of English law unless and until it has been incorporated into the law by legislation: so far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which is a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

88. Both aspects of this basic rule are important. The domestic court has no jurisdiction to interpret an unincorporated treaty which operates on the plane of international law. But

even if the interpretation of the treaty is uncontroversial, whether because the language is plain and unambiguous or because it has been authoritatively interpreted by an international court, it remains the case that an unincorporated treaty is not a source of rights and obligations in domestic law.[3] In this regard it is important to keep in mind that the treaty obligations undertaken by the UK are not owed to individuals but to the other contracting states. In the present case, therefore, the UK has not undertaken obligations to individual performers, let alone to performers who in the case of the Rome Convention and the CTPPT are not even nationals of contracting states, but to those states which are parties to the treaty concerned.

89. That is not to say that the court will never interpret a treaty. If the treaty has been incorporated into domestic law by legislation, its terms may be interpreted just as any other legislation may be. If legislation is enacted in order to give effect to the UK's obligations under a treaty, the terms of the treaty may have to be interpreted in order to resolve any ambiguity or obscurity in the statute. However, that is not this case. The claimants do not suggest that the 2024 Order is ambiguous. Their case is that (at any rate once the drafting is unravelled) it is all too clear, and that it is contrary to the UK's international obligations contained in the treaties.

90. The basic rule has been affirmed in a number of cases at the highest level, including *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, where Lord Hoffmann observed at para 28 that if Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not; *R (SG) v Secretary of State for Work and Pensions*[4] [2015] UKSC 16, [2015] 1 WLR 1449, where Lord Reed said at para 90 that UK courts have no jurisdiction to interpret or apply international treaties and that it is therefore inappropriate for the courts to purport to decide whether or not the executive has correctly understood an unincorporated treaty obligation; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61; and *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223.

Domestic foothold

91. Although the basic rule is that the court does not have jurisdiction to interpret or apply an unincorporated treaty, there are some circumstances in which it will do so, where there is what has been described as a sufficient 'domestic foothold'. As explained in *Law Debenture Trust Corporation v Ukraine* [2023] UKSC 11, [2024] AC 411, para 158, approving the decision of this court in *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Admin), this 'is simply a way of referring to a situation where it is necessary to decide a question of international law in order to determine a question of domestic law'. However, the concept of domestic foothold must not be stretched so wide as almost to obliterate the basic rule. Thus in the *CND* case the Prime Minister's statement that 'We will always act in accordance with international law' did not enable the court to determine whether the decision in question was in

[3] In her skeleton argument for this hearing the defendant either conceded or came close to conceding that during the nine-month period between the 2024 Order coming into force (15th December 2024) and the new reservation coming into force (28th September 2025) UK domestic law was incompatible with the Rome Convention. However, it remains the case, if the basic rule applies, that an unincorporated treaty does not create rights for the claimants in domestic law. Accordingly this concession by the defendant does not advance the claimants' case unless they can establish a 'domestic foothold' in accordance with the principles discussed below.

[4] Also known as *R (JS) v Secretary of State for Work and Pensions*.

accordance with international law. Later cases have confirmed that such a self-direction does not open the door to enabling a domestic court to interpret or apply an unincorporated treaty and does not create rights and obligations enforceable in domestic law.

Launder and Kebilene

92. The starting point for the claimants' argument in the present case is the decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839, an extradition case decided at a time when the European Convention on Human Rights (**'ECHR'**) had not yet been incorporated into domestic law. The claimant resisted extradition to Hong Kong on bribery charges on the ground that the People's Republic of China would not honour the obligation which it had undertaken in the 1984 Sino-British Joint Declaration to protect the rights and freedoms of persons in Hong Kong following the 1997 handover, including the right to a fair trial. He contended that his extradition would therefore infringe his rights under Article 6 of the ECHR. The certified issue for the House of Lords was whether the Secretary of State was entitled, when exercising his powers under the Extradition Act 1989, to proceed on the basis that it was the collective view of the UK Cabinet that the PRC would respect its treaty obligations, so that evidence to the contrary would not be considered.

93. In the event the House of Lords decided that the certified issue did not arise because the Secretary of State had not relied on any collective Cabinet view, but had formed his own judgment whether the claimant would receive a fair trial, as he was required to do when deciding whether extradition would be unjust or oppressive. The House of Lords held that, in an extradition case, the Secretary of State could not ignore representations that the claimant would not receive a fair trial on the ground that it must be assumed that the requesting state would adhere to its treaty obligations. Rather, if issues of that kind were raised in a responsible manner, by reference to evidence and supported by reasoned argument, the Secretary of State was required to consider them. That was what the Secretary of State had done and his conclusion that the PRC would honour its treaty obligations was rational.

94. In the course of his speech, but in a passage which was unnecessary for the decision, Lord Hope referred to the fact that the Secretary of State had said in the reasons for his decision to extradite that he had taken account of the claimant's representations that extradition would breach his rights under the ECHR. As to this, Lord Hope said:

> 'It is often said that, while the Convention may influence the common law, it does not bind the executive. … That is so; but the whole context of the dialogue between the Secretary of State and the respondent in this case was the risk of an interference with the respondent's human rights. … *If the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument. The ordinary principles of judicial review permit this approach because it was to the rationality and legality of the decisions, and not to some*

> *independent remedy, that Mr. Vaughan directed his argument.*'
> (The claimants' emphasis).

95. However, as suggested in *Al-Haq*, the invocation in *Launder* of the claimant's rights under the ECHR was something of an irrelevance, as well as being *obiter*. The question for decision by the Secretary of State under established domestic extradition law principles was whether extradition to Hong Kong would be unjust or oppressive. The answer to that question would necessarily take account of whether the claimant would receive a fair trial and whether, as he suggested, he was at risk of ill-treatment there. That was a matter which needed to be addressed under domestic law and reference to the ECHR added little if anything to his case.

96. The claimants rely also on *R v Director of Public Prosecution, ex parte Kebilene* [2000] 2 AC 326, a case where rights contained in the ECHR were relied on at a time when the Human Rights Act 1998 had been passed, but had not yet been brought into force. The House of Lords held that the provisions of the Act did not give rise to any legitimate expectation that a prosecution would not be brought under terrorism legislation in circumstances which would infringe Article 6(2) of the Convention (which guarantees the presumption of innocence). In the course of his speech Lord Steyn cited the passage from Lord Hope's speech in *Launder* which I have set out above and expressed his agreement with it. He said that because the Director of Public Prosecutions had taken legal advice on the compatibility of the legislation with the provisions of the Convention, the court could examine that issue so that, if the advice turned out to be wrong, the Director would have the opportunity to reconsider his decision to prosecute on the correct legal basis.

Corner House

97. To treat these cases as deciding that an acknowledgement (or self-direction) by the decision maker that he had sought to comply, or that he believed that his decision did comply, with the provisions of an unincorporated treaty was sufficient to enable a domestic court to interpret and apply the terms of that treaty would represent a major inroad into the basic principle that the court has no jurisdiction to interpret or apply the terms of such a treaty. Any such exception to the basic rule was firmly rejected in *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756. In that case the Director of the Serious Fraud Office decided to discontinue an investigation into allegations of corruption against BAE Systems Plc in connection with a contract for the supply of arms to Saudi Arabia. The Attorney General made a statement to Parliament explaining that the decision had been taken in the UK public interest for national security reasons and was in accordance with the UK's obligations under the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, an unincorporated treaty. The claimant submitted, relying on *Launder* and *Kebilene*, that the Director's public claim to be acting in accordance with the Convention enabled the domestic court to review the correctness in law of his self-direction. The House of Lords rejected this submission. Lord Bingham said:

> '44. In support of step (1) in this argument reliance was placed in particular on *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, 866-867 and *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 341-342,

> 367, 375-376. Both cases concerned decision-makers claiming to act consistently with the European Convention at a time when it had not been given effect in domestic law. The courts accepted the propriety of reviewing the compatibility with the Convention of the decisions in question. But there was in the first case no issue between the parties about the interpretation of the relevant articles of the Convention, and in the second there was a body of Convention jurisprudence on which the courts could draw in seeking to resolve the issue before it. Whether, in the event that there had been a live dispute on the meaning of an unincorporated provision on which there was no judicial authority, the courts would or should have undertaken the task of interpretation from scratch must be at least questionable. It would moreover be unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the UK by fear that their decisions might be held to be vitiated by an incorrect understanding.'

98. Lord Brown added:

> '65. Although, as I have acknowledged, there are occasions when the Court will decide questions as to the state's obligations under unincorporated international law, this, for obvious reasons, is generally undesirable. Particularly this is so where, as here, the Contracting Parties to the Convention have chosen not to provide for the resolution of disputed questions of construction by an international court but rather (by article 12) to create a Working Group through whose continuing processes it is hoped a consensus view will emerge. Really this is no more than to echo para 44 of Lord Bingham's opinion. For a national court itself to assume the role of determining such a question (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons.
>
> 66. Are there such compelling reasons here? In my judgment there are not. There seem to me to be very real differences between this case and both *Launder* and *Kebilene*. In the first place, as Lord Bingham points out at para 44, there is a marked distinction between seeking to apply established Convention jurisprudence to the particular case before the court (as there) and determining, in the absence of any jurisprudence whatever on the point, a deep and difficult question of construction of profound importance to the whole working of the Convention (as here). Secondly, it seems to me tolerably plain that the decision-makers in both *Launder* and *Kebilene*, deciding respectively on extradition and prosecution, would have taken different decisions had their understanding of the law been different. In

> each case the decision-maker clearly intended to act consistently with the UK's international obligations whatever decision that would have involved him in taking. That, however, was not the position here. Although both the Director (and the Attorney General) clearly believed—and may very well be right in believing—that the decision was consistent with article 5, it is surely plain that the primary intention behind the decision was to save this country from the dire threat to its national and international security and that the same decision would have been taken even had the Director had doubts about the true meaning of article 5 or even had he thought it bore the contrary meaning. All that he and the Attorney General were really saying was that they believed the decision to be consistent with article 5. This clearly they were entitled to say: it was true and at the very least obviously a reasonable and tenable belief. Both the Director's and Attorney General's understanding of article 5 was clearly apparent from their public statements: it was implicit in these that they understood article 5 not to preclude regard being had to fundamental considerations of national and international security merely because these would be imperilled by worsening relations with a foreign state.
>
> 67. *The critical question is not, as the respondents' arguments suggest, whether the Director's successor would make the same decision again once the Courts had publicly stated that this would involve a breach of the Convention; rather it is whether the Court should feel itself impelled to decide the true construction of article 5 in the first place. It simply cannot be the law that, provided only a public officer asserts that his decision accords with the state's international obligations, the courts will entertain a challenge to the decision based upon his arguable misunderstanding of that obligation and then itself decide the point of international law at issue*. For the reasons I have sought to give it would certainly not be appropriate to do so in the present case.' (Emphasis added).

99. The claimants submit that it was critical to the decision in *Corner House* that the Director would have made the same decision irrespective of the OECD Convention, which is not the position in the present case, but Lord Brown said precisely the opposite in the passage which I have emphasised.

100. The effect of *Corner House* is to confine the dicta in *Launder* and *Kebilene* to the particular context in which they arose. They were concerned with individual rights arising under the ECHR, at a time when the Convention had not yet been incorporated into domestic law, but everybody knew that it soon would be, in circumstances where there was an established body of Strasbourg case law expounding the meaning of the Convention. That is a context very different from that of the present case. *Launder* and *Kebilene* do not stand for any general proposition that a statement by a minister or public official that a decision is in accordance with the UK's international obligations

enables a domestic court to decide for itself the correctness of that statement. On the contrary, *Corner House* firmly rejects that proposition.

101. This is further confirmed by the decision of the Supreme Court in *SG*. The claimants in that case argued that legislation capping welfare benefits was unlawful, in part because it was inconsistent with Article 3(1) of the United Nations Convention on the Rights of the Child, an unincorporated treaty. When making the legislation, the relevant Minister had acknowledged a 'clear commitment' to pay 'due consideration' to Article 3(1), but this was held not to entitle the court to decide whether the legislation was inconsistent with that Article. As already noted, Lord Reed said at para 90 that it was inappropriate for the courts to purport to decide whether or not the executive had correctly understood an unincorporated treaty obligation. He approved what had been said in *Corner House* and distinguished *Launder* on the same basis as it had been distinguished in *Corner House*. Lord Carnwath said that it was 'trite law that, in this country at least, an international treaty has no direct effect unless and until incorporated by statute, but it may be taken into account as an aid to interpretation in cases of ambiguity'. He added that:

> '115. Ministerial statements of the government's 'commitment' to giving 'due consideration' to the UNCRC articles … may have political consequences but are no substitute for statutory incorporation.'

102. *SG* was not a case involving issues of national security, defence or foreign relations. It demonstrates that the principles affirmed in *Corner House* are not limited to such a context, but apply more widely.

The ECAT cases

103. A line of cases concerned with the ECAT, culminating in *R (EOG) v Secretary of State for the Home Department* [2022] EWCA Civ 307, [2023] QB 351 shows that the promulgation by the relevant Secretary of State of a policy as to the way in which an international treaty will be implemented may give rise to a domestic foothold which has the practical effect of enabling the court to interpret or apply the treaty. The Secretary of State chose to implement the UK's obligations under ECAT by issuing guidance which was initially non-statutory, but which became statutory after the passing of the Modern Slavery Act 2015, section 49 of which required guidance to be issued. In several cases claimants contended that because the guidance was intended to give effect to the requirements of ECAT, judicial review was available to determine whether that intention was successfully achieved.

104. Initially the Secretary of State did not challenge that approach, but it was challenged in *R (KTT) v Secretary of State for the Home Department* [2021] EWHC 2722 (Admin), [2022] 1 WLR 1312. Mr Justice Linden held that the critical point was that the source of the public law obligation for which the claimant contended was not the treaty but the Secretary of State's policy, and that the court was therefore able to decide whether the policy correctly stated the effect of the treaty. When the case reached the Court of Appeal (together with the appeal in *EOG*), the Secretary of State abandoned the challenge to this approach, but Mr Justice Linden's view was approved *obiter* by Lord Justice Underhill.

105. This approval is not binding upon us, but it represents strong persuasive authority that if a policy is expressly stated as being intended to comply with an international obligation, it is open to the court to hold that it is unlawful on public law grounds if it does not so comply. In such a case the court is not interpreting or enforcing the unincorporated treaty; rather it is giving effect to the policy. However, as indicated in *Al-Haq*, the ECAT line of cases must be seen in their context. The reasoning in cases concerned with the trafficking of individuals cannot simply be transposed into what may be a very different context.

Legitimate expectation

106. In their skeleton argument the claimants submitted that if a public authority goes beyond merely ratifying a treaty and states clearly and unambiguously that it will give effect to an unincorporated treaty provision, that may engender a legitimate expectation to that effect which provides a sufficient domestic foothold. *R v Uxbridge Magistrates Court, ex parte Adimi* [2001] QB 667, 686 and *R (Abbasi) v Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598, paras 87 and 106(iii) were cited. This submission was not developed orally. For my part I find it hard to see how a statement that the government intends to comply with, or that it will give effect to, an unincorporated treaty provision could give rise to a justiciable expectation. That would be contrary to the principle that it is for Parliament to decide whether and to what extent such provisions should be incorporated into domestic law. Knowledge of that basic constitutional principle, which can be assumed in the case of well advised organisations such as the claimants, would prevent any expectation from arising. But in any event it is well established that, in order to found a substantive legitimate expectation, a statement must be 'clear, unambiguous and devoid of relevant qualification', and must be given to 'an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment' (*United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 1 WLR 3383, para 121).

Heathrow

107. In *Heathrow Airport Ltd v HM Treasury* [2021] EWCA Civ 783, [2021] STC 1203, which was not cited in *Al-Haq*, Lord Justice Green and Mrs Justice Whipple sat as both the Court of Appeal and the Divisional Court. However, it is common ground that for the purpose of its discussion of justiciability the court was sitting as a Divisional Court. The case concerned a challenge to the abolition of 'tax (or VAT) free' shopping at airports following the exit of the UK from the EU.

108. The government's position was that it was bound by the General Agreement on Tariffs and Trade ('**GATT'**), an unincorporated treaty, to ensure that the domestic law VAT regime adhered to the non-discrimination principle in Articles I:1 and III:2 of the GATT. It construed these provisions as requiring it to ensure that the same rules applied in domestic law as between the EU and the rest of the world, and contended that this prevented it from retaining the existing scheme or from modifying it in a manner which treated the EU differently from the rest of the world. It was therefore the government which relied on the provisions of the GATT as limiting the options available to it and shutting out what were found to be serious alternative options which would have been of benefit to the claimants.

109. Thus the unincorporated treaty, the GATT, was being used by the government as a defence to the claimants' claim (a shield and not a sword) and it was this which was decisive in enabling, indeed requiring, the court to examine the government's defence. To have held that the matter was non-justiciable would have enabled the government to rely on an unincorporated treaty as a means for denying an otherwise well-founded claim. That would be contrary to the basic rule that an unincorporated treaty cannot be a source of rights or obligations in domestic law.

110. In my judgment this is the *ratio* of the decision in *Heathrow*. However, Lord Justice Green also considered many of the cases on the justiciability of unincorporated treaties, including *Launder*, *Kebilene* and *Corner House*. He identified what he described as 'two main themes':

> '164. … Standing back, two main themes emerge. The first (and most important) focuses upon the nature of the linkage between the (formally unincorporated) measure of international law and domestic law. Case law treats as a critical question whether the decision maker has taken the international law into account in its decision making. The second concerns the intrinsic justiciability of the measures in question i.e. whether it is the sort of measure that is capable of being adjudicated upon. This seems less critical to justiciability because it can be taken into account in applying the flexible tenability test which arises only in relation to a measure which is justiciable … and which enables the court to adjust the test for reviewability accordingly.'

111. I would respectfully suggest that some caution is needed here. The claimants recognise – in my judgment rightly – that an unincorporated international law obligation would not become justiciable merely because the decision maker had taken it into account when making the impugned decision. They submit that the test for whether the decision maker had acted lawfully should be whether the international law obligation in question was sufficiently central to the domestic law decision that it needed to be grappled with. In my judgment such a test is unhelpful in a context such as the present, where the decision (here the legislation) has multiple objectives. Moreover, 'intrinsic justiciability' is an uncertain concept which, if anything, is better regarded as a necessary but not sufficient condition for justiciability. If the issue is one which is inherently unsuited for determination by a domestic court, that is a strong indication that it is non-justiciable. But the mere fact that a domestic court could decide the issue if it needed to does not necessarily mean that it should do so. That would mean that unincorporated treaty obligations could become part of domestic law merely because the language of the treaty was clear.

The tenability approach

112. Lord Brown suggested in *Corner House* that in some contexts the court may be able to decide whether the government's interpretation of an unincorporated treaty is tenable, but should go no further than this. This suggestion has been taken up in later cases, including *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777, para 35, where the limitations of such an approach were referred to, *R (Friends of the Earth) v Secretary of State for International Trade* [2023] EWCA Civ 14 and *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2024]

EWCA Civ 1227. In *Save Stonehenge* the Court of Appeal explained at paras 146 and 147 that the appropriateness of this approach will always depend on the circumstances of the individual case and identified a number of factors that are likely to bear on this question.

113. However, it is unnecessary to consider this issue further. The defendant submits that if we conclude that the claimants' claim is not justiciable, we should not go on to decide whether the 2024 Order is contrary to the UK's obligations contained in the three treaties on which the claimants rely, and that it would therefore be unnecessary to determine whether the position taken by the defendant is tenable. I accept that submission.

Discussion and conclusion on justiciability

114. As will be apparent from my summary of the applicable legal principles, I consider that many of the claimants' submissions are too widely expressed, and contrary to the basic rule that unincorporated treaties are non-justiciable.

115. The starting point is that Parliament has chosen not to incorporate the three treaties on which the claimants rely into domestic UK law. It has legislated in this field, including by the 1988 Act, the 2024 Act and the 2024 Order. Parliament's legislative choices must be respected by the court. The 2024 Order was subject to parliamentary scrutiny from (1) the Secondary Legislation Scrutiny Committee, (2) the Joint Committee on Statutory Instruments, and (3) questions and motions tabled by members of the House of Commons and the House of Lords. The decision to disapply Conditions C and D in certain cases, with the effect that performers who are nationals of states which do not provide equivalent rights for UK performers will not be entitled to equitable remuneration, must therefore be taken to have been a deliberate choice. In such circumstances there is and should be a heavy burden on a claimant in a parliamentary democracy to show that the resulting legislation is unlawful.

116. In my judgment the claimants cannot discharge this burden. The *Launder* line of cases on which they rely has been narrowly circumscribed by subsequent cases such as *Corner House* and, whatever its remaining scope, has no application outside the field of human rights. Statements by or on behalf of the defendant that one purpose of the 2024 Order was to ensure that UK law was consistent with international treaties to which the UK is party, or that the 2024 Order would achieve this objective, do not entitle the court to interpret the treaties in order to decide for itself whether the objective was achieved. Such statements, including those made in the consultation process, are equivalent to the self-direction which has repeatedly been held insufficient to create a 'domestic foothold' for the interpretation and enforcement of unincorporated treaties (*CND, Corner House*, *SG*, *Al-Haq*). They are, to adopt Lord Carnwath's comment in *SG*, no substitute for statutory incorporation.

117. As explained above, this is a principled position which reflects the UK's dualist legal system and gives effect to parliamentary sovereignty. It is to be expected that the UK government will seek to comply with the UK's international obligations as it understands them to be, but the fact that it says so (either of its own motion or in response to questioning, and with whatever degree of emphasis or conviction) does not turn the provisions of unincorporated treaties into a source of rights and obligations in domestic law. It is in practice likely to be impossible in any politically controversial

area where unincorporated treaty provisions might be relevant for the government to avoid expressing a view (even if it wished to do so) about whether decisions which it proposes to make, or subordinate legislation which it proposes to invite Parliament to enact, are consistent with the UK's international law obligations. The government must be able to do this without rendering such decisions justiciable on the ground that the government's understanding of international law is mistaken.

118. Moreover, seeking to ensure consistency with the UK's international obligations was not the only objective of the legislation. As the consultation document explained, other objectives included reducing costs to UK broadcasters and other users of foreign music, promoting and increasing revenues for the UK creative industries, and keeping down costs to UK consumers of music from overseas, of which the US was the most significant overseas origin. Most of the questions in the consultation document were focused on these other objectives. How best to give effect to all these objectives was a social, cultural, economic and foreign policy question for the defendant as well as a legal question.

119. There was no question of the 2024 Order taking away rights which had been granted by the 2024 Act. Rather, the Act and the Order, which came into effect on the same day, are best considered as a coherent legislative package by which non-UK performers would have the right to equitable remuneration in circumstances where their own countries afforded equivalent rights to UK performers.

120. It does not avail the claimants to say that, in large measure, the provisions of the treaties on which they rely have been incorporated into domestic law – although that may anyway overstate the position. The point is that Parliament has chosen how, and to what extent, to give effect to the treaties in domestic law and it is not for the court to say that, because the treaties are in some way 'intrinsically justiciable', it is open to the court to give them greater effect than Parliament has chosen. As already explained, I would not in any event accept that 'intrinsic justiciability' is a decisive factor, or that it has any significance in the present case where a number of policy objectives were in play. The claimants have not pointed to any international consensus or body of jurisprudence dealing with the issues which arise in this case and the complexity of the treaties is such that their interpretation is not straightforward.

121. The case which comes closest to addressing the issues which arise in the present case is the decision of the Court of Justice of the European Union ('**CJEU'**) in Case C-265/19 *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd* ('*RAAP'*) on a reference from the Irish High Court. Irish domestic legislation limited the performers who qualified for equitable remuneration to those who were nationals or residents of a European Economic Area (**'EEA'**) Member State. The question arose whether this was compatible with EU Directive 2006/115/EC, which provided for the implementation of the WPPT by Member States within the EU. The CJEU considered first whether in principle this was compatible with the Directive and held that it was not:

> '71. Accordingly, if the WPPT is not to be disregarded, Article 8(2) of Directive 2006/115 simply cannot be implemented by Member States in such a way as to exclude from the right to equitable remuneration all performers who are nationals of States outside the EEA, with the sole exception of those who are

> domiciled or resident in the EEA or his contribution to the phonogram was made EEA.'

122. However, that was the position before taking account of the reservation entered by the US, which had the effect that Irish performers were not entitled to equitable remuneration for recordings broadcast in the US. The CJEU went on to consider the impact of that US reservation in its answer to the third question referred by the Irish court. It invoked the principle of reciprocity codified in Article 21(1) of the Vienna Convention on the Law of Treaties 1969 ('**the Vienna Convention**'), which provides that:

> '*Article 21*
>
> *Legal effects of reservations and of objections to reservations*
>
> 1. A reservation established with regard to another party in accordance with Articles 19, 20 and 23:
>
> (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
>
> (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
>
> 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.
>
> …'

123. The CJEU continued:

> '79. … Under that principle, a reservation entered by a contracting party with regard to the other contracting parties modifies the provision of the international agreement to which it relates for the reserving State in its relations with those other parties and modifies that provision to the same extent for those other parties in their relations with the reserving State.
>
> 80. It follows from those considerations that, pursuant to the relevant rules of international law that are applicable in the relations between the parties, the European Union and its Member States are not required to grant, without limitation, the right to a single equitable remuneration laid down in Article 15(1) of the WPPT to nationals of a third State which, by means of a reservation notified in accordance with Article 15(3) of that international agreement, excludes or limits the grant of such a right on its territory.'

124. However, the CJEU held that it was for the EU legislature, and not the legislature of individual Member States, to determine whether the principle of reciprocity should apply to nationals of states such as the US which had entered reservations to the WPPT.

Now that the UK is no longer part of the EU, that particular EU law constraint would no longer apply to the UK.

125. Accordingly this case provides no support to the claimants on the merits of their claims and gives some support to the defendant's position. More importantly for present purposes, however, the fact that the CJEU was able to determine the meaning and effect of an EU Directive which implemented the WPPT does not enable a UK domestic court, when the UK is no longer part of the EU, to interpret the WPPT (let alone the other treaties) directly.

126. Further, in each case the treaties in issue contain their own mechanisms for disputes to be resolved on the international plane, a factor which was recognised in *Corner House* at para 65 as pointing strongly against justiciability in a domestic court. We were told that none of the states which are parties to the treaties, which includes the US in the case of the WPPT, has invoked the dispute resolution mechanism of the treaties in order to challenge the position adopted by the UK.

127. Moreover, the treaties should not be interpreted in accordance with domestic law principles of statutory or contractual interpretation, but in accordance with the principles set out in Articles 31 and 32 of the Vienna Convention. These principles reflect customary international law and therefore apply to treaties concluded before the entry into force of the Convention itself. They can, in an appropriate case, require account to be taken of such matters as any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. There was no evidence and we received no submissions as to how the principles of interpretation set out in Articles 31 and 32 should be applied to the interpretation of the treaties in issue in this case or as to the impact, if any, of the principle of reciprocity recognised in Article 21 which the CJEU regarded as important in the *RAAP* case. That detracts from any 'intrinsic justiciability' which the treaties might otherwise have.

128. Nor can it be said, as it was in the ECAT cases (and in *Save Stonehenge*, although there appears to have been no issue about justiciability in that case), that the source of the obligation on which the claimants rely is a policy or guidance document issued by the government as distinct from the unincorporated treaty itself. No such policy or guidance is relied on. Instead, as is apparent from their pleadings and submissions, the claimants' case is that the 2024 Order itself is unlawful because it is inconsistent with the UK's obligations contained in the treaties – but that is what the court has no jurisdiction to decide. Nor is this a case where human rights considerations arise or where the context is remotely similar to the prevention of modern slavery, such as in the ECAT cases.

129. Although the claimants say that it would be unsatisfactory for this court to decide that the claim is non-justiciable when (they say) materially the same issues will have to be determined in private law litigation in the *Francovich* proceedings, this does not in my judgment provide a basis for rendering this public law claim justiciable. The issues in the two proceedings are distinct. The *Francovich* claim is concerned with alleged historic non-compliance with the Rome Convention and the WPPT during the period when the UK was a member of the EU. The present claim is concerned with the lawfulness of the 2024 Order. The *Francovich* claim will have to take its course and it

will be for the judge hearing that claim to determine what issues of EU law need to be decided and how they should be decided.

130. Finally on this issue, as already indicated I doubt whether the principle of legitimate expectation has any role to play in the present case. But even if that principle were potentially applicable, there is here no clear, unambiguous and unqualified statement to which the claimants can point and the matters on which they rely were not statements made to any identifiable person or group. Nor do the claimants suggest that they acted to their detriment on the basis of any statement made by or on behalf of the defendant.

131. For all these reasons I would accept the defendant's submission that grounds 1 to 4 of the claim are non-justiciable because they would require the court to interpret and give effect to unincorporated international treaties in the absence of any domestic foothold which would enable it to do so.

Ultra vires

132. The claimants' *ultra vires* case is put in two ways. The first is that the purpose of the 2024 Act was to implement the CPTPP, which expanded the eligibility criteria pursuant to which performers might qualify for equitable remuneration, and that the power which the 2024 Act contains to make Orders in Council must be construed as limited to the making of Orders which give effect to and are not incompatible with the CPTPP. The claimants accept that, for this way of putting the case to succeed, they must demonstrate that the 2024 Order is incompatible with the CPTPP. Their second way of putting the case is not so dependent. It is that the provisions of the 2024 Order have the effect, by disapplying Conditions C(b) and D in the new section 181 of the 1988 Act, of repealing the primary legislation in the 2024 Act which inserts those Conditions into section 181.

133. Common to both ways of putting the case is that the 2024 Order is unlawful because it seeks to remove rights conferred by primary legislation. For this principle the claimants rely on the decision of the Court of Appeal in *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, where Lord Justice Waite said at p. 293 that:

> 'The principle was undisputed, that subsidiary legislation must not only be within the *vires* of the enabling statute, but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation.'

134. The claimants rely also on the judgment of Lord Justice Singh in *R (Al-Enein) v Secretary of State for the Home Department* [2019] EWCA Civ 2024, [2020] 1 WLR 1349:

> '28. In *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, it was held that Regulations which had been made could be held to be unlawful if they contravened "the express or implied requirements of a statute": see p. 292 (Simon Brown LJ). At p. 293, Waite LJ said that the principle was undisputed that:

> "Subsidiary legislation must not only be within the *vires* of the enabling statute but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation."
>
> In my view, the same principle would apply to subsidiary legislation which is in conflict with statutory rights conferred by the same primary legislation under which the subsidiary legislation is made. A fundamental point of principle is that subsidiary legislation will be *ultra vires* if it seeks to cut down or negate rights which have been created by primary legislation. The same would also apply to a governmental policy, which does not have the force of legislation. This is simply an example of the fundamental principle that the executive cannot act in a way which is inconsistent with the will of Parliament.'

135. In my judgment the straightforward answer to both ways of putting this case is that Parliament provided in section 5(3) of the 2024 Act for restrictions on the rights to equitable remuneration for which the Act provided to be made by Orders in Council. It did this by inserting the new paragraph (za) into section 206(4) of the 1988 Act and expressly contemplated that restrictions might be introduced to restrict the rights of performers who qualified for equitable remuneration by virtue of Conditions C or D. There was, therefore, no question of subordinate legislation taking away rights which had been conferred by primary legislation. Rather, the rights conferred by the primary legislation were always qualified by the expressly contemplated prospect that an order such as the 2024 Order would be made. I would therefore reject this ground of challenge.

136. I note, moreover, that the 2024 Act was not limited in its purposes to the implementation of the CPTPP. As the long title of the Act explains, it was also 'to enable … the making of other provision in connection with the' CPTPP, language which is apt to refer to making some qualifications as to the way in which the CPTPP would be implemented.

The challenge to the consultation process

137. The claimants accept that the defendant was under no duty to consult, either on Option 0A or at all, but say that, having decided to consult, she was under a duty to carry out a fair consultation process. They say that the consultation process carried out was unfair because it failed even to refer to the possibility that the defendant was open to making a new reservation to the Rome Convention and it was limited to inviting views as to possible changes to domestic law. They submit that the defendant's disclosure reveals that Option 0A and the new reservation were being considered at least as early as the summer of 2024 and that, as a result, the consultation process (which made no mention of them) was misleading. Obviously, if the claimants had succeeded in showing that the 2024 Order was unlawful on any of grounds 1 to 5, they would not need to challenge the consultation process. They say that if this new ground alone were to succeed, there would need to be a new consultation but do not, as I understand it, say that success on this ground would enable the 2024 Order to be quashed.

138. The applicable legal principles, which were not in dispute, are conveniently summarised by Mr Justice Calver in *R (Clifford) v Secretary of State for Work and*

Pensions [2025] EWHC 58 (Admin), paras 19 to 27, in which the principal cases, including *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 and *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947, are discussed. As there explained, the fundamental question is whether the consultation was so unfair as to be unlawful, which is a substantial hurdle for a claimant to overcome. The claimants emphasise the requirement to let those who may be affected know in clear terms what the proposal is and why it is under consideration so that they can make an intelligent response. They rely also on the summary by Mr Justice Morris in *R (Electronic Collar Manufacturers Association) v The Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin), para 142:

> '…the presentation of the information must be fair. Thus it must be complete, not misleading and must not involve failure to disclose relevant information… Whether non-disclosure made the consultation so unfair as to be unlawful will depend upon the nature and potential impact of the proposal, the importance of the information to the justification of the proposal and for the decision ultimately taken, whether there was a good reason for not disclosing the information and whether the consultees were prejudiced by the non-disclosure, by depriving them of the opportunity of making representations which it would have been material for the decision-maker to take into account…'

139. The claimants say that, if the possibility of a new reservation had been included in the consultation, they would have had the opportunity to seek to persuade the defendant, at a time when the proposal was still in formation, that the new reservation was not in accordance with the UK's obligations under the Rome Convention.

140. The foundation of the claimants' case on this issue is an email exchange in September 2023, well before the date of the consultation document. In the first email Mr Burns, then Head of Music Copyright Policy at the IPO, passes on internally an email from the BPI expressing the view that there was no need for a change in the law because existing UK law was already compliant with the Rome Convention and the WPPT. Mr Burns commented that:

> 'The BPI take the view that no changes to the law are necessary … for compliance with either Rome or WPPT – in the case of Rome because (if we were to change a declaration) we do not need to provide rights to sound recordings the producer of which is a non-Rome national …'

141. The response from Mr Stout, another senior civil servant in the IPO to whom Mr Burns' email had been addressed, was that:

> 'This analysis [i.e. the BPI's] does not seem very thorough (e.g. they seem to ignore the UK's existing Rome declaration) but I think there is at least an argument that we could rewrite our Rome declaration to achieve the effect they set out. … I have a bunch of questions on my mind about how reservations work in general, and how Rome's Article 16 reservations work in practice. …'

142. There is no further evidence to suggest that the possibility of a revision to the UK's reservation was taken further before the close of the consultation.

143. The claimants need permission to amend their pleading to advance this ground of challenge. The defendant says that permission should be refused, not only because the challenge should fail on its merits, but also because it is brought beyond the three month time limit for a judicial review claim. The new reservation was made on 28th March 2025, but this ground of challenge was first advanced only on 13th October 2025, after receipt of the defendant's Detailed Grounds of Resistance dated 16th September 2025 to the claim for judicial review.

144. The claimants say that time for bringing this challenge only started to run on receipt of the defendant's Detailed Grounds of Resistance and its accompanying disclosure which, they say, made it clear for the first time that Option 0A and the new reservation were being considered at least from the summer of 2024. Alternatively, and if necessary, they seek an extension of time.

145. In my judgment the short answer to this ground of challenge is that the new reservation was not a sufficiently developed policy option to be required to be included in the consultation. Although the possibility of a new reservation had been mentioned in a single internal exchange of emails within the IPO, it had not reached the stage of becoming a serious policy proposal. The sophisticated and well advised parties to whom in practice the consultation was addressed could be expected to understand that the treaties allowed for the possibility of reservations to be made and for the UK's existing reservation to the Rome Convention to be revised. Indeed some consultees did refer to that possibility in their responses. There was, therefore, no need for the consultation document to spell out that general possibility, and the IPO had not formulated any particular proposal, let alone the proposal which was eventually adopted, on which it would have been necessary to consult. In any event a new reservation would not have been a matter for the IPO alone, but would have involved other departments, including in particular the Foreign Office, whose views had not even been canvassed at the date of the consultation document.

146. I would therefore reject the submission that the consultation process was so unfair as to be unlawful and would refuse permission to amend.

Disposal

147. I would refuse permission to amend to introduce ground 6 and would dismiss the claim for judicial review.

MR JUSTICE BOURNE:

148. I agree.