

R(Miller) v the Prime Minister [2019] UKSC 41: An Unlawful Prorogation

On 24 September 2019, the Supreme Court handed down its unanimous judgment in R(Miller) v the Prime Minister [2019] UKSC 41 holding that the prorogation of Parliament had been unlawful and was null and void. Undoubtedly, the reverberations of this judgment will be felt in the legal world for some time. 4 Pump Court's Edward Garnier QC and Anna Hoffmann acted together with Tom Cleaver in this case for Sir John Major, the Fourth Intervener in the Supreme Court (in the Divisional Court Sir John was permitted to make written submissions only) and one of the first to announce that he would be joining Gina Miller's legal challenge. This short article sets out the key points that emerge from this seminal judgment.

From 17 September, over the course of three days, the Supreme Court heard the joint appeals from the judgments of the English Divisional Court and the Inner House of the Court of Sessions in Scotland and a number of interveners. Lord Garnier QC made his submissions on the third day. A recording of which is available on the Supreme Court website.

The High Court of England and Wales had held that the issue was non-justiciable and the Scottish Court at first instance (the Outer House) agreed with that view. However, the Inner House, Scotland's appeal court, held that the matter was justiciable. Interestingly, the government conceded in the Scottish proceedings that the issue could be justiciable in some, if not these, circumstances. The Inner House held that the prorogation had been unlawful because it stymied Parliament at a crucial time: *"The circumstances demonstrate that the true reason for the prorogation is to reduce the time available for Parliamentary scrutiny of Brexit at a time when such scrutiny would appear to be a matter of considerable importance, given the issues at stake."* as per Lord Carloway, The Lord President in Joanna Cherry QC MP v The Advocate General [2019] CSIH 49, at [53].

The questions before the Supreme Court were:

- (1) Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?
- (2) If it is, by what standard is its lawfulness to be judged?
- (3) By that standard, was it lawful?
- (4) If it was not, what remedy should the court grant?



Justiciability

It was common ground between the parties that the mere fact that the power to prorogue was a prerogative power did not mean that it was not amenable to judicial review. It was also accepted that Her Majesty was obliged by constitutional convention to accept her ministers' advice to prorogue Parliament. The government argued that the Court could not review this decision as it was inherently a matter of high politics. However, the Supreme Court made it clear that *“although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it”* [31] and cited paragraph 76 of *The Case of Proclamations (1611)*: *“the King hath no prerogative, but that which the law of the land allows him”*. [32]

The Court considered that it was entirely proper to consider this matter and that doing so would strengthen, not undermine, the separation of powers: *“Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers.”* [34]

Scope and constitutional principles

Next, the scope of the prerogative power was analysed – by what standard was the lawfulness of the prorogation to be assessed? The government had argued that it was precisely the absence of such measurable standards which made this issue non-justiciable. The rhetorical question, “how long is too long?” hung heavily in the air in the English Divisional Court proceedings. However, the Supreme Court, going back to first principles, held that the scope of a prerogative power can be established by reference to constitutional principles: *“A prerogative power is therefore limited by statute and the common law, including, in the present context, the constitutional principles with which it would otherwise conflict.”* [49] Michael Fordham QC's submissions had addressed this point head on. The two constitutional principles relevant to this case were: Parliamentary sovereignty and Parliamentary accountability.

The scope and limit of the power was put in these terms by the Court:

“(…) 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. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.” [50]

The Court placed its analytical emphasis on effect/impact rather than improper motive and thus did not have to grapple with the thorny issue of bad faith. This has been described as a potential *“elision of*



review on reasonableness and scope-of-power-grounds” (Prof. Mark Elliott). How this approach might affect future judicial review cases is difficult to predict, as this case was in many ways a “one-off”, as Lady Hale put it.

No reasonable justification

It was obvious to the Court that in the present context, the *“Prime Minister’s action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account”*. [55] The Judges distinguished motive from reasonable justification . This elevated the question of what evidence had been submitted to the Court. Sir John had submitted a witness statement setting out his experience. As Lord Garnier QC put it in his oral submissions: *“We are, I think, unique in this case for having put in a witness statement about how the power is actually exercised. This is the unchallenged evidence of a former Prime Minister in this case.”*

The Court took note of this:

“The unchallenged evidence of Sir John Major is clear. The work on the Queen’s Speech varies according to the size of the programme. But a typical time is four to six days.” [59]

In the absence of evidence to the contrary as to why a prorogation of the suggested length had been necessary, the Court concluded that the prorogation of this length at this particular time had not been justified and was unlawful.

Remedy

At the end of the third hearing day, there were many questions from the Justices about potential remedies. This may have been an early indication that the Judges were considering this point in detail. In its judgment, the Supreme Court went beyond the declaration sought by the Claimant and held that the prorogation itself and not merely the advice had been unlawful and that the prorogation was therefore null and void – it had never happened. It was for Parliament to decide what would happen next.

Conclusion

Each step of the Court’s analysis applied well-established legal principles. It is the cumulative effect of all of these well-grounded analytical steps which leave us with a ground-breaking constitutional judgment that speaks with a clear and unified voice at a crucial time in British constitutional history. It emphasizes the importance of constitutional principles and that a well-functioning separation of powers means that the Courts will review prerogative powers with reference to these principles.

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