

Which way to Brexit?

Daniel Habashy reports on *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5

On 1 January 1973, the United Kingdom joined the European Economic Community, now the European Union (EU). This was achieved by government ministers signing a Treaty of Accession, and Parliament enacting the *European Communities Act 1972* (1972 Act).

Section 2 of the 1972 Act provides, in summary, that whenever EU institutions make new laws, those new laws become part of UK law, and take precedence over all domestic sources of UK law. The 1972 Act therefore makes EU law an independent and overriding source of UK law and operates as a partial transfer of law-making power by Parliament to EU institutions, until Parliament decides otherwise.

Over the next 40 years, developments in the EU resulted from further treaties, many of which were adopted in subsequent Acts of Parliament, through the medium of an amendment made to the 1972 Act by a short, appropriately worded statute passed by Parliament, and the treaty was then ratified by the UK. Some of those Acts curbed the exercise of the powers of UK ministers in EU institutions.

One of those Acts, namely the European Union (Amendment) Act 2008, approved the inclusion of Article 50 into the 'Maastricht Treaty on European Union' of 7 February 1992. In broad terms, Article 50 provided that a country wishing to leave the EU, must give a notice in accordance with its own constitutional requirements, and that the treaties which govern the EU (EU treaties), will cease to apply to the country within two years.

On 23 June 2016, a UK wide referendum, undertaken pursuant to the *European Union Referendum Act 2015*, produced a majority in favour of leaving the EU, and the UK government then announced its intention to trigger Article 50. The outcome of the referendum and the government's proposed mode of giving notice were, to put it lightly, controversial.

Within days after the referendum, proceedings were commenced in the Divisional Court of England and Wales, against the UK Government's intention to trigger Article 50 without a parliamentary vote. On 3 November 2016, the court (Lord Thomas of Cwmgiedd LCJ, Sir Terence Etherton MR and Sales LJ) ruled against the UK Government on the basis that the 1972 Act fundamentally changed UK law by granting EU rights to UK citizens that are enforceable in domestic law, and withdrawal from the EU would effectively change (in most cases remove) those domestically enforceable rights, and therefore such a decision could not be taken by the UK Government exercising its prerogative powers. The ruling produced further controversy, including personal attacks on the judges in major newspapers.

On appeal to the Supreme Court, the issues in the proceedings were:

- whether the government could trigger Article 50 without the prior authority of an Act of Parliament. This was expressed to be the main issue; and
- whether the UK Government was obliged, under the devolution legislation, to consult the legislatures in Scotland, Wales and Northern Ireland before triggering, or attempting to trigger, Article 50.

A. The main issue

It was common ground that, as a general principle of constitutional law in the UK, the government has a prerogative power to withdraw from international treaties as it sees fit, but that it cannot exercise that power if it would thereby change UK laws, unless it is authorised to do so by Parliament.

The claimants argued that as a result of leaving the EU, UK law will change, and legal rights enjoyed by UK residents will be lost. Accordingly, the claimants contended that the government cannot trigger Article 50 unless authorised by Parliament.

In reply, the government argued that the 1972 Act does not exclude the power for ministers to withdraw from the EU treaties, and that s 2 of the 1972 Act actually caters for the exercise of such a power as it gives effect to EU law only so long as the power of withdrawal is not exercised.

By a majority of eight to three, the Supreme Court ruled that the government cannot trigger Article 50 without an Act of Parliament authorising it to do so (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge in the majority, with Lord Reed, Lord Carnwath and Lord Hughes dissenting in separate judgments).

The majority

The majority reasoned that, when the UK withdraws from the EU treaties:

- a source of UK law will be cut off; and
- further, as was common ground, certain rights enjoyed by UK citizens will be affected,
- and therefore, the government cannot trigger Article 50 without Parliament authorising that course.

The majority rejected the government's argument that s 2 of the 1972 Act caters for the possibility of the government withdrawing from the EU treaties without prior parliamentary approval.

The majority said that there is a vital difference between changes in UK law resulting from variations in the content of EU law arising from new EU legislation (which is authorised by s 2 of the 1972 Act), and changes in UK law resulting from withdrawal by the UK from the EU treaties. The former was said to involve

RECENT DEVELOPMENTS

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changes in EU law, which are then brought into domestic law through s 2 of the 1972 Act. The latter involves a unilateral action by the relevant constitutional bodies, which effects a fundamental change in the constitutional arrangements of the UK, by cutting off the source of EU law. The majority '[could] not accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by parliamentary legislation'.

The majority also said that another ground for justifying that conclusion is that withdrawal from the EU treaties effects changes to EU law, and therefore domestic law, and therefore the rights of UK citizens, and it was not permissible for Ministers to do this by a unilateral act, without approval by an Act of Parliament.

On both counts, namely the constitutional alteration and the change in domestic law that would be effected by triggering Article 50, the UK's constitutional arrangements require such changes to be authorised by Parliament, and the 1972 Act does not do that.

The majority observed that the Act of Parliament which established the 2016 referendum did not say what should happen as a result of the referendum, and accordingly any change in the law to give effect to the referendum must be made in the only way permitted by the UK constitutional principles, namely by an Act of Parliament, and to proceed otherwise would be a breach of constitutional principles.

The minority

The dissenting justices considered the government can trigger Article 50 without an authorising Act of Parliament. Their view was that the 1972 Act, taken with the 2008 Act, renders the domestic effect of EU law conditional on the EU treaties applying to the UK. In their view, Parliament has not imposed any limitation on the government's prerogative power to withdraw from the treaties, and if Article 50 is triggered, EU law will cease to have effect in UK law in accordance with the 1972 and 2008 Acts.

B. The devolution issues

The devolution issues concerned whether:

- the terms on which powers had been statutorily devolved to Scotland, Wales and Northern Ireland; or
- the Sewel Convention (which preserved the power of the UK Parliament to make UK-wide laws even where within the legislative competence of the devolved states),
- required consultation with or the agreement of the devolved legislatures before Article 50 can be triggered.

On the first issue, the Supreme Court unanimously ruled that UK ministers are not legally compelled to consult the devolved legislatures before triggering Article 50. The devolution statutes were enacted on the assumption that the UK would be a member of the EU, but they do not require it. Relations with the EU and other foreign matters are reserved to the UK Government and Parliament.

On the second issue, the majority reasoned that the Sewel Convention provides that the UK Parliament will not normally exercise its right to legislate with regard to devolved matters without the agreement of the devolved legislatures. While it therefore plays an important part in the operation of the UK Constitution, and operates as a political constraint on the activity of the UK Parliament, it does not give rise to a legally enforceable obligation, and the policing of its scope and its operation is not a matter for the courts.

C. Outcome

Two days after the judgment, the government published details of the European Union (Notification of Withdrawal) Bill 2017 that would, once enacted, confer on the government the authority to give notice pursuant to Article 50. Two days were allocated in the following week for second reading debate in the House of Commons.

The Bill was passed and at the time of writing the Article 50 Notice was scheduled to be presented to the EU on 29 March 2017. The next stage for the UK Government is negotiation with the EU as to the details of the exit, which are anticipated to commence in May 2017.