

SUPREME COURT UNANIMOUSLY HOLDS THAT EXTENDED PROROGATION OF PARLIAMENT IS UNLAWFUL

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Legal Briefings - By **Andrew Lidbetter, Nusrat Zar and Jasveer Randhawa**

In [*R \(Miller\) v The Prime Minister; Cherry and ors v Advocate General for Scotland* \[2019\] UKSC 41](#), the Supreme Court found that the Prime Minister's advice to Her Majesty to prorogue Parliament for an extended period was unlawful and void, and quashed the consequent Order in Council effecting the prorogation.

Key Points

- It is the function of the Court to determine the limits of prerogative powers, which can be by reference to common law principles.
- Parliamentary sovereignty and Parliamentary accountability are both common law constitutional principles which will be protected by the Court where necessary.
- The Government must provide a reasonable justification for any attempt to frustrate or prevent the exercising of these constitutional principles.

BACKGROUND

On 27 or 28 August 2019, the Prime Minister formally advised Her Majesty that Parliament should be prorogued for a period starting between 9 and 12 September until 14 October 2019. The Prime Minister announced the decision on 28 August 2019 and sent an explanatory letter to all MPs. An Order in Council effecting the prorogation was made that same day.

Mrs Miller immediately challenged the decision by way of judicial review and it was heard by the Divisional Court on 5 September 2019. The Court found against Mrs Miller but allowed her appeal to leap-frog to the Supreme Court.

Joanna Cherry QC MP and a cross party group of 75 MPs had separately, and pre-emptively, brought proceedings in Scotland on 30 July 2019 in relation to the same matter. The claim was initially dismissed by the Outer House of the Court of Session on the basis that it was not justiciable. It was then appealed to the Inner House of the Court of Session, where it was determined that the case was justiciable and, further, that the decision was unlawful as it had been tainted by improper purpose.

Both decisions were appealed to the Supreme Court and were heard by the Court on 17 - 19 September 2019.

A number of interveners also argued that prorogation was unlawful. These included The Right Honourable Sir John Major KG CH (for whom Herbert Smith Freehills acted), the Lord Advocate (on behalf of the Scottish Government), the Counsel General for Wales, Raymond McCord (a victims' campaigner in Northern Ireland), the Shadow Attorney General (Baroness Chakrabarti) and the Public Law Project.

JUDGMENT

The Supreme Court determined that the Prime Minister's advice to Her Majesty to prorogue Parliament was justiciable and, due to the effect that it had on Parliament, unlawful.

Justiciability

The first question concerned whether the Courts were allowed to review the lawfulness of the Prime Minister's advice to Her Majesty the Queen i.e. is it justiciable.

It was not disputed that the Prime Minister's advice to Her Majesty fell within scope of his prerogative powers. When determining whether the exercise of this power was justiciable, the Court set out the two relevant questions. The first related to whether a prerogative power existed and, if so, to what extent. If it was accepted that a prerogative power did exist, as it did here, the second question was whether the exercise of that power was open to legal challenge on "*some other basis*" [35] (i.e. one of the recognised grounds of judicial review). The Court found that the first question as to the limits of a prerogative power undoubtedly lies within the jurisdiction of the courts. However, in relation to the second question, where prerogative powers were being exercised within their legal limits, their subject matter might mean that they were not amenable to judicial review. For example, a matter of 'high policy' would fall within such an excluded category.

In this instance, the question concerned the legal limits of the power to prorogue Parliament and whether they had been exceeded. Such questions were a question of law for the Court to determine. It was the Court's function to determine whether the Prime Minister's advice had trespassed beyond that limit. It was therefore, by definition, a justiciable question.

Lawfulness

Having determined that the issue was justiciable, the Court went on to consider the lawfulness of the Prime Minister's advice.

The power to prorogue is limited by the constitutional principles of Parliamentary sovereignty and Parliamentary accountability with which it would otherwise conflict. The Court therefore imposed the following test: "*...a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive*" [50].

The Court did not think it necessary to consider whether the Prime Minister's motive or purpose in advising Her Majesty to prorogue for this period was lawful, instead it looked at the effect of the decision.

This particular prorogation, the Court noted, prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and Exit Day on 31 October 2019. Moreover, documentation disclosed by the Government did not explain why the prorogation was five weeks long when a usual prorogation was four to six days. In other words, there was no reasonable justification provided for the Prime Minister's advice to the Queen. In the absence of "*any reason - let alone a good reason*" [61] for the length of the prorogation, the Court found the decision unlawful.

REMEDY

The Court concluded that the Prime Minister's advice to Her Majesty was unlawful, void and of no effect. Consequently, it found that the Order in Council was also unlawful, void and of no effect and was to be quashed. In practical terms, Parliament had not been prorogued.

The Court disagreed with the Government's submission that the prorogation would still stand if the Prime Minister's advice was found to be unlawful. It did not agree with the fact that the Order in Council would be protected as a "*proceeding in Parliament*" which could not be impugned by a Court under Article 9 of the Bill of Rights 1688, simply because it took place in the House of Lords chamber.

COMMENT

This judgment is of immense constitutional significance. It reviews the relationship between the three branches of State – the judiciary, Parliament and the executive – and clarifies the limits on the executive's prerogative powers. It builds on cases such as [R \(UNISON\) v Lord Chancellor \[2017\] UKSC 51](#) in order to contribute to "*the constitutional history of this country [which] 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*" (Lord Browne-Wilkinson in [R \(v Secretary of State for the Home Department, Ex p Fire Brigades Union \[1995\] 2 AC 513](#) at p552). Having said that, the Court was keen to stress that the facts in this case were exceptional and it remains to be seen whether the Court's findings will be able to be applied more widely.

Herbert Smith Freehills LLP represented The Right Honourable Sir John Major KG CH in the above case as an intervener in both the Divisional and Supreme Courts.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**ANDREW
LIDBETTER**
PARTNER, LONDON

+44 20 7466 2066
Andrew.Lidbetter@hsf.com



NUSRAT ZAR
PARTNER, LONDON

+44 20 7466 2465
Nusrat.Zar@hsf.com



**JASVEER
RANDHAWA**
OF COUNSEL,
LONDON

+44 20 7466 2998
Jasveer.Randhawa@hsf.com

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