The Brexit Litigation: A Guide for the Perplexed

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This week, the UK Supreme Court is hearing four days of oral argument (5 – 8 December 2016) in the appeal from the decision of the High Court in *R. (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), which decided in effect that the UK Government could not give notice of withdrawal from the European Union (EU) without parliamentary approval. The case has been hugely controversial, not only in the mass media, but also amongst legal commentators who have provided numerous blogs arguing both for and against the correctness of the decision. A decision is expected sometime in January 2017. This blog provides a brief discussion of some of the issues in the case. It does not pretend to be a comprehensive review of the arguments but I hope it gives a clear overview of what the central legal questions are and the contrasting views held on them.

Background

The case concerns the relationship between parliamentary legislation and prerogative power and how that relationship affects the process whereby the UK will leave the EU. The term 'prerogative' includes certain powers of government, formerly exercised by the Monarch personally, but now exercised by government ministers in the name of the Crown. It is settled law that as a general rule the conduct of international relations including the making or unmaking of treaties on behalf of the UK is a matter for the Crown, in the sense of UK executive government (Judgment, para 30).

In order to begin the process of withdrawal from the EU, a Member State must notify the European Council that it intends to withdraw in terms of Article 50 of the Treaty on European Union (TEU). The decision to withdraw must be made in accordance with Member State's own constitutional requirements. The UK government's position is that the decision to notify under Article 50 is an exercise of the prerogative and is for it alone to decide; the consent of Parliament is not necessary.

What did the High Court decide?

In essence, the High Court decided that the UK Government could not give notice of withdrawal from the EU under the prerogative; the giving of such notice required parliamentary authority. Its reasoning may be summarised as follows:

- The prerogative may not be used to change domestic law, in particular it may not be used to diminish or remove rights enjoyed by citizens under statute or common law;
- Rights arising from EU law were conferred on persons in the UK by or under the European Communities Act 1972 (ECA);
- Notifying withdrawal under Article 50 would inevitably lead to the diminution or removal of such rights;
- Parliament had not in the ECA or in any other legislation authorised the use of the prerogative to diminish or remove rights enjoyed under ECA.

- Therefore, the prerogative could not be used to give notice of withdrawal.

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The Key Questions

In my view the key questions arising from the High Court's decision are:

What is the scope of the prerogative power in the field of international relations?
Did the ECA cut down the scope of the prerogative?
Is notification of withdrawal from the EU under Article 50 irrevocable?
Would notification automatically lead to loss of EU Rights?
What is the relevance of the referendum?
Does devolution impose any constraints on the giving of notification?

The High Court decision was based on two important certain assumptions as to the law that were agreed between the parties: (i) once it has been given, a notice under article 50 cannot be withdrawn, and (ii) that giving notice under Article 50 would lead to the loss of at least some statutory rights, i.e. some rights deriving from the ECA. These two points are not a matter of consensus amongst the wider legal community.

The scope of the prerogative power in international relations

The High Court took it to be 'a settled feature' of UK law that as a general rule the conduct of international relations including the making and unmaking of treaties is a matter for the Crown in the exercise of its prerogative powers. It also said there is a constitutional principle that the Crown cannot not use its prerogative power to alter domestic law. The 'basic position [is] that the Crown cannot through the use of its prerogative powers increase or diminish or dispense with the rights of individuals or companies conferred by common law or statute or change domestic law in any way without the intervention of Parliament.'[Judgment, para 33]

Some commentators and the government in its written argument in the appeal consider that the court stated the principles regarding the limits of the prerogative too broadly. Feldman argues that the the claim that the prerogative cannot be used to deprive individuals of their rights cannot be treated as absolute as there are prominent examples of serious deprivations of rights being accepted by the courts, for example, the compulsory removal of the inhabitants of the Chagos islands to clear the way for a US military base in *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] AC 453, the destruction of property during wartime for the purposes of defence of the realm (*Attorney General v. De Keyser's Royal Hotel* [1920] AC 508; *Burmah Oil Company (Burma Trading) Ltd v. Lord Advocate* [1965] AC. 75) and the loss of trade union rights for workers at GCHQ (*Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374).

He suggests a narrower possible formulation of the limit of the prerogative, echoed in the Government's written case (para 57) which is that prerogative powers can be used to change domestic law in the UK if the power in question genuinely is part of the prerogative and if the change is not inconsistent with the requirements of an Act of Parliament which occupies the field in question. That formulation seems better to reflect the existing authorities than does that of the High Court, but there is an important reason why we should be cautious about concluding

that those authorities establish that the decision to withdraw is within the scope of the prerogative power. That reason is the immense scale and effect of this exercise of the prerogative. However, this does not fatally undermine the Court's argument. The extinction of a large number of statutory rights in a variety of fields is a very different context from that of previous cases which have accepted that the prerogative may be used to change the law and legal rights. However, if it is accepted that the prerogative might, in principle, have such dramatic effects, it is necessary to consider whether to do so would be inconsistent with relevant legislation including ECA.

Did the ECA cut down the scope of the prerogative?

The High Court considered that in the light of the constitutional principle set out above that it was clear that Parliament in enacting the ECA intended to legislate for the introduction of EU law and rights into domestic law in such a way that this could not be undone by an exercise of the prerogative. After ECA, the Crown had no power to effect withdraw from the EU treaties on whose continued existence the EU rights of British citizens depend. The indications that this was Parliament's intentions included the long title of ECA, the heading of section 2, ECA and certain phrases within section 2(1) including the references to rights "from time to time created or arising by or under the Treaties" and remedies "from time to time provided for by or under the Treaties" and "enforceable EU right". Some commentators, including both Elliot and Hooper and Feldman have criticised the way in which these arguments were deployed by the Court.

In its written case of the appeal, the Government stresses the dualist nature of the UK constitution and the consequent need to take domestic action to give effect within the UK to rights set out in international treaties. Domestic law is the conduit through which international legal rights and obligations are given effect in domestic law (para 46). On that view, the giving of effect to EU law rights within the UK has been brought about by a combination of action by Parliament – enactment of the ECA and by Government acting on the international plane (signing the treaties and voting on EU legislation. It argues further that withdrawing from treaties does not in general require the consent of Parliament and standard constitutional practice has not been varied in this context. Legislation subsequent to the ECA may have constrained aspects of the prerogative power to act under the EU treaties but have not constrained the power to with draw. Section 2 (1) ECA indicated that Parliament intended that there would be a continuing condition for the existence of EU rights, namely that the UK would continue to be a member of the EU. In addition, Parliament intended that whether that condition was satisfied or not would depend on entirely upon actions taken by the Crown on the international plane. Therefore, the Crown could terminate membership of the EU under the prerogative. Parliament should not be taken to have abrogated a prerogative power other than by express words in a statute, or possibly by necessary implication.

The Supreme Court will have to decide which of the competing interpretations of the ECA and subsequent legislation is the preferable one.

Is notification of withdrawal irrevocable?

As noted above, the parties agreed in the High Court that a notification given under Article 50 is irrevocable. Some commentators have questioned this. Article 50, TEU does not state

expressly that a notification of withdrawal cannot be revoked, so that conclusion that it cannot be withdrawn can only be derived by implication, i.e. by assuming that is what the Member States intended when concluding the TEU. Paul Craig has pointed out that Article 68 of the Vienna Convention on the Law of Treaties (VCLT) states that any notification or instrument withdrawing from a treaty may be revoked at any time before it takes effect. If this applies to TEU, then plainly a notice under Article 50 may be withdrawn. Jowell and Patel counter that VCLT does not apply because of the unique character of EU law which is different in its nature and effects from general international law and because specific inferences may be drawn from the text of Article 50 that suggest that it is a complete code for withdrawal from the EU. Against that, Craig and others argue that the interpretation of Article 50 should take into the consequences of particular interpretations and that some of the consequences of the irrevocability thesis would be extremely problematic. If a notification cannot be withdrawn, it would mean that withdrawal would have to proceed even if the notification had triggered an economic meltdown in the country, and this would be so even if a government had been elected on a manifesto pledge to reverse the previous decision and to remain in the EU. That government would have to continue to negotiate withdrawal. This seems to run counter to democratic principles, and of course Article 2, TEU lists democracy as one of the EU's founding principles. A further argument is that before TEU was adopted there was no express provision on withdrawal, but it had been widely assumed that a Member state could leave the EU by entering into negotiations with the other Member States and reaching an agreement to withdraw. If that is correct, then it could be inferred that the inclusion of an express provision on withdrawal should be presumed not to take away that right from States.

It remains the Government's position that an Article 50 notice is not revocable, but it also argues that it makes no difference whether the notice is revocable; whether it is revocable or not does not affect the question whether the Crown has the power to issue notification. That may be true but revocability does have a bearing on another important issue which is relevant to the argument, namely the causal link between giving notice and the loss of EU rights. It is an assumption of the High Court's judgment that the giving of notice *inevitably* leads to the loss of rights.

Is a reference to the CJEU required?

The argument about revocability also raises the question of whether the Supreme Court should make a reference to the Court of Justice of the EU (CJEU). In fact, neither the parties nor the interveners are asking the Court to make such a reference. That does not mean that a reference cannot be made; the Supreme Court can take that step on its own initiative.

The argument in favour of a reference is that the question whether the Article 50 notice is revocable is a question of EU law which is necessary for the Supreme Court's decision. Therefore, as a final court of appeal, the Supreme Court must make a reference under Article 267. However, a final appeal court need not make a reference where the meaning of a provision is clear and does not require interpretation – the *acte clair* doctrine. As experts on EU law have been disagreeing whether notification is revocable, it is difficult to argue that the *acte clair* applies. However, national courts have on occasion taken a very broad view of the *acte clair* exception and I would expect the Supreme Court to do so in this case. The Justices will be acutely aware of the political importance and sensitivity of this case and, in particular of the benefits of a speedy resolution of the notification question so that the political processes related to Brexit can continue.

This perspective is likely to be shared by many of the political representatives of Member States and many in the EU institutions. The need to negotiate Brexit and to cope with its possible adverse consequences are unwelcome problems which it would be preferable to have resolved as quickly as possible. It is hard to see that either other Member States or the EU institutions would want to make an issue of the Supreme Court's failure to refer the question.

Would notifying withdrawal inevitably lead to the loss of rights?

If Brexit follows the government's preferred path, it will issue the notification under the prerogative and subsequently, Parliament will enact the Great Repeal Bill and this will come into force *before* the notification becomes effective. If that happens, an Act of Parliament will be the proximate cause of the loss of EU rights at the time they are lost and not the exercise of a prerogative power. Can it, therefore, be argued that notification does not inevitably lead to loss of EU law rights on the basis that if Parliament does enact a Great Repeal Act then the loss of rights will have been achieved by an Act of Parliament and not done under the prerogative? Perhaps we can be certain that rights would be lost once notification were given, but we cannot be certain that the exercise of the prerogative would itself be the legally effective cause, because Parliament might, and almost certainly will, legislate to repeal the ECA.

Without directly addressing the question in terms of causation the Government's written case does stress the extent of Parliamentary involvement that it anticipates including amendment or repeal of the ECA, the enactment of a the Great Repeal Bill which may reproduce as domestic law rights and obligations current EU rights and obligations, and legislation relating to the freestanding statutes which implement EU rights and obligations. More generally, it is entirely a matter for Parliament how much or how little involvement it has in the process of withdrawal (see paras 80-81). None of this alters the fact that if the Government is right, Parliament will not have a real choice on the question of whether to with draw. However, that seems less problematic when we consider the significance of the EU referendum.

What is the significance of the referendum?

The referendum was only briefly discussed in the High Court's judgment and dismissed as being merely advisory. As Aileen McHarg has argued, the decision is framed in terms of a centuries old constitutional dynamic of the Crown and Parliament. Restricting prerogative power means more power for Parliament. Conversely, expanding prerogative power means less power for Parliament. But there is now a third element in the constitution: the people. There was no place in the constitution for the people as such when the decisions such as The *Case of Proclamations*, which are the foundations of modern doctrine on the prerogative, were handed down. Many things have changed since then. Most importantly, the practice of committing important decisions to referendums means that we need to consider the constitution as involving a three-way relationship between Parliament, the Executive and the people. An executive act that implements the decision of a referendum cannot be viewed in the same light as past attempts of the executive to act without parliamentary authority.

The Government's case makes more of the referendum than did their case in the High Court pointing out that Dicey, the leading authority of the sovereignty Parliament appeared to consider them a positive development in the constitution because they gave effect to the popular will (para 82).

There is good reason to treat the EU referendum as supporting the Government's case. Referendums may be a relatively modern innovation in the constitution but they are now an established feature of it. They are used to provide authority for major constitutional change and political practice has been to treat their outcome as decisive. In all referendums to date, Parliament has respected the outcome, even when that outcome was by the narrowest of margins (cf. the 1997 Welsh devolution referendum).[1] It was assumed in all these cases by the people, the Government and Parliament that Parliament would act consistently with the outcome whether that outcome was to authorise constitutional change or to reject it. This was equally true of the EU referendum of 2016.

Of course, *as a matter of law*, a referendum is only advisory, the outcome does not change the law and neither Parliament nor the Government comes under a legal obligation to implement the vote. However, there is no doubt what the political implications of the referendum are; the UK must cease to be a Member State of the EU. If either Parliament or the Government seek to obstruct the process of leaving, they could fairly be accused of acting unconstitutionally. Of course, conventions are not binding as such, but they can and should influence the resolution of contested questions of law in appropriate cases. If the law is not clear, there is a strong argument that an interpretation which fits with key political conventions should be preferred to one which does not. The Lord Advocate argues that Article 50 requires that states must decide to withdraw from the EU in accordance with their own constitutional requirements and, in the UK those requirements include constitutional conventions as well as laws. That point tends to reinforce this argument.

It may be objected that Parliament's hands will have been tied by a withdrawal notice as (assuming notification is irrevocable) the possibility of the UK remaining a Member State will have been ruled out once an Article 50 notice has been given. The short answer to this objection is that Parliament had no choice once the result of the referendum was known. It became constitutionally obliged to facilitate departure from the EU. This case does not truly engage the values that underpin the case law concerning the prerogative. The point of the doctrine is to reserve law-making to the legislature. It is the ultimate law-maker because it represents the people. But we no longer live in a pure representative democracy. Occasionally, the people speak directly through a referendum. For the executive to begin the process of withdrawal is merely to give effect to the people's decision. It is not a power grab. It does not impinge on Parliament's legitimate authority because Parliament has no real choice in the basic question of whether we are to leave the EU and we may regard some loss of rights as inevitable – as the price people were willing to pay for leaving the EU. On this issue, the people are a higher authority.

The Role of Parliament

The indications are that the UK Parliament will not try to block withdrawal from the EU. What is at stake here is influence and control. Many members of Parliament wish to have some control over the negotiating strategy, or at the very least to know what the strategy is. The insistence that Parliament should decide whether to trigger Article 50 is a means to that end. There are of course strong arguments for Parliament having a say in the process and I agree with them, but accepting that the Crown has the power to trigger Article 50 does not result in

[1] The Scottish devolution referendum of 1979 was not an exception. Devolution was not adopted following a Yes vote because it had been specified in advance that a minimum proportion of the electorate had to vote in favour to make a vote for devolution binding.

Parliament having no influence or control. To give full effect to our departure from the EU will require repeal of the ECA and clearly only Parliament can decide the terms of the 'Great Repeal Bill'. But Parliament can affect the process much sooner. Any member could introduce a Bill tomorrow that aimed to set the limits within which the Executive could negotiate, e.g. by insisting that Ministers seek to retain involvement in the single market. Alternatively, the House of Commons could debate and pass a substantive motion on the negotiations. A number of Parliamentary committees have already held hearings on aspects of Brexit. If the government were to prove completely uncooperative, the last resort would be for the House of Commons to pass a motion of no confidence. There are, therefore, many ways in which Parliament can bring pressure to bear on the Government and this pressure may make a real difference.

Devolution Questions

Additional questions concerning Northern Ireland were discussed in *McCord* [2016] NIQB 85. The applicants argued that the prerogative had been displaced by the Northern Ireland Act when interpreted in the light of the Good Friday Agreement and consequential arrangements. The High Court of Northern Ireland rejected this argument. Additional questions regarding Scotland and Wales have been raised by The Lord Advocate and the Counsel General for Wales both of whom are interveners in the appeal.

The Lord Advocate's written case reinforces the claim that laws cannot be amended or repealed by the prerogative alone by reference to the Claim of Right 1689 and Article XVIII of the Acts of Union and by the consequences for the constitution, devolved institutions, and Scots law. In his view the Crown cannot alter the constitution of the UK in a fundamental way by giving notice unilaterally under Article 50. It also argues that to do so would be incompatible with the Sewel Convention. The convention is that the UK Government and Parliament have to seek the consent of the Scottish Parliament before legislating within the devolved area. That includes changes to the competence of the devolved institutions such as removing the EU law constraint on the competence of the devolved institutions.

Conclusion

It would be brave person who tried to predict what the Supreme Court will decide, so I will conclude by offering my own suggestions as to how the key questions should be resolved:

- In principle, executive government may notify withdrawal from treaties under the prerogative;
- The ECA did not cut down the scope of the prerogative in relation to the EU;
- A notification of withdrawal given under Article 50 is revocable and a reference to the CJCE is not required;
- Notification would not automatically lead to loss of EU Rights given political uncertainty about how the process of withdrawal might proceed; and
- The relevance of the referendum is that Parliament has a constitutional duty to enact legislation providing for the UK to withdraw from the EU.

On the devolution issues, I tend to the view that devolution does not create any additional legal obstacles to withdrawing from the EU but arguably, there is a conventional limitation – the

need to seek the consent of the devolved institutions to alterations of their competence. That issue deserves fuller analysis than I can give it here.

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