

APPEAL NOS: UKSC 2019/0192 & 2019/0193

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE INNER HOUSE OF THE COURT OF SESSION
THE LORD PRESIDENT, LORD BRODIE & LORD DRUMMOND YOUNG
NEUTRAL CITATION [2019] CSIH 49

BETWEEN:

JOANNA CHERRY QC MP AND OTHERS

Petitioners/Respondents

-and-

THE ADVOCATE GENERAL FOR SCOTLAND

Respondent/Appellant

AND ON APPEAL FROM HER MAJESTY'S HIGH COURT OF JUSTICE
(ENGLAND & WALES)
QUEEN'S BENCH DIVISIONAL COURT (ADMINISTRATIVE DIVISION)
LORD BURNETT OF MALDON CJ, SIR TERENCE ETHERTON MR & DAME
VICTORIA SHARP P
NEUTRAL CITATION [2019] EWHC 2381 (QB)

BETWEEN:

THE QUEEN on the application of GINA MILLER

Claimant/Appellant

-and-

THE PRIME MINISTER

Defendant/Respondent

CASE FOR THE LORD ADVOCATE

A. INTRODUCTION

1. The intervener is the senior Scottish Law Officer. He is, by virtue of his office, a member of the Scottish Government and represents the Scottish Government in litigation before the Courts. He sought permission to intervene in these cases by reason

of the constitutional significance of the issues¹ and the implications of the decision under review for the interests of the Scottish Government and the Scottish Parliament in the context of the withdrawal of the UK from the EU.

2. The UK will, as a matter of law, leave the EU on 31 October 2019 unless the UK and the EU agree to extend that date. Withdrawal of the UK from the EU, and the basis of withdrawal, will have profound implications for areas of policy, law and administration in relation to which the Scottish Parliament has primary legislative responsibility and the Scottish Government sole executive competence. The Scottish Parliament and Scottish Government have been, and are, making legislative and administrative arrangements in anticipation of withdrawal (and for seeking to manage, so far as they can, the impact thereafter)².
3. Since the appointment of the current Prime Minister on 24 July 2019, the UK Government has taken a markedly different policy approach to withdrawal from the EU, including to withdrawal without an agreement. The UK Government has been making preparations in anticipation of withdrawal, including against the potential for withdrawal without an agreement. The policies and legislative and administrative arrangements made by the UK Government in anticipation of withdrawal have implications for the Scottish Parliament and the Scottish Government. The Scottish Government's assessment is that withdrawal from the EU without an agreement will have a particularly serious adverse impact in Scotland. It is in the interest of all parts of the UK that the policies and actions of the UK Government with regard to withdrawal

¹ Scottish Ministers exercise prerogative and other executive powers within devolved competence: Scotland Act 1998, section 53. There is, in respect of the Scottish Parliament, no mechanism, equivalent to prorogation, by which the Scottish Government can prevent the Parliament from sitting. Recess dates are agreed by the Parliament itself on the motion of the Parliamentary Bureau (the committee, which is responsible for the timetabling of Parliamentary business, comprising the Presiding Officer and representatives of parties represented in the Parliament): Standing Orders of the Scottish Parliament, rule 2.3.

² The programme of legislation in non-reserved areas required in anticipation of withdrawal has included: (i) SIs made by the UK Government under the EU (Withdrawal) Act 2019; and (ii) SSIs made by Scottish Ministers. The Scottish Government, for its part, has agreed, in many areas, that the subordinate legislation required to prepare the statute book for withdrawal from the EU should be made at UK level; its consent to specific instruments is the subject of ongoing scrutiny by the Scottish Parliament. The Lord Advocate understands that all planned laying dates for statutory instruments have been rescinded since Parliament was prorogued and that many of the instruments required for exit day are now likely to be subject to urgent procedures in the UK Parliament. Although the number of outstanding instruments of interest to the Scottish Government is small, the point illustrates that the role of the UK Parliament at this time in scrutinising the UK Government is not confined to issues of policy, but extends also to the arrangements, legislative and practical, being made in anticipation of withdrawal. The advice to the Prime Minister which preceded the decision to prorogue Parliament for five weeks did not address the consequences of a five week prorogation at this time for the programme of subordinate legislation, or, indeed, for the work of the devolved administrations and legislatures.

from the EU should be subject to the usual processes of Parliamentary scrutiny at this time³.

B. THE PRINCIPLE OF RESPONSIBLE GOVERNMENT

4. It is a fundamental principle of the UK's constitutional democracy that the executive is accountable to parliament – that the government's policies and actions are subject to scrutiny in parliament by the elected representatives of the people. That principle – the principle of responsible government - is “no less fundamental to our constitution” than the legal doctrine of the sovereignty of parliament⁴. It applies to the relations between the UK Government and the UK Parliament, and is reflected in the constitutional arrangements set out in the devolution statutes. The purposes served by that principle include: (i) subjecting the policies of the executive to consideration by the representatives of the people; (ii) promoting transparency of executive action by requiring the government to report, explain and defend its actions; and (iii) protecting citizens from the arbitrary exercise of executive power.⁵ In a society governed by the rule of law, that constitutional principle must be, and is, recognised by the law.

C. EFFECT OF THE DECISION UNDER REVIEW

5. By reason of its timing and duration, the decision under review will have a profoundly intrusive effect on the operation of those mechanisms which give effect to the principle of responsible government at UK level at a critical time in the country's history. As Lord Drummond Young observed, in the Inner House in *Cherry* (§ 114), at this time, “Parliament's second essential constitutional function, the scrutiny of the executive, is of paramount importance”. Yet, as a result of the decision under review, throughout the duration of the prorogation, no such scrutiny will be possible. Neither the House of Commons nor the House of Lords will be able to sit. Committees of Parliament will be unable to function. Members of Parliament and Peers will be unable to table questions to Ministers. The effect of the decision is to reduce the sitting time of Parliament by

³ On 5 September 2019, the Scottish Parliament passed a resolution by 87 votes to 28 in the following terms: “That the Parliament agrees that the UK should in no circumstances leave the EU on a no-deal basis, and condemns the Prime Minister's suspension of the UK Parliament from as early as 9 September until 14 October 2019.”

⁴ *Miller v Secretary of State for Exiting the European Union* [2018] AC 61 (*Miller*) at § 249 per Lord Carnwath; see also § 240 per Lord Reed.

⁵ *Cherry* [2019] CSIH 49 per Lord Drummond Young at §§ 98-99.

five weeks during the very limited period remaining before 31 October 2019. Lord Brodie in the Inner House in *Cherry* was correct (§ 91) to characterise this as “a lengthy prorogation at a particularly sensitive moment when time would seem to be of the essence”. It has the effect of preventing the mechanisms of responsible government at UK level from operating at all throughout the period of the prorogation.

D. JUSTICIABILITY

6. It is one of the functions of the Courts in a constitutional democracy governed by the rule of law to adjudicate on the lawfulness of executive action. As a matter of principle, that function applies to the exercise of prerogative powers as it does to other exercises of executive power. Accordingly, the Courts may adjudicate, where the issue relevantly arises for decision, on: (i) whether a claimed prerogative exists; (ii) the legal limits on a claimed prerogative; and (iii) whether a prerogative power has been exercised lawfully.
7. Prerogative powers, recognised by the common law⁶, are conferred upon the Crown for the public benefit, and not for the benefit of the executive.⁷ As Lord Sales has observed, extra-judicially: “The conception of prerogative power as conferred on the Crown for the public benefit has allowed the courts to identify or interpret the powers as subject to qualification as to the manner of their exercise, in much the same way as basic qualifications are read into statutory powers – that they be exercised within the bounds of the power in question, without procedural impropriety and on a rational basis.”⁸
8. The Court should reject the proposition that the power to prorogue Parliament is not justiciable.

⁶ The Court should not proceed on any generalised assumption that the prerogatives of the Crown, are identical in their content and effects in Scots law and in the law of England & Wales. Scots law has historically been more sceptical about Crown claims to special treatment in various contexts: see A Tomkins, “The Crown in Scots Law” in McHarg and Mullen, *Public Law in Scotland*, 2006, pp. 277-280; for an illustration of the willingness of the Court of Session to review an act of the monarch, see *Officers of State v. Douglas* (1838) 1D 300. However, the prerogative at issue here is the power of the Crown in right of the United Kingdom to prorogue the UK Parliament. The legal content and effects of that prerogative cannot sensibly differ as between the different jurisdictions of the United Kingdom; nor, at the level of constitutional principle, should there be any difference of approach between the different jurisdictions of the United Kingdom as regards the proper role of the Court in reviewing the exercise of that prerogative: the important thing is that the correct approach should be taken in that regard in both jurisdictions. For the reasons set out in this Case, the intervener’s position is that the Divisional Court was wrong to conclude that the power to prorogue Parliament is not justiciable; and the Inner House of the Court of Session was correct to treat it as justiciable.

⁷ Sales: “*Crown Powers, the Royal Prerogative and Fundamental Rights*” in “*The Scope and Intensity of Substantive Review*” (Wilberg & Elliott, eds.) (Hart, 2015).

⁸ Sales (*sup. cit.*) at p. 382; see also pp. 374-5.

- (a) If it were truly the case that the power to prorogue Parliament is legally untrammelled and not susceptible to judicial review, that power would be capable of being used in a manner which would not only interfere with the principle of responsible government, but which could undermine the UK's constitutional democracy.⁹ Contrary to the opinion of the Divisional Court in *Miller No. 2*¹⁰ at § 66, it is helpful, in considering whether the power to prorogue Parliament is or is not justiciable, to postulate extreme cases: extreme cases test whether the issue is truly one of justiciability, or is, rather, whether the particular exercise of the power at issue is open to review.
- (b) Judicial restraint in relation to review of prerogative powers has been reduced to those areas where an issue is clearly “beyond the constitutional competence assigned to the courts under our conception of the separation of powers”.¹¹ The UK conception of the separation of powers includes the principle of responsible government. It is not beyond the institutional or constitutional competence of the courts to intervene where intervention is justified by that principle. The better approach is, in any event, to examine the particular circumstances carefully before reaching a view as to whether a particular exercise of power is truly beyond the court's institutional competence.¹²
- (c) The justification for non-interference by the courts in political questions – that such questions are a matter for executive accountability to Parliament – should not be applied to a decision which deprives Parliament of the means by which to enforce the accountability of the executive for policy or political questions. By reason of its effect on the constitutional principle of responsible government, the decision to prorogue Parliament in the present case is of quite a different kind to the political questions considered in *Wheeler* and *McClellan*. It is, of course,

⁹ Cp the observation of the European Court of Human Rights that: “... the Convention establishes a close nexus between an effective political democracy and the effective operation of Parliament. Accordingly, there can be no doubt that the effective functioning of Parliament is a value of key importance for a democratic society ...”: *Selahattin Demirtas v. Turkey (No. 2)*, Application No. 14305/17, 20 November 2018 (under reference to the Grand Chamber), at § 227 (quoting from earlier cases raising issues under Article 10 and Article 3 of the First Protocol); see also TEU Article 2. It is not hard to imagine how a legally untrammelled executive power to suspend Parliament could be abused to undermine democracy.

¹⁰ *The Queen (on the application of Miller) v The Prime Minister* [2019] EWHC 2381 (QB).

¹¹ *Shergill v Khaira* [2015] AC 359 at §42 per Lord Neuberger of Abbotsbury PSC, Lord Sumption and Lord Hodge JJSC.

¹² *Justiciability*: Lord Mance DPSC, 27 November 2017, 40th Annual FA Mann Lecture; *McCord v Prime Minister* [2019] NIQB 78 per McCloskey LJ at § 109; contra *The Queen (on the application of Miller) v The Prime Minister* [2019] EWHC 2381 (QB) at § 41.

commonplace that decisions which have significant political implications may nevertheless fall to be reviewed by the courts on legal grounds.

- (d) Holding that a decision to prorogue Parliament may, in appropriate circumstances, be susceptible to judicial review does not – contrary to the view of the Divisional Court – require the Court to adjudicate on the appropriate duration of prorogation. The only question is whether the particular decision to prorogue was or was not lawful. There are judicial standards and techniques which can, and should be, applied to answer that question – namely, the ordinary principles of review applied in the particular context and in light of the effect of the decision under review on the constitutional principle of responsible government. If, on the basis of those principles, the particular decision under review is unlawful, then that decision falls to be reduced or quashed: there is no need for the Court to address whether a different decision would have been justified; or, if so, what that decision might have been.
- (e) No authority has been cited in support of the proposition that the power to prorogue Parliament is not justiciable, other than a reference to Dicey – who was writing long before the development of the modern law of judicial review. The list of powers which Lord Roskill, “as presently advised”, did not consider could be the subject of judicial review¹³ included the dissolution of Parliament, not its prorogation. Dissolution has the consequence that the Government submits itself to the people in a general election.¹⁴ By contrast, prorogation maintains in office the Government (it may be, a minority Government pursuing a policy which would not command the support of the House of Commons), insulated, throughout the period of prorogation, from Parliamentary scrutiny.
- (f) In any event, subsequent cases have shown that at least some of the powers referred to by Lord Roskill are, in fact, susceptible to judicial review in appropriate circumstances¹⁵. Authorities dealing with political agreements, or the materiality of differences between treaties, are not analogous to the present case,

¹³ *CCSU v. Minister for the Civil Service* [1985] AC 374, at p418.

¹⁴ Fixed Term Parliaments Act 2011, s. 3. The Cabinet Office Manual contains guidance on the conventions which govern the conduct of Government following dissolution: paras. 2.27 ff.

¹⁵ See authorities referred to in *Miller No. 2*, para. 36.

which is specifically concerned with the power to prorogue Parliament.¹⁶ Nor does it assist to compare historic uses of this prerogative power in different circumstances and at a different stage in the development of public law.

9. Rejecting the UK Government's contention that the power to prorogue Parliament is not justiciable does not imply that decisions to prorogue Parliament would routinely be brought under review. By contrast with the decision to prorogue Parliament which is brought under review in these proceedings, use of the power to prorogue Parliament to bring a Parliamentary session to an end and to pave the way for a Queen's Speech will usually have neither the effect nor the purpose of interfering with the mechanisms of responsible government.

E. GROUNDS OF REVIEW

10. The Prime Minister's decision to advise and procure the prorogation of Parliament for five weeks at this time may properly be characterised as an abuse of executive power which calls for the intervention of the Court. The abuse of power may be founded on either, or both, of the following grounds:
 - (a) The decision under review is unreasonable, by reason of the significant adverse effect which it has, without a compelling justification, on the mechanisms of responsible government.
 - (b) It may properly be inferred that the power is being used for an improper purpose – namely, to insulate the Government from Parliamentary scrutiny.
11. Both grounds rest on the significant interference of the decision under review with the mechanisms of responsible government. The courts have been prepared to contemplate review of legislation where that is necessary to protect a fundamental feature of the UK's democratic order¹⁷. They should equally be prepared to review executive action –

¹⁶ *Wheeler v Office of the Prime Minister* [2008] EWHC 1409 (Admin); *McClellan v First Secretary of State* [2017] EWHC 3174 (Admin) cited in *Miller No 2* at §§ 49-50.

¹⁷ *AXA General Insurance Limited v Lord Advocate* 2012 SC (UKSC) 122, per Lord Hope at §§ 50-51 and Lord Reed at § 153 and § 169. See also Lord Brodie in *Cherry* [2019] CSIH 49 at § 91.

whether or not under the prerogative – where that is necessary to protect the constitutional mechanisms of responsible government.¹⁸

F. UNREASONABLENESS

12. In *Pham v. Home Secretary* [2015] 1 WLR 1591 at § 114, Lord Reed observed:

“There are also authorities which make it clear that reasonableness review, like proportionality, involves considerations of weight and balance, with the intensity of the scrutiny, and the weight to be attached to any primary decision-maker’s view depending on context. The variable intensity of review has been made particularly clear in authorities ... concerned with the exercise of discretion where fundamental rights are at stake. The rigorous approach which is required in such contexts involves elements which have their counterparts in an assessment of proportionality, such as that an interference with a fundamental right should be justified as pursuing an important public interest, and that there should be a searching review of the primary decision-maker’s evaluation of the evidence.”

13. The same approach falls to be applied where a constitutional principle is at stake. As Lord Mance put it in *Kennedy v. Charity Commissioners* [2015] AC 455 at § 55:

“... it is inappropriate to treat all cases of judicial review together under a general but vague principle of reasonableness, and preferable to look for the underlying tenet or principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation. Among the categories of situation identified in *de Smith*¹⁹ are those where a common law right or constitutional principle is in issue.”

14. Just as there is “in reality a sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference”²⁰ there is equally a sliding scale concerning

¹⁸ The courts have protected the sovereignty of parliament from the misuse of prerogative power in several notable cases: see Paul Craig “Prorogation: Constitutional Principle and Law, Fact and Causation” on the Oxford Human Rights Hub at <https://ohrh.law.ox.ac.uk/prorogation-constitutional-principle-and-law-fact-and-causation/>

¹⁹ The reference was to *de Smith’s Judicial Review*, 7th edn (2013), para. 11-028; the equivalent passages in the current (8th) edition (2018; with First Supplement 2019) are at paras 11-025 and 11-052-11-060.

²⁰ *Pham v Secretary of State* [2015] 1 WLR 1591, per Lord Sumption at §§ 105-106; see also Lord Reed at §§ 114-118.

justification for executive action which interferes with a legally recognised constitutional principle.²¹ The decision under review in this case will have a profoundly intrusive effect on a fundamental aspect of the constitution, namely the principle of responsible government, and the mechanisms through which that principle is given effect at UK level. The decision to deprive the UK Parliament of the ability to sit for five weeks at this particular time (when that is such a significant proportion of the remaining time before 31 October 2019) calls for a clear and compelling justification; and invites close scrutiny – a “searching review” – of that justification, commensurate with the importance of the constitutional principle at stake.

15. The UK Government has publicly stated that the purpose of prorogation at this time is to bring the current session of Parliament to an end and to pave the way for a Queen’s speech at the opening of the new session. The Leader of the House of Commons and Lord President of the Council told the House of Commons: “That is the straightforward reason for the Prorogation. The Prorogation is taking place to have a new Queen’s Speech to set out the really exciting one nation policies that my right hon. Friend the Prime Minister wishes to set out.”²² Modern practice shows that this purpose can be achieved by a prorogation of a few days. There is accordingly no rational connection between the stated purpose and the duration of the prorogation.²³ In any event, as the Inner House in *Cherry* recognised, it is the duration of the prorogation which calls for justification; and it is the justification for a five week prorogation which falls to be critically evaluated.
16. So far as the intervener is aware, no justification has been advanced for a five week prorogation. The only explanation which, so far as the intervener is aware, has been provided is that the period involves losing only a small number of sitting days as compared with the recess which would usually occur at this time of year. The submission to the Prime Minister does not address the significant distinction (not least in terms of impact on the principle of responsible government) between a recess and a prorogation. In particular, by contrast with prorogation, during a recess: (a) ongoing parliamentary business in relation to primary and subordinate legislation does not fall;

²¹ The Divisional Court in *Miller (No. 2)* recognised that the “political questions” doctrine does not preclude review where the decision affects individual rights: paras. 43-44. The same applies where the decision affects a constitutional principle.

²² Rt. Hon. Jacob Rees-Mogg, House of Commons Hansard 5 September 2019 at col. 394.

²³ See also Paul Craig, *op. cit.*

(b) Parliamentary committees may continue to sit and to scrutinise the UK Government; and (c) Members of Parliament may continue to table questions to the UK Government. It would, in any event, be for each House, and not for the Government, to determine the duration of any recess. The reasons advanced by the UK Government accordingly do not explain or justify a prorogation of five weeks at this time. It does not identify an important public interest such as to justify the interference with the mechanisms of responsible government which is entailed by such a prorogation at this time. The decision is accordingly unlawful.

G. IMPROPER PURPOSE

17. Separately, the principle of responsible government places an implicit limit on the purposes for which prorogation may legitimately be used – in particular, that it may not be used for the purpose of shielding the executive from Parliamentary scrutiny.²⁴ Where, in ordinary course, Parliament is prorogued to bring a session to an end, and to pave the way for a Queen’s speech, the power is not used for such a purpose. By contrast, the circumstances and effect of the decision under review in this case amply justify the inference as to its purpose which was drawn by the judges of the Inner House in *Cherry*; and the decision is, for that reason also, unlawful.

RT HON W JAMES WOLFFE QC, LORD ADVOCATE

JAMES MURE QC

CHRISTINE O’NEILL

²⁴ Mark Elliott, “Prorogation and Justiciability: some thoughts ahead of the *Cherry/Miller* (No 2) Case in the Supreme Court”