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UK – High Court judgment in R(Miller) -v- Secretary of State for Exiting the European Union.

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As widely reported, the High Court of England and Wales recently heard a challenge to the UK government's right to give a notification under Article 50 of the Treaty on European Union (an "**Article 50 Notification**") without first seeking authority from the UK Parliament.

The ruling of the High Court is not a ruling on 'Brexit', and will not necessarily affect whether Brexit occurs. It affects the procedural steps required to trigger Brexit, and is likely to impact the UK government's planned March 2017 timetable for giving an Article 50 Notification. It may affect the form of Brexit (i.e. 'hard' or 'soft' Brexit) which the government is able to seek to agree in any withdrawal agreement. The outcome is not certain, however, since the government has now formally appealed against the judgment to the Supreme Court. The hearing of the appeal has been scheduled to start on 5 December 2016, with the hearing expected to extend over four days. The Supreme Court's judgment will probably not be published until the New Year.

This note summarises the legal background to the case and the basis of the High Court's judgment, which was made by three very senior judges, concluding that the government does not have the power to give an Article 50 Notification under the royal prerogative.

Background

UK membership of the European Union is given effect by the European Communities Act 1972 ("**ECA 1972**"). This is an Act of Parliament which incorporates into UK law both the various treaties on the European Union and also other types of EU law that under the treaties have direct effect or direct applicability in EU member states.

Article 50 of the Treaty on European Union allows a member state to "decide to withdraw from the Union in accordance with [the member state's] own constitutional requirements". It goes on to provide that "a member state which decides to withdraw shall notify the European Council of its intention". The giving of such a notification starts the clock running on the timetable laid down by Article 50 for reaching a withdrawal agreement with the EU: the UK's membership will end automatically when a withdrawal agreement comes into force or, if no such agreement is reached, within two years of the date of the

Article 50 Notification, unless member states unanimously agree with the UK to extend this period.

There is an underlying constitutional principle in the UK of 'Parliamentary Sovereignty'. This principle, in summary, renders Parliament (the legislature) the supreme legal authority in the UK. The judiciary is limited to interpreting and giving effect to the will of Parliament as expressed in statute, and the government (the executive) only has those powers which are: (i) delegated to the government by Parliament by means of legislation; or (ii) residual or 'rump' powers which derive from the powers historically exercised by the monarchy of the UK and in respect of which Parliament has not legislated (the government's 'royal prerogative' powers).

The royal prerogative powers tend to be associated with the conduct of international relations and with the making and unmaking of treaties on behalf of the United Kingdom. The ambit of these powers is often ambiguous, given that the UK has an uncodified constitution. The judiciary is responsible for ruling on disputes as to the scope of the government's royal prerogative powers.

The question of law considered in this case was whether, following the referendum that took place on 23 June 2016 in which the UK voted to "leave the European Union", as a matter of UK constitutional law, the government is entitled to use its prerogative powers to give the Article 50 Notification.

Arguments

Uncontested/agreed procedural issues

The parties agreed the following:

- that the claim is justiciable on the grounds that it is a pure question of law, i.e. whether the executive can use the Crown's prerogative powers to give an Article 50 Notification. The court is not expressing any view on the merits or demerits of withdrawal which is of course a political question; and
- that the claimants had standing to bring the challenge.

Agreed legal principles

The parties agreed the following:

- that an Article 50 Notification, once served, is irrevocable and cannot be conditional (for example, a notice saying that it only takes effect if Parliament ultimately approves any agreement on the terms of withdrawal). The UK would therefore withdraw from the EU two years after notice has been served (absent any agreement between the UK and other member states to extend) irrespective of what Parliament might do further down the track. This was relevant since it was argued that serving the Article 50 Notification would inevitably result in changes to UK domestic law that should only be made by Parliament, not by the government under the royal prerogative;

- that Parliament is sovereign and legislation enacted by Parliament is supreme;
- that the executive has the royal prerogative powers conferred by common law but these powers are subject to limits. Critically, the executive cannot do anything which removes or abrogates rights conferred by primary legislation. To put it another way, the principle of Parliamentary sovereignty is not subject to displacement by the executive through the exercise of its royal prerogative powers. As the High Court said, the "*subordination of the Crown (i.e. the executive government) to law is the foundation of the rule of law in the United Kingdom*" (the "subordination principle");
- that, as a general rule, the making and unmaking of treaties and the conduct of international relations on behalf of the UK are regarded as matters for the executive in the exercise of its royal prerogative powers. The government relied on this principle to argue that it has power to take the UK out of the EU absent wording in the ECA 1972 which either expressly, or by necessary implication, removes the prerogative power to do this;
- that the general rule referred to above must, however, be read subject to the subordination principle – in other words, nothing that the executive does on the international plane can have the effect of changing domestic law;
- EU law is unique in that it creates individual rights which are directly effective in the UK, i.e. through treaties and regulations, and sometimes through directives;
- there are a number of different categories of rights arising under EU law. Some of these rights could not be replicated in UK law post-withdrawal (for example, the right to vote in elections for Members of the European Parliament or to complain to the European Commission) while others might be capable of being replicated;
- there was some debate between the parties as to what rights would be removed by withdrawal and whether these rights derive from the ECA 1972 and/or are capable of being re-created by Parliament. However, in the final analysis, the government had to concede that certain rights would be irretrievably lost as a result of withdrawal; and
- as regards the Referendum Act 2015 (which provided for the conduct of the referendum on 23 June 2016), both sides accepted this was advisory only and the government did not argue that they had any authority conferred by that Act to give an Article 50 Notification. The government's argument on authority was therefore based purely on the royal prerogative.

Key area of dispute

The judges focused their attention on the key area of dispute which was whether the ECA 1972 (or indeed any subsequent amending legislation) gave the government the power to withdraw from the EU without Parliamentary approval even though such a withdrawal would interfere with statutory rights.

The claimants argued that no such authority, either expressly or by necessary implication, could be found in the ECA 1972 or any other relevant legislation. The government argued that Parliament should not be taken to have abrogated the executive's royal prerogative powers to make or unmake treaties unless words could be found in the ECA 1972 or other relevant legislation which expressly or by necessary implication abrogated that power.

The question became one of statutory interpretation, primarily in respect of the ECA 1972, and as to Parliament's intentions at the time of passing of the legislation as to whether it would grant the government the power to withdraw from the EU without Parliamentary approval.

Decision

The court's key findings were as follows:

- there are certain principles of statutory interpretation which must be applied when examining the ECA 1972, one of which is that there is strong presumption that Parliament intends to act in accordance with established constitutional principles and not to undermine them. The court was of the view that this presumption was particularly important in this case because of the constitutional importance of the ECA 1972. This presumption is likely only to be overcome by explicit wording in the relevant Act of Parliament providing for the disapplication of the presumption in relation to that Act;
- it is clear that Parliament intended to legislate by the ECA 1972 so as to introduce EU law into domestic law in such a way that this could not be undone by the exercise of royal prerogative power. There are two strong constitutional principles which inform this view: (i) the principle that the executive cannot use its royal prerogative powers to alter domestic law; and (ii) that the executive's prerogative power operates only on the international plane; and
- there are various other arguments which the court relied on to support the view taken above based on an interpretation of certain provisions of the ECA 1972. The court concluded (at para. 94 of the judgment) that "*the clear and necessary implication from these provisions taken separately and cumulatively is that Parliament intended EU rights to have effect in domestic law and that this effect should not be capable of being undone or overridden by action taken by the Crown in the exercise of its prerogative powers*".

Appeal to the UK Supreme Court

The government has appealed to the Supreme Court. The Prime Minister has said that she is confident that the judgment of the High Court will be overturned, and that the timetable for giving an Article 50 Notification will not be affected. The Welsh and Scottish devolved governments have announced that they intend to intervene in the appeal process to make representations about the implications of the decision for Wales and Scotland, respectively.

It is possible for arguments that were not made in the High Court to be heard on appeal with the permission of the Supreme Court. This would mean that, theoretically, the agreed positions between the parties (for example that an Article 50 Notification is irrevocable) might be re-opened on appeal. However, this will turn on the Supreme Court granting permission for this issue to be raised, and it is only in exceptional circumstances that permission will be granted for a concession made in the lower court to be withdrawn.

We would note the presiding judges' comments that, in their view, the claimants' and government's submissions had not properly engaged with each other. Given this, it would seem plausible that the government, forearmed with knowledge of the thrust of the claimants' arguments, might address them more effectively on appeal.

Implications for Brexit

The strong message that the UK government has been disseminating since judgment was handed down in this case is that Brexit will still go ahead. The Prime Minister has reassured other European leaders that the government's timetable for giving an Article 50 Notification (March 2017) will not be affected. If the government's appeal is unsuccessful, however, it remains possible that this ruling will affect i) the timing of Brexit; and ii) the terms of any withdrawal agreement reached.

The High Court remained silent as to the crucial question of the exact nature of the parliamentary consent required. The easiest form of Parliamentary consent to secure would be a non-amendable motion to be put to the House of Commons alone, which would give Members of Parliament ("**MPs**") the option to either approve or reject the giving of an Article 50 Notification. Given such a stark choice, it is likely that MPs would feel compelled to give effect to the results of the 23 June 2016 referendum by approving the giving of an Article 50 Notification, despite the fact that, prior to the referendum, the majority of MPs were opposed to leaving the EU.

However, it appears that the government is of the view that the form of Parliamentary consent required if the Supreme Court rules against it, will be an Act of Parliament (primary legislation). On 3 November 2016, David Davis (Secretary of State for Exiting the European Union) confirmed that, in the view of the government, a full Act of Parliament would be required. It is plausible that the government are cautiously choosing to make use of a full Act of Parliament to avoid any future judicial challenge to the validity of the Parliamentary consent.

The majority of commentators are of the view that it will not be possible for the government to introduce and pass an Act of Parliament which would enable the giving of an Article 50 Notification in time to give this notification in March 2017. This is particularly likely since an Act of Parliament will need to pass through the House of Lords (the UK upper legislature), which has the power to delay legislation sent up to it by the House of Commons by up to a year.

A further issue for the government if a full Act of Parliament is required for the giving of an Article 50 Notification is that MPs would have the power to propose amendments to the bill giving this approval. In particular, they may seek amendments to allow parliamentary scrutiny of the government's negotiating objectives and strategy, and to define the terms of the withdrawal agreement or the UK's future relationship with the EU. For example, they might try to ensure the government protects access to the single market for UK companies and to restrain the government's freedom to negotiate in other ways.

It is also possible that Parliament might seek to introduce a requirement that Parliament approve the terms of any withdrawal agreement which is negotiated. However, since it is not certain that an Article 50 Notification can be withdrawn once given (and as substantive negotiations are unlikely to be started until an Article 50 Notification is given), it is hard to see how this could represent a significant safeguard as to the form of Brexit: if Parliament were to reject the terms of a proposed withdrawal agreement then the UK could be left with no withdrawal agreement in place at all – the hardest of 'hard' Brexits. As the High Court said in this case, "*Parliament's consideration of any withdrawal agreement… would thus be constrained by the knowledge that if it did not approve ratification of it, however inadequate it might believe the withdrawal agreement to be, the alternative was likely eventually to be complete removal of all rights for the United Kingdom and British citizens under the EU Treaties when the relevant Article 50 time period expires*".

Quite apart from the implications for the Brexit process, this case is important as a rare example of court consideration of the UK's unwritten constitution, albeit against the backdrop of legal and political circumstances which are decidedly unique. For the first time, the panel hearing the appeal will be made up of all 11 of the Supreme Court Justices. The approach taken by the Supreme Court will be watched worldwide with unprecedented interest – and like all Supreme Court proceedings will be livestreamed on the Supreme Court's website for those who wish to follow it closely. Meanwhile, the wider political ramifications of the challenge remain to be seen.

The High Court judgment can be found here:

https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/

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