

UK Supreme Court, 24th September 2019

The Brexit conundrum: The Legality of the Prorogation of Parliament

(2019) UKSC 41 R (on the application of Miller) (Appellant) - v -
The Prime Minister (Respondent) Cherry and others (Respondents)
v Advocate General for Scotland (Appellant) (Scotland) (“Miller II”)

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Legality of the UK Prime Minister’s decision to Prorogue (suspend) Parliament UK Supreme Court Judgment 24.9.19.

This case is a ‘one off’. It arises in circumstances which have never arisen before and are unlikely ever to arise again.

That was the introduction from Lady Hale, president of the 11 member panel of justices of the UK Supreme Court convened to hear one of the most important constitutional law appeals of recent years.

The UK Supreme Court was inaugurated by the Queen on 16 October 2009, taking over the historic role of the Appellate Committee of the House of Lords as the highest court in the UK, hearing appeals solely on questions of law. Only twice in its 10 year existence, has the Court called on the fullest panel permissible of 11 justices. The only other case was to hear the same litigant, Gina Miller, also in a matter of the scope of Royal Prerogative as used by the executive in the context of Brexit. That case effectively compelled the then Prime Minister, Theresa May, to obtain the authorisation of the UK Parliament before seeking to give notice of intention to withdraw from the European Union under Article 50 of the European Treaty. (*R (Miller) v Secretary of State for Exiting the European Union* (“Miller I”).

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This case was a single appeal bringing together two separate causes, one in the English Divisional (High) Court, and a second, before the Scottish Court of Session in Edinburgh. Both cases were brought to challenge the Prime Minister's use of the Royal Prerogative to prorogue (suspend) the UK Parliament for an unusually long period of 5 weeks at what was alleged to be a moment of critical importance constitutionally, before the UK was due to leave the EU on 31 October 2019. Curiously, the two lower instance courts had held opposing views; the English High Court holding that the decision to prorogue was a purely political one, and hence not justiciable before the Courts, whilst the Court of Session in Edinburgh held that the matter was indeed justiciable and that the executive had deliberately exceeded its powers with "the improper purpose of stymieing Parliament" thereby declaring the prorogation to be unlawful.

The mechanics of a prorogation of Parliament are a two stage process. Firstly the Prime Minister advises the Monarch that there is a need to prorogue Parliament – usually immediately before a Queen's Speech – and then the Monarch is constitutionally bound by precedent to grant a binding Order in Council for Parliament to be prorogued. The Monarch is traditionally – and constitutionally – very reluctant to become involved in any matter which is, or might become, politically controversial, and here, the Supreme Court has offered some level of support to Buckingham Palace. The Court regards the Monarch's consent to the Prime Minister's request upon advice as being obligatory under the British Constitution. The decision can therefore be treated as being one which is unilaterally at the discretion of the Prime Minister and not bilateral or subject to challenge by the monarch. This in turn imposes on the Prime Minister "a constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament".

In reaching its decision, the Supreme Court divided the issues into four key questions:

1. Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?
2. If it is, by what standard is its lawfulness to be judged?
3. By that standard, was it lawful?
4. If it was not, what remedy should the Court grant?

1. Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?

In the 17th Century *Case of Proclamations* (1611) 12 Co Rep 74, an attempt to alter the law by the use of the Royal Prerogative was held to be unlawful. The court concluded at p 76 that "the King hath no prerogative, but that which the law of the land allows him", indicating that the limits of royal prerogative powers were set by law and were indeed determined by the courts. The Supreme Court also followed the 18th century precedent of *Entick v Carrington* (1765) 19 State Tr 1029; 2 Wils KB 275, denying the executive a prerogative right, in that case to search private property unless this was supported by statute or common law.

2. If it is, by what standard is its lawfulness to be judged?

The Supreme Court was concerned that if the power to prorogue Parliament were unlimited, then that would grant potentially unlimited power to the executive to override the will of Parliament in breach of the long-standing doctrine of the Supremacy of Parliament as the ultimate authority.

The Court therefore held that any prorogation would be unlawful “if it has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature”.

3. By that standard, was the advice to the Queen lawful?

Here, unlike the Edinburgh Court of Session, the court decided to look at the effect of the decision, rather than the intention of the executive. The Court did not look at the advice given to the Queen by the Prime Minister – because the Privy Council meetings where such advice is given are traditionally kept secret – or indeed the Prime Minister’s motives for giving that advice. Nevertheless, the Court held that:

... the Prime Minister’s action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account.

The question to be considered therefore, was whether there was:

... reasonable justification for such an extreme effect upon the fundamentals of our democracy.

The Government had argued that the prorogation of Parliament was a usual and required procedure before the making of a “Queen’s Speech” to Parliament, which all governments carry out in order to introduce their legislative programs to Parliament, and the nation.

Submissions had however been given to the Court by the former Prime Minister Sir John Major, whilst confirming that a prorogation was usual before a Queen’s Speech, prorogations (suspensions) of Parliament typically lasted between 4 and 6 days depending on the size of the legislative program envisaged and not to the extent of five weeks. Sir John Major’s evidence was not challenged by the Government and the Court drew attention to the fact that the Government had made no justification of why this prorogation should be any longer. As a result, the Court held that it was impossible to conclude “that there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks”.

4. If it was not, what remedy should the Court grant?

As a preliminary issue the Supreme Court had to consider whether the Monarch’s Order in Council and the consequent prorogation of Parliament were “proceedings in Parliament” within

the meaning of Article 9 of the Bill of Rights 1689 and hence were within the jurisdiction of the Courts. It held that they did not because the prorogation was an action which was imposed upon Parliament from outside and was not a matter of its own consideration. This jurisdictional decision in turn allowed the Court to make a declaration that both the Order in Council and the prorogation of Parliament were unlawful, null and of no effect, and that accordingly Parliament had not been prorogued. No further action was therefore necessary from the Courts regarding the next steps, because competence for the business of Parliament was and remains with the respective Speakers of the two Houses of Parliament.

Consequences of the judgment

During the hearings, the Court went to significant lengths to stress that the matter it was considering was not the merits of Brexit itself, merely the validity of the prorogation of Parliament. The courts should, and do, seek to avoid entering into political controversy. Nevertheless, the ongoing context of Brexit make its importance undeniable albeit as just one of the numerous stepping-stones the UK passes on its path following the 2016 Brexit referendum.

Before the justices handed down their judgment, the Prime Minister had already gone on record as saying that even if the prorogation were held to be unlawful, then he would consider himself free to seek to prorogue Parliament again. What this judgment makes clear however, is that if an identical attempt were to be made to prorogue Parliament, then it would be unlawful and with no legal effect. In practice, this judgment limits the advice a Prime Minister can give to the Monarch to prorogue Parliament for only the few days indicated as being usual by Sir John Major, unless there is reasonable justification to advise otherwise.

The Courts have been and will continue to be reluctant to intervene in future Parliamentary controversies unless absolutely necessary and only where sound constitutional authority allows. Perhaps that is the very reason why Lady Hale prefaced the judgment by noting that:

This case is a 'one off'. It arises in circumstances which have never arisen before and are unlikely ever to arise again.

It remains to be seen whether other steps on the Brexit path need to be reviewed by the UK Supreme Court.