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SUPREME COURT RULES THAT THE APPROVAL OF PARLIAMENT IS REQUIRED TO TRIGGER ARTICLE 50

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Legal Briefings

In a landmark constitutional law ruling (R (*Miller*) v *Secretary of State for Exiting the EU [2017] UKSC* 5, the Supreme Court today held (by a majority of 8 to 3) that the UK Government cannot trigger Article 50 of the Treaty on the European Union ("**Article 50**") without an Act of Parliament authorising it to do so. When the UK joined the EU in 1973 by signing the Treaty of Accession and by Parliament enacting the European Communities Act 1972 (the "**ECA**"), EU law became a source of UK law which takes precedence over all other domestic sources of UK law. Withdrawal from the EU will therefore make a fundamental change to the UK's constitutional arrangements, by removing the source of EU law, which can only take effect through Parliamentary legislation. Withdrawal will also remove a number of existing domestic rights of UK residents. The Supreme Court confirmed the High Court's finding that, as Parliament had legislated to confer these rights in domestic law, only Parliament could take them away: the executive branch of Government could not do so using its prerogative powers to make and break treaties.

The ruling confirms the victory of the claimants, who had been successful last November before a Divisional Court of the High Court. The case was appealed directly to the Supreme Court by the Government, leapfrogging the Court of Appeal, and was heard over four days in December 2016. The constitutional importance of the issue and today's judgment is accentuated by the fact the appeal was heard by the full bench of eleven Justices.

The judgment makes it clear that an Act of Parliament will be necessary to authorise ministers to trigger Article 50. The Government is rumoured to have the necessary draft legislation prepared to be put before the UK Parliament within a matter of days. David Davis, the Secretary of State for leaving the EU has stated today that: "It will be the most straightforward bill possible to give effect to the decision of the people and respect the Supreme Court's judgment." It is not clear how vigorously Parliament would seek to intervene and interfere with the Government's ability to pass such a bill authorising the triggering of Article 50, as there appears to be widespread acceptance in political circles of the need to reflect the June 2016 referendum result. It should be noted that the House of Commons has already passed a motion supporting the Government's timetable for notification and politicians may be reluctant to be seen to be obstructing the progress of Brexit by resiling from that. The Leader of the Opposition has said he will instruct or encourage (it is not clear which) opposition MPs to support triggering Article 50. The House of Lords, which is less influenced by the electoral cycle and where parties opposed to Brexit are more heavily represented, may be more willing to intervene. However, the unelected status of that chamber may weigh heavily on members' minds in any vote on the issue.

BACKGROUND TO THE CASE

Article 50 sets out the procedure for the withdrawal of a Member State from the EU. Article 50(1) requires the withdrawal of a Member State to "be in accordance with its own constitutional requirements". Once triggered, a two year timeline starts to run at the end of which the relevant Member State must leave the EU, regardless of whether a formal withdrawal arrangement has been agreed. The other Member States may decide, on a unanimous vote, to extend this period.

As a general rule, in the UK, the conduct of foreign affairs, including the making and unmaking of treaties, involves the exercise of prerogative powers – a residue of powers exercisable by the Crown acting through the executive branch of Government. On that basis, the Government argued that it could trigger Article 50 through the use of the prerogative, without prior authorisation by an Act of Parliament. It asserted that by issuing a notice under Article 50 it would simply be giving effect to the will of the people expressed in the June referendum under the Referendum Act 2015, and that Parliament would, in any case, have an opportunity to vote on any withdrawal treaty negotiated with the EU.

This approach was successfully challenged before the High Court, where the claimants argued instead that triggering Article 50 without prior authorisation by Act of Parliament is not in accordance with the constitutional requirements of the UK, because "it would frustrate the rights and duties enacted by Parliament in the European Communities Act 1972 and would be inconsistent with the object and purpose of that Act, namely to give effect to the rights and duties consequent on membership of the EU". The fact there may be an opportunity for Parliament to vote on the terms of an exit treaty once negotiated with the EU is insufficient, because triggering Article 50 will start an irreversible process of withdrawal.

The Supreme Court also considered an appeal against the *McCord* decision relating to Northern Ireland, as well as interventions from, amongst others, the Lord Advocate on behalf of the Scottish Government and the Counsel General for Wales on behalf of the Welsh Government.

THE MAJORITY JUDGMENT

The entire Supreme Court made clear that the case was not concerned with the merits of leaving the EU, a political issue, but instead related to a point of UK constitutional law - whether the Government is entitled to give notice of the UK's decision to leave the EU under Article 50 by exercising the Crown's prerogative powers without reference to Parliament. By a majority of 8 Justices to 3, the Supreme Court dismissed the Government's appeal and, in a joint judgment of the majority, held that an Act of Parliament is required to authorise ministers to give notice of the UK's decision to leave the EU under Article 50.

At the heart of the challenge was a potential conflict between different constitutional principles. The Government's case focused on the executive's prerogative power to make and unmake treaties, and claimed that nothing in the legislation enacting EU law domestically (primarily the ECA) abrogated or limited the scope of this prerogative power, which was sufficient to give notice under Article 50. The claimants focused on a higher constitutional principle: the supremacy of Parliament in the UK's constitutional order. Whatever their scope, the executive could not rely on prerogative powers to override rights conferred through legislation enacted by Parliament.

The Government argued that when Parliament enacted the ECA it must have intended that the Crown would retain its prerogative power to withdraw from the EU, and that the Crown should also have the power to choose whether or not EU law should continue to have effect under UK domestic law. The Supreme Court dismissed this argument on the basis that the terms of the ECA are inconsistent with such an approach. Section 2 of the ECA provides for EU law to become a source of UK law, and to take precedence over all domestic sources of UK law. Withdrawal from the EU will fundamentally change the UK's constitutional arrangements by removing the source of EU law, which, in line with UK constitutional requirements, can only take effect through primary legislation.

In addition, withdrawal from the EU will remove a number of existing rights of UK residents. As a matter of constitutional law, the Crown has no power to change domestic law and nullify rights under the law unless Parliament confers on it authority to do so. Parliament cannot have intended to leave the continued existence of all the rights introduced into domestic legislation by virtue of the ECA subject to the exercise of prerogative powers – especially given the ECA's fundamental importance to the constitutional structure of the UK. It is for Parliament, not the executive, to repeal legislation.

On the argument that, by triggering Article 50, the Government would simply be giving effect to the will of the people expressed in the June referendum, the Supreme Court made clear that under UK constitutional law a referendum can only be advisory unless very clear language to the contrary is used in the referendum legislation in question. This was not the case for the Referendum Act 2015, which was passed on the basis that it would have advisory effect only. Parliament must have appreciated that this had to be the case, as a vote to leave would inevitably involve many important questions relating to the legal implementation of withdrawal from the EU being decided at a later date.

DISSENTING JUDGMENTS

Lord Reed, Lord Carnwath and Lord Hughes gave separate dissenting judgments on the central question of whether the Government is entitled to give notice of the UK's decision to leave the EU under Article 50 by exercising the Crown's prerogative powers without reference to the UK Parliament.

Whilst fully accepting the constitutional importance of the principle of Parliamentary supremacy, the dissenting Justices considered that the prerogative power to make or withdraw from international treaties remains intact and unrestricted by the UK Parliament in relation to the ability to withdraw from the EU, such that this can be done by the executive without first needing to be authorised by an Act of Parliament. In Lord Reed's view, with which Lord Carnwath and Lord Hughes agreed, the legislative framework centred on the ECA creates a scheme under which EU law is given effect in domestic law so as to track the UK's treaty obligations at the international level, whatever they may be. The legislation imposes no requirement for the UK to remain a member of the EU. Rights given effect under the ECA may be added to, altered or revoked without a further Act of Parliament.

Lord Carnwath also added that, in his view, triggering Article 50 does not itself change the law or affect any rights, and the Government remains accountable to the UK Parliament in the subsequent negotiations with the EU since withdrawal cannot be implemented without primary legislation, such as the 'Great Repeal Bill' announced in late 2016.

DEVOLUTION ISSUES

Accepting that the majority's judgment was that an Act of Parliament is required to authorise the triggering of Article 50, the Supreme Court went on to agree unanimously on the outcome in relation to the interaction between the triggering of Article 50 and the constitutional arrangements of Northern Ireland, Scotland and Wales.

As part of the appeal in *McCord*, the Supreme Court considered whether triggering Article 50 required the consent of the people of Northern Ireland due to the Good Friday Agreement and the Northern Ireland Act 1998 (the "**NIA**"). The Supreme Court found that the decision to withdraw from the EU is not a function carried out by the Secretary of State in relation to Northern Ireland, as defined in the NIA, and the NIA does not regulate changes in the constitutional status of Northern Ireland. The NIA does not require the consent of the majority of people of Northern Ireland to the withdrawal of the UK from the EU.

The Supreme Court also considered interventions from the Scottish and Welsh Governments. These interveners argued that triggering Article 50 and withdrawing from the EU would lead to the competence of the Scottish and Welsh legislatures being modified – significantly changing the devolution settlements. Under the Sewel Convention, the UK Parliament in Westminster does not normally legislate with regard to devolved matters without the consent of the devolved legislatures. The Scottish and Welsh Governments argued that, if the prerogative was used to trigger Article 50, the Sewel convention would be bypassed since there would be no opportunity for the UK Parliament to seek the assent of the devolved legislatures. This was, therefore, an additional reason for finding that the Government could not trigger Article 50 by relying on the prerogative. In relation to Scotland this argument was supported by the incorporation of the Sewel Convention into statute through section 2 of the Scotland Act 2016.

The Supreme Court found that the purpose of the Sewel Convention is to establish cooperative relationships between the UK Parliament and the devolved institutions where there are overlapping legislative competences. The UK Parliament has preserved its right to legislate on matters within the competence of the devolved legislatures and the aim of the Sewel Convention is to avoid duplication of effort and enable the UK Parliament to make UK-wide legislation where appropriate.

The Sewel Convention operates as a political restriction on the activity of the UK Parliament. It is well established that it is not within the constitutional remit of the courts to enforce the scope and operation of political conventions. The incorporation of the Sewel Convention into the Scotland Act 2016 does not convert it into a legal rule justiciable by the courts. The effect of incorporation is that the UK Parliament has recognised the Sewel Convention as a political convention and declared that it is an entrenched feature of the devolution settlement in the case of Scotland. The Sewel Convention does not therefore provide a veto on the triggering of Article 50. Any role for the devolved legislatures in that process is a matter of politics.

COMMENT AND NEXT STEPS

It remains too early to know precisely how the Supreme Court's judgment will shape the Government's approach to Brexit. It is, however, now more difficult to see how the Government will be able to continue the approach it has taken so far to the timetable for serving notice by the end of March 2017 unless Parliament quickly confers a power to trigger Article 50 without adding substantive qualifications, limitations, or additional requirements.

This case is also not the end of the line for Brexit-related litigation:

- A fresh legal challenge has been brought to attempt to force the Government to seek Parliamentary approval before leaving the single market. The claimants in this case contend that the UK is a member of the single market in its own right, and not just as a member of the EU. As such, they contend that to leave the single market the Government must trigger Article 127 of the European Economic Area agreement – and, further, that this can only be done with Parliamentary approval. The Government contends that the UK is only a member of the single market as a result of its membership of the EU.

- Another legal challenge is being brought before the courts of the Republic of Ireland, seeking a reference to the Court of Justice of the European Union on the issue of whether a notice under Article 50 can be revoked.

- Finally, members of the Alliance Party in Northern Ireland have indicated that they may consider bringing further litigation seeking to prevent the Government from triggering Article 50 without the consent of the legislature of Northern Ireland on different grounds to those already litigated. Any such litigation seems unlikely to hold up service of the Article 50 notice, although it could cast some doubt on its validity.

We will provide updates on further developments in due course.

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KEY CONTACTS

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