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UK – Supreme Court hearing in R(Miller) -v- Secretary of State for Exiting the European Union

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As has been widely reported, the UK Supreme Court recently heard an appeal from the High Court of England and Wales in respect of a challenge brought to the UK government's right to give a withdrawal notification under Article 50 of the Treaty on European Union (the "**Article 50 Notification**") without first seeking authority from the UK Parliament (the "**Westminster Parliament**"). This appeal was brought by the UK government in an attempt to overturn the first instance judgment of the High Court, which held that the UK government was not able to give an Article 50 Notification under its royal prerogative powers.

The Supreme Court hearing of the Article 50 appeal ran from 5 December to 8 December 2016. All eleven Supreme Court Justices heard the case, the first time that the Supreme Court has sat *en banc*. The Supreme Court has indicated that it will be handing down its judgment in the New Year and press reports suggest it will be published by the end of January.

Adding to the constitutional importance of the case, the devolved governments of Scotland and Wales entered pleadings as Intervening Parties. The devolved governments argued that the exercise of the royal prerogative to give the Article 50 Notification would cut across the devolved governments' legislative competencies, and that the notification requires either consent of the devolved governments, or, at minimum, an Act of Parliament. Two Northern Irish applications for judicial review in respect of the impact of the peace settlement in Northern Ireland (the Good Friday Agreement) on the constitutional requirements for triggering Article 50 were also joined to the appeal.

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. When a withdrawal agreement comes into force, or, if no agreement is reached within two years of the date of the Article 50 Notification, after two years, the UK's membership of the EU will end automatically, 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 broad summary, renders the Westminster Parliament (the legislature) the supreme legal authority in the UK. The judiciary is limited to interpreting and giving effect to the will of the Westminster Parliament as expressed in statute, and the UK government (the executive) only has those powers which: (i) are delegated to the UK government by the Westminster Parliament by means of legislation; or (ii) are residual or 'rump' powers which derive from the powers historically exercised by the monarchy of the UK and in respect of which the Westminster Parliament has not legislated (the UK government's 'royal prerogative' powers).

These 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 the UK government's royal prerogative 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 UK government's royal prerogative powers.

The question of law considered in this case was whether the High Court was correct to rule that, 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 UK government is not entitled to use its royal prerogative powers to give the Article 50 Notification.

Arguments

Royal prerogative arguments

The UK government, Respondents (Ms Gina Miller and Mr Deir Tozetti Dos Santos), Interested Parties (Graham Pigney and others and AB, KK, PR and children) and the "Expat Interveners" (George Birnie and others) essentially

restated their cases at first instance. We summarise the key arguments below.

A summary of the arguments at first instance can be found in our summary of the High Court judgment.

UK government arguments

The UK government argued that:

> Under the UK constitution, the UK government can exercise its royal prerogative powers to conduct international affairs, including the making and unmaking of treaties.

> The ECA 1972 does not confer EU law rights upon UK citizens, but is instead a "*conduit*" allowing EU law rights to be exercised in the UK. The object of the ECA 1972 is to ensure that the UK complies with its obligations that arise "*from time to time*" while it is an EU Member State. The ECA 1972 was never intended to strip the UK government of its royal prerogative powers to make or unmake international treaties.

> Legislation after the ECA 1972 (e.g., the European Union (Amendment) Act 2008; the European Union Act 2011) expressly restricts the use of the royal prerogative in relation to EU treaties in various respects, but none of these Acts restrict the use of the royal prerogative to withdraw from EU treaties.

> Therefore, triggering Article 50 will not result in the removal of any rights created by an Act of Parliament, and will not undermine the purpose of the ECA 1972.

The UK government also made extensive submissions on the Westminster Parliament's passing of the European Union Referendum Act 2015, which authorised the holding of the 23 June 2016 referendum on whether the UK should remain a member of or leave the European Union. The thrust of these submissions was that to return the matter to the Westminster Parliament would be unnecessary, given this authorisation.

Counter-arguments

It was argued on behalf of those who had brought the case against the government that:

> The ECA 1972 created statutory rights, giving direct effect in domestic law to rights developed at the international level, with such rights having priority over other UK statutes. The Westminster Parliament has also given effect to rights under EU law in, for example, the European Parliamentary Elections Act 2002.

> For the Secretary of State to give notification under Article 50 would cause at least some of those statutory rights to be destroyed or frustrated.

> The UK government's royal prerogative powers cannot be used to defeat those statutory rights because: firstly, the Westminster

Parliament's intention when enacting the ECA 1972 was that only the Westminster Parliament – and not a minister exercising royal prerogative powers – could defeat the statutory rights being created; and secondly, in any event, clear statutory authority is required at common law for royal prerogative powers to defeat statutory rights.

> In accordance with the principle of Parliamentary Sovereignty, only the Westminster Parliament itself can nullify or render nugatory primary legislation (e.g. Acts of Parliament).

> The ECA 1972 and the European Parliamentary Elections Act 2002 granted rights to UK citizens. Article 50 being triggered by royal prerogative powers, without Parliamentary authority, would nullify and render nugatory those Acts. This is directly contrary to the doctrine of Parliamentary Sovereignty.

> Therefore, an Act of Parliament is required in order to give an Article 50 Notification.

Devolution arguments

The Lord Advocate (instructed by the Scottish government) argued that an Act of Parliament was required to authorise the Article 50 Notification, given that the UK's withdrawal from the EU would change the competence of the Scottish government and Scottish Parliament and would disapply or disable laws applying within Scotland which fall outside the scope of matters reserved to the Westminster Parliament. It was also argued that the effects of withdrawal from the EU on devolved matters would engage the Sewel Convention, under which "*the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament*". This principle has now been put on a statutory footing in section 28 of the Scotland Act 1998 as amended by the Scotland Act 2016. The Counsel General for Wales made analogous arguments in relation to the Welsh government.

On devolution, the UK government argued that powers concerning international relations are reserved for the Westminster Parliament and the UK government. It was contended that the Sewel Convention does not arise in relation to the use of the prerogative as these are not "*normal*" circumstances and, furthermore, the legislation authorising Article 50 to be triggered is not "*with regard to devolved matters*". A further point was made in relation to the lack of sanction for a breach of the Sewel Convention, even though it has been incorporated into statutory form.

The claimants in the Northern Irish cases argued that foreign affairs had not been reserved to the Westminster Parliament or the UK government in the context of Northern Ireland and the Republic of Ireland, and that Northern Ireland's departure from the EU should not be done by the exercise of the royal prerogative, rather requiring direct and separate consent from Northern Ireland or, at a minimum, authorisation from the Westminster Parliament.

Failure to raise arguments as to revocability of an Article 50 Notification

Prior to the appeal, some commentators had indicated that there might have been scope for a question of law in relation to the revocability of an Article 50 Notification to be referred to the European Court of Justice ("**ECJ**") as a question of EU law. In the High Court, the UK government had accepted that the issuing of an Article 50 Notification was irrevocable. The UK government did not change its argument in the Supreme Court.

Notably, on Day 2 of the hearing, the President of the Supreme Court stated, "*an irrevocable step is going to be taken in the form of the Article 50 notice – because of the Article 50 notice that cannot be gone back on, which is what we are assuming…*" to which James Eadie QC (for the UK government) responded "*Exactly so. Exactly so*". It would be surprising for a referral to be made by the Supreme Court in the absence of submissions being requested on this point.

Reference to House of Commons Motion

On the evening of 7 December 2016 the House of Commons passed a motion: (a) calling on Theresa May to commit to publishing the UK government's plan for leaving the EU before Article 50 is invoked; (b) recognising that the House of Commons should respect the wishes of the UK as expressed in the 23 June referendum; and (c) calling on the UK government to invoke Article 50 by 31 March 2017.

In the UK government's closing arguments, James Eadie QC referred to the House of Commons motion, submitting that, whilst not legally binding, it was "*highly significant*", and arguing that it showed the 'joint effort', referred to throughout the UK government's oral evidence, required between the Westminster Parliament and the UK government.

The 7 December resolution is non-binding and will not affect the decision of the Supreme Court, but it does suggest that the House of Commons is not minded to stand in the way of the giving of an Article 50 Notification. This means that the Prime Minister's 31 March 2017 deadline for the giving of an Article 50 Notification is likely to be achievable even if the UK government's appeal is dismissed, although an Act of Parliament authorising the Article 50 Notification would need to pass both Houses of Parliament, rather than just the House of Commons.

Conclusions and what is to come

The Supreme Court judgment on the case is expected in January 2017. If this appeal is unsuccessful, the UK government will then bring forward a short bill to pass an Act of Parliament approving the giving of an Article 50 Notification. It is also possible that the UK government may choose to commence the process of passing an Act of Parliament in advance of the handing down of the Supreme Court's verdict.

Media speculation following the conclusion of the appeal has claimed that the UK government's legal team were of the view that they were unlikely to

succeed on the appeal, but that they were expecting a split bench, with a slim majority upholding the decision of the High Court. The value of this speculation is probably limited, given the professional inscrutability of the Supreme Court justices.

The arguments heard in the appeal hearing and the House of Commons motion both somewhat firm up the conclusion that an Article 50 Notification is likely to be given by the end of March 2017. This is due to the evidence of the support of the House of Commons, but also due to the fact that the potential for referral of the revocability of an Article 50 Notification to the ECJ is now appearing less likely. The key outstanding issue which could seriously delay the giving of an Article 50 Notification remains whether consent of the devolved parliaments of Scotland and Wales is required. This might represent a real issue for the UK government, as in the referendum of 23 June 2016 Scotland decisively voted to remain in the EU.

It should be noted that as we went to press on this note, it was being reported that Jolyon Maugham QC had crowdfunded a proposal to bring proceedings in the Irish courts aimed at having the questions of: i) Article 50 Notification revocability; and ii) whether an Article 50 Notification had, as a matter of law, been given by the result of the 23 June 2016 referendum, referred to the ECJ. This would be an interesting (indirect) intervention in the UK constitutional system and politics by the Irish Courts. In addition, a new legal challenge by Peter Wilding (Chairman of British Influence) and Adrian Yalland (a Conservative lobbyist) was being reported. Wilding and Yalland are claiming they will seek judicial review and argue that the government has no mandate to withdraw from the single market, due to this not being included on the referendum ballot paper or forming part of the Conservative Party manifesto at general election. The detail of these claims is beyond the scope of this note but does highlight the moving landscape of potential hurdles to the giving of the Article 50 Notification.

The first instance judgment can be found here:

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

Our summary of the first instance judgment can be found here:

http://www.linklaters.com/pdfs/mkt/london/161109_R(Miller)_Note_(amended).pdf

A further note will be circulated in the New Year when the judgment of the Supreme Court is handed down.

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