The UK Supreme Court finds that Boris Johnson's prorogation of Parliament was unlawful

Stephanie Gaussen reports on *R (Miller) v The Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41

On 23 June 2016, the United Kingdom (**UK**) determined by referendum to leave the European Union (**EU**). After two extensions to the 'leave date' and several failed attempts by Prime Minister Theresa May to secure an approved withdrawal agreement, on 24 July 2019 Boris Johnson was appointed Prime Minister. On 28 August 2019 the UK Parliament was ordered to be prorogued by Queen Elizabeth II upon the advice of Boris Johnson. The prorogation was to suspend the Parliament for five weeks from 9 September to 14 October 2019 – with MPs returning just 17 days before the UK was scheduled to depart the EU on 31 October 2019.

What is prorogation?

Parliamentary sittings are divided into sessions. Prorogation is a prerogative act of the Crown which terminates the parliamentary sitting session – usually for less than a week. In effect, prorogation ends all business and proceedings in Parliament. Neither House can meet, debate or pass

legislation while Parliament is prorogued. Generally, bills which are not yet complete must be started again in the next session of Parliament.

Prorogation may be distinguished from the dissolution of Parliament, which brings the current Parliament to an end with a general election called. Similarly, prorogation may be distinguished from a parliamentary recess, whereby each house does not sit, but parliamentary business can otherwise continue as usual.

Parliament is prorogued by the Crown on the advice of the Privy Council. The Crown is obliged, by constitutional convention, to accept the Privy Council's advice.

Lower Court decisions

In early September 2019, the High Court of Justice ruled that the matter of prorogation was not subject to judicial review as it was a political decision: *R (Miller) v The Prime Minister* [2019] EWHC 2381 (QB). The same conclusion was reached by the Outer House of the Court of Session, the Scottish civil Court of first instance: *Cherry v Advocate General for Scotland* [2019] CSOH 70. However, on 13 September 2019 the Inner House of the Court of Session in Scotland overturned the Outer House ruling and held that the prorogation was justiciable and unlawful: *Cherry v Advocate General for Scotland* [2019] CSIH 49. The three-judge bench unanimously found that the prorogation

was motivated by the improper purpose of stymying parliamentary scrutiny of the Executive, declaring the royal proclamation null and of no effect. The High Court and the Inner House each granted leave to appeal to the Supreme Court (**UKSC**).

The UKSC Proceedings

The conflicting decisions of the High Court and the Inner House of the Court of Session were appealed and heard together in the UK Supreme Court (**UKSC**). The UKSC, in a unanimous decision, held that the prorogation was both justiciable and unlawful.

Justiciability

Counsel for the Prime Minister and the Advocate General representing the UK Government argued that the Court should decline to consider the matter on the basis that the issues raised were not justiciable.

The Court noted that Courts have exercised a supervisory jurisdiction over the decisions of the Executive for centuries. It observed that when considering justiciability, two different issues could arise. The first is whether a prerogative power exists, and if it does, its extent. The second question is whether, granted that a prerogative power exists, and that it has been exercised within its limits, the exercise of the power is open to legal challenge on some other basis. The Court held, and it was accepted by all parties, that it undoubtedly has the power to decide upon the first issue. The Court concluded that this case concerned the first question only, namely the existence and limit of prerogative power to advise the Queen to prorogue Parliament.

What then, are the limits of that power? Two fundamental constitutional principles were informative:

(1) Parliamentary sovereignty – that laws enacted in Parliament are the supreme form of law, with which everyone, including Government, must comply. The sovereignty of Parliament would be undermined if the Executive could, through prorogation, prevent Parliament from exercising its legislative authority for as long as it pleased. Such a position would only arise if there was no legal limit on the power to prorogue; and

(2) Parliamentary accountability – Ministers are accountable to Parliament through various mechanisms including their duty to answer parliamentary questions, to appear before parliamentary committees and through scrutiny of the delegated legislation which Ministers make. This requires that the Executive report, explain and defend its actions, thereby protecting citizens from the arbitrary exercise of Executive power.

The Court observed that the longer Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government. An unlimited power of prorogation would be incompatible with the legal principles of parliamentary sovereignty and parliamentary accountability.

The Court concluded that the ruling as to the extent of prerogative power to prorogue was a justiciable issue.

Defining the relevant limitation, the Court said that 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. (At [50]).

The Court observed that it would only intervene if the effect was sufficiently serious. In judging any justification which might be put forward a Court must be sensitive to the responsibilities and experience of the Prime Minister and proceed with appropriate caution.

Was the advice lawful?

In then considering whether the prorogation had the effect of frustrating or preventing the ability of Parliament to carry out its constitutional functions, the Court concluded: 'of course it did' (at [55] – [56]).

The prorogation was not a 'normal prorogation'. It prevented Parliament from carrying out its constitutional functions for several weeks and it was ordered in exceptional circumstances whereby the UK was scheduled to exit the EU on 31 October 2019. The Court observed that Parliament, and in particular the House of Commons, had a right to voice how the UK would withdraw from the EU, particularly since the House of Commons had not supported the Prime Minister on the issue of leaving the European Union without an agreement.

When considering whether there was a reasonable justification, the Court ultimately held that it was impossible to conclude on the evidence before it that there was a good reason, let alone a reasonable justification, to advise the Queen to prorogue Parliament for five weeks. In circumstances where Parliament was stymied with no reasonable justification, it followed that the advice was unlawful. It was outside of the powers of the Prime Minister to give the advice, meaning that it was null and of no effect. Accordingly, the actual prorogation was also null and of no effect.

The Court thereby declared that Parliament had not been prorogued at all and was still in session. Contrary to media reports that the Court found that Boris Johnson had 'lied' to the Queen, the Court explicitly declined to determine the Prime Minister's motive or purpose. This consideration was unnecessary in circumstances where it was satisfied that there was no reasonable justification for the Prime Minister's advice to the Queen.

Prorogation in Australia

In Australia, prorogation is a power held by the Governor-General under section 5 of the Constitution. Most modern Australian Parliaments (other than the 44th, which was prorogued in 2016) have consisted of a single session, being prorogued only shortly before the House of Representatives was dissolved ahead of a general election.

The use of prorogation as a political tactic is not a foreign concept. In 2010 Governor Marie Bashir accepted advice from New South Wales Premier Kristina Keneally to prorogue Parliament for more than two months, in the lead up to the State election. This act was widely criticised as an attempt to shut down a parliamentary inquiry into the privatisation of the State's electricity assets.[1]

While the UKSC emphasised that the decision was a 'one off', the case may be used as a framework through which prorogation could be challenged in Australia. This is particularly so if an order to prorogue is made for a lengthy period, or at a politically sensitive time. Questions arise in Australia as to whether the Governor-General's power to prorogue is constrained by the convention to act on the advice of responsible ministers, or is subject to 'reserve powers' that repose a discretion as to whether or not to accept that advice.[2] That may give rise to different questions of justiciability than those that arose before the UKSC.

The UKSC decision does not bind Australian Courts. However, an order to prorogue has never been contested in Australia. If it was, the UKSC decision would be persuasive. In the future, government may well have to answer a challenge by demonstrating that it had reasonable justification to prorogue.[3] **BN**

ENDNOTES

1 For discussion, see Oliver, E 'Proroguing the Parliament of Australia: The Effect on the Senate and the conventions that constrain the prerogative power' (2012) 40 *Fed LR* 69.

2 See Oliver, E, above at p 83, 87-88.

3 See discussion in Twomey, A 'The UK Supreme Court ruling on suspending parliament is a warning for Australian politicians.' *The Conversation*, 26 September 2019 [http://theconversation.com/the-uk-supreme-Court-ruling-on-suspending-parliament-is-a-warning-for-australian-politicians-124263].