



JUDICIARY OF
ENGLAND AND WALES

11 September 2019

R (Gina Miller) v The Prime Minister [2019] EWHC 2381

SUMMARY

Lord Burnett of Maldon CJ, Sir Terence Etherton MR, Dame Victoria Sharp P.

Introduction

At a meeting of the Privy Council on Wednesday 28 August 2019, Her Majesty, on the advice of the Prime Minister, ordered that Parliament be prorogued from a date between 9 and 12 September until 14 October 2019.

On the same day Gina Miller, the claimant, applied for judicial review of that decision, seeking a declaration of the court that the decision of the Prime Minister to tender this advice was unlawful.

The court subsequently gave permission to Baroness Chakrabarti, the Shadow Attorney General on behalf of the official opposition, the Rt Hon Sir John Major KG CH, the former Prime Minister, the Counsel General for Wales on behalf of the Welsh Government and the Lord Advocate on behalf of the Scottish Government to intervene in writing in these proceedings. All interveners supported the case for the claimant. [29] – [33]

On 6 September 2019, the court granted permission to bring the application for judicial review but in a unanimous decision, dismissed the claim. The court also certified pursuant to section 12 (3A)(c) of the Administration of Justice Act 1969 that a sufficient case for an appeal to the Supreme Court has been made out to justify an application for leave to bring such an appeal (a leapfrog). [1]

The reasons for the court's decision are set out in the full version of the judgment of the court handed down on 11 September 2019.

The claimant's case

The claimant's case is that the Prime Minister's advice to Her Majesty to prorogue Parliament is an unlawful abuse of power because it was substantially influenced by improper considerations and breached the principle of Parliamentary Sovereignty by impeding the ability of Parliament to enact legislation as it sees fit on issues relating to the arrangements for the United Kingdom to leave the European Union on the existing deadline of 31 October 2019 and to perform Parliament's 'scrutiny' function of holding the Government to account. [19] [20] [23]- [28]

The claimant submits that there is an inextricable link between Parliamentary Sovereignty and the Rule of Law and that, irrespective of any political accountability of the Prime Minister and the Government to Parliament, the courts have a duty to enforce the constitutional principle of Parliamentary Sovereignty, which entails the right of Parliament to make any law it sees fit and to hold the Government to account. [58]

In the present case, she submits the advice was unlawful and an abuse of power because Parliament will be silenced for far longer than is necessary to prepare for the Queen's Speech, which is the purpose stated by the Prime Minister for the prorogation; and, further, it is a reasonable inference that the advice to her Majesty was improperly motivated or influenced by the Prime Minister's dislike of the views of Members of Parliament, his concern that Parliament might undermine the Government's strategy in negotiating an exit deal and his impression of Parliament as a potential threat to his policy of exiting the European Union whether or not a deal can be done, all of which demonstrate a fundamental misunderstanding by the Prime Minister of Parliamentary Sovereignty and Parliament's role. [26] [58 (7)]

Reasons for the Decision

The court concludes on well established and conventional grounds that the claim is non justiciable - that is, it is not capable of being determined by the courts.

A decision to prorogue Parliament is a prerogative power, a discretionary power still in the hands of the Crown. Such a decision is formally made by the Sovereign on the advice of the Privy Council. By constitutional convention the Sovereign invariably acts on the advice of the Prime Minister. [4]

Decisions and action of the Executive branch of government are not immune from judicial review merely because they are carried out pursuant to an exercise of the royal prerogative. [34]

The first question when considering the court's power to review the exercise of prerogative powers is whether the subject-matter of the power is non-justiciable. [40] The court rejects the claimant's submission that it should explore the facts first to decide whether there has been a public law error, and then turn to justiciability. The question of justiciability comes first as a matter of logic and law. [41]

The criteria adopted by the courts for identifying non-justiciable exercises of prerogative power are whether they involve matters of high policy or are political. In this way the courts have marked out the separation of power between the Judicial and the Executive branches of government, a fundamental feature of our unwritten constitution. In this context the essential characteristic of a political issue is the absence of judicial or legal standards by which to assess the legality of the Executive's decision or action. [42]

The refusal of the courts to review political questions is well-established. [43] – [50]

The defendant's evidence is that a number of considerations were taken into account by the Prime Minister. They included the need to prepare the Government's legislative programme for the Queen's Speech; that Parliament would still have sufficient time before 31 October 2019 to debate Brexit and to scrutinise the Government's conduct of the European Union withdrawal negotiations; that a number of days falling within the period of prorogation would ordinarily be recess for party conferences; that the parliamentary session had been longer than for the previous 40 years; and that it was increasingly difficult to fill parliamentary time with appropriate work. All of those matters involved intensely political considerations. [10] – [14][51]

Both the decision of the Prime Minister that Parliament should be prorogued at the time and for the duration chosen and the advice given by the Prime Minister in the present case were inherently political in nature and there are no legal standards against which to judge their legitimacy. [51] There is no legal measure of the length of time between Parliamentary sessions, nor even a constitutional convention which governs that matter, albeit constitutional conventions are not justiciable. [54] Parliament may be prorogued for various reasons, including political reasons, and there is no statute, law or convention which requires Parliament to sit in constant session. [55]

If the primary purpose of prorogation is to undertake preparations for the Queen's Speech, it would be impossible for the court to decide whether the period of prorogation is excessive as it would require the court to examine and assess how much time it is legitimate for the Government to spend on its preparations in relation to each aspect of its proposed legislative programme, a purely political matter. [56]

It is also impossible for the court to assess by any measurable standard how much time is required to hold the Government to account, including by passing legislation that would require the Prime Minister to take steps to avoid leaving the European Union without an agreement. This is graphically illustrated by the speed with which the European Union (Withdrawal) (No 6) Bill has been enacted. The ability of Parliament to move with speed when it chooses to do so undermines the underlying premise of the case for the claimant that prorogation would deny Parliament the opportunity to do precisely what it has now done. [57]

The claimant seeks to circumvent these difficulties by advancing a novel argument resting on Parliamentary Sovereignty [58].

The analysis founders for a number of reasons. Alongside the principle of Parliamentary Sovereignty, the separation of powers, reflecting the different constitutional areas of responsibility of the courts, the Executive and Parliament is a fundamental principal of our unwritten constitution; the line of separation is set by the courts by reference to whether an issue is one of high policy, or political or both and on the facts, the decision in this case was political. The purpose of prorogation is not confined to preparations for the Queen's speech but may be used for a number of different reasons, which may, depending on the facts and circumstances, extend to obtaining a political advantage. Even if prorogation must be justified as being to enable preparations for the Queen's speech, the decision is not something the court can judge by any measurable standard. [59]-[60]

The concept of Parliamentary Sovereignty recognises that the Queen in Parliament is able to make law by primary legislation without legal restraint, save as Parliament has imposed on itself for the time being. [61]

The claimant's novel and wider legally enforceable concept of Parliamentary Sovereignty, distilled to its essence as the ability of Parliament to conduct its business unimpeded, is not supported by the passages from the authority relied on [62].

It also runs into similar difficulties of identifying measures against which allegedly offending action may be judged. There is another fundamental objection to the claimant's expanded concept of Parliamentary Sovereignty. This is that it has been fashioned to invite the judicial arm of the state to exert hitherto unidentified power over the Executive branch of the state in its dealing with Parliament. [63]

The constitutional arrangements of the United Kingdom have evolved to achieve a balance between the three branches of the State; the relationship between the Executive and Parliament is governed in part by statute and in part by convention. Standing Orders of both Houses elaborate the procedural relationship between the Executive and Parliament. This is territory into which the courts should be slow to intrude by recognising an expanded concept of Parliamentary Sovereignty. [64]

NOTE: This summary is provided to assist in understanding the Divisional Court's decision. It does not form part of the reasons for the decision. References in square brackets are to paragraphs in the judgment. The full judgment of the court is the only authoritative document. Judgments are public documents and are available at: <https://www.judiciary.uk/judgments/> and <http://www.bailii.org/>

