Client Update
The Article 50 Judgment—Pulling the Trigger: Parliament, not Prerogative

LONDON

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INTRODUCTION

The much-anticipated judgment in the legal challenge to the government's announcement that it would invoke Article 50 without recourse to Parliament (*R (on application of Gina Miller and others) v Secretary of State for Exiting the European Union*) was handed down last Thursday.

The judgment, which was delivered by three senior judges, Lord Thomas (Lord Chief Justice), Sir Terence Etherton (Master of the Rolls) and Sales LJ, held that the government could not rely on the Crown's royal prerogative to give notice of the United Kingdom's intention to withdraw from the European Union pursuant to Article 50 of the Treaty of the European Union, without recourse to Parliament.

This decision is of tremendous constitutional and practical importance. The government has already announced that it will appeal the judgment directly to the Supreme Court by way of "leap-frog appeal" (*i.e.*, without having to first appeal to the Court of Appeal). The Supreme Court has already set aside time on 7 and 8 December 2016 for a hearing so that a final decision may be obtained by the beginning of next year. As discussed below, if upheld, this decision could have significant effects on the conditions, timeline and terms of the United Kingdom's eventual exit from the European Union.

HOW DID WE GET HERE?

Following the outcome of the referendum of 23 June 2016 that the United Kingdom should leave the European Union, a number of individuals and representative groups issued proceedings seeking judicial review of the government's position that following the referendum, it had the power, acting under the Crown's royal prerogative, to trigger the process of withdrawal. Opponents of the government's position argued that the government alone

could not decide to invoke Article 50, and that parliamentary approval would be required.

The Court identified lead claimants and a trial took place over three days in October. The claimants made several key submissions as to why the government could not invoke Article 50 without recourse to Parliament:

First, it was argued that the invocation of Article 50 in reliance on the Crown's prerogative powers would violate an essential principle of the United Kingdom's unwritten constitution—that the Crown's prerogative powers could not be used by the government to alter domestic law or diminish or abrogate rights, unless Parliament has given this authority to the Crown (either expressly or by implication). The claimants argued that no such authority had been given by Parliament either in the European Communities Act 1972 (the "ECA 1972"), pursuant to which the United Kingdom acceded to the European Union, or under subsequent legislation.

Another key argument focused on the fact that three categories of fundamental rights would be affected if the United Kingdom invoked Article 50. In the first category were rights that could be replicated under UK domestic law, albeit with some differences. These would include rights derived from European legislation. The second category of rights covered those enjoyed in other member states of the European Union (such as the right to reside under free movement rules). The rights in the third category were those that could not be replicated in UK law (*i.e.*, rights flowing directly from membership of the European Union, such as the right to stand for selection in EU elections). The claimants argued that invoking Article 50 would abrogate the third category of rights, remove Parliamentary scrutiny over the maintenance of the second category of rights, and remove the rights in the first category as they had been enacted.

The claimants further argued that the 2015 Referendum Act had not given authority to the government, acting via the Crown's powers, to give notice of withdrawal and, furthermore, that the government's proposal of ratification by Parliament of a withdrawal agreement or treaty would not cure this circumvention, since the actual decision on withdrawal would by then be out of Parliament's hands.

In response, the government's position was that the Crown held prerogative powers in relation to treaty-making that had not been abrogated by statute or by implication. It argued that since subsequent acts of Parliament (notably the European Communities (Amendment) Act 2008 and the European Union Act 2011) and other UK legislation had not placed restrictions on the Crown to

invoke rights under Article 50, there was no such restriction on the power of the Crown. With respect to the effect on the various categories of rights, the government agreed that rights in the third category would be lost, but that rights in the second category arose from the interaction of EU law with the laws of member states and such a loss would not be directly attributable to the invocation of Article 50.

The government also argued that the eventual vote on a withdrawal agreement/treaty would satisfy the United Kingdom's constitutional process, since domestic law was usually enacted by Parliament only after a treaty had been ratified.

THE JUDGMENT OF THE COURT

The Court held that withdrawal from the European Union would necessarily affect citizens' rights, in light of the agreement of the parties that the issuance of the Article 50 notice was irrevocable and could not be issued conditionally. It was also held that in addition to the loss of rights in category three, category one rights would also be lost unless Parliament chose to maintain them. The Court also rejected the argument that the loss of rights in category two arose because of the interaction of EU law with the laws of other member states. This was regarded as formalistic, since Parliament knew and intended that EU citizens would have those rights under the ECA 1972.

Having established this, the Court's judgment was largely based on the role and purpose of the ECA 1972 as a constitutional statute. It was emphasised that where background constitutional principles were "strong", there was a presumption that Parliament intended to legislate in conformity with them and not to undermine them. Consequently, it was held that the government's position was flawed because it had omitted to take into account two important constitutional principles:

First, the government had not taken into account the fundamental principle that the Crown had no power to alter the law of the land by use of its prerogative powers. The judgment cited Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, ex p Fire Brigades Union [1995] 2 AC 513*, that "It is for Parliament, not the executive to repeal legislation. The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body". The Court noted, in that regard, that Parliament intended to produce profound effects in domestic law by the enactment of the ECA 1972 such that it was a statute of special constitutional significance. Given that

Parliament took the "major step of switching on the direct effect of EU law in the national legal systems by passing the ECA 1972… it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again".

Second, it was held that the submissions of the government in relation to the executive's treaty-making powers had been overstated because the Crown's prerogative powers operated only in international matters. The Court held that the government had failed to take into account the limitations upon the Crown's power to conduct international relations. The Court noted that the Crown's prerogative powers in the conduct of international relations usually had no effect on domestic law, but in this case, this justification could not be applied, since major changes in domestic law were likely to be brought about by the exercise of powers given under the Crown's prerogative.

The Court therefore concluded, via detailed statutory construction of the ECA 1972, that Parliament intended for EU rights to have effect in domestic law and this should not be capable of being undone or overridden by actions taken by the Crown in exercise of its prerogative powers. Because triggering Article 50 would effect a withdrawal from the treaties upon which the three categories of rights described above depended, a notice under Article 50 could not be given under the royal prerogative.

IMPLICATIONS

A statement has since been issued by the government that it intends to appeal the results. It had already been agreed that any appeal would be "leap-frogged" directly to the Supreme Court. It is likely that permission to appeal will be granted, given the constitutional importance of the question.

If the decision is upheld, the consequences could be significant, not only in relation to the timeline for Brexit, but also in relation to the terms and the inevitability of Brexit itself. Although the Court made it clear that the question of whether to leave the European Union was not adjudicated, a number of interesting observations follow from the judgment.

First, a question was put to the Court on whether the challenge by claimants was a challenge to the making of the decision to withdraw under Article 50(1) or to the decision to notify the European Council under Article 50(2). The Court's observation on this point was that both provisions had to be read together—if the Crown had no prerogative power to give a notice under Article 50(2), then it follows that it could not, under Article 50(1) on behalf of the United Kingdom,

withdraw "in accordance with the UK's constitutional requirements". This suggests that the decision on withdrawal has to be put before Parliament in addition to the terms of withdrawal and the notice requirements.

This view is reinforced by the Court's comments on the scope and effect of the Referendum Act 2015. It was made clear (and accepted by the government) that this Act could not supply a statutory power for the Crown to give notice under Article 50. The Court reiterated that basic constitutional principles led to the conclusion that a referendum could only be advisory for the lawmakers in Parliament unless very clear language was used, and that no such language was in fact used. This, therefore, suggests that Parliament would be within its rights to reject the outcome of the referendum, although this is a political question that will be subject to various considerations.

Some commentators have expressed the view that members of Parliament could choose to vote to leave, but only on condition that there is a 'soft' Brexit so that the United Kingdom retains access to the single market, while many other commentators are of the view that Parliament would be compelled to respect the views of the electorate as expressed in June 2016.

A statement has been issued by the Prime Minister that the judgment will not change the timetable for Brexit (which foresees that the Article 50 notice will be given before April 2017). The question of whether legislation by Parliament was required before issuance of the Article 50 notice was not expressly decided by the Court, but it is suggested in the judgment that the Crown could not act unless and until Parliament legislated for withdrawal.

If legislation is required, it is difficult to see how timing would not be affected if the decision is upheld by the Supreme Court and particularly given the significance of a Brexit bill. In addition to the usual requirements that apply to the passage of a bill in the House of Commons and in the House of Lords, it is possible that any such bill may need to be published in draft form for consultation before introduction, possibly with a White Paper, and/or to be considered by parliamentary committees, which will likely make recommendations before it is even introduced. As a result, it remains to be seen whether the government's proposed Brexit timeline and, indeed, its Brexit strategy, remain intact.

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Please do not hesitate to contact us with any questions.