

Appeal nos: UKSC 2019/0192 & 2019/0193

**IN THE SUPREME COURT OF THE UNITED KINGDOM**

**ON APPEAL FROM HER MAJESTY'S HIGH COURT OF JUSTICE  
(ENGLAND AND WALES)**

**QUEEN'S BENCH DIVISIONAL COURT (ADMINISTRATIVE COURT)**

**NEUTRAL CITATION: [2019] EHC 2381 (QB)**

**LORD BURNETT OF MALDON CJ, SIR TERENCE ETHERTON MR & DAME  
VICTORIA SHARP P**

**AND ON APPEAL FROM THE INNER HOUSE OF THE COURT OF SESSION  
THE LORD PRESIDENT; LORD BRODIE & LORD DRUMMONG YOUNG**

**NEUTRAL CITATION: [2019] CSIH 49**

BETWEEN:

AND BETWEEN:

THE QUEEN

(on the application of GINA MILLER)

JOANNA CHERRY MP QC AND OTHERS

*Claimant/Appellant*

*Petitioners/Respondents*

-and-

-and-

THE PRIME MINISTER

THE ADVOCATE GENERAL FOR SCOTLAND

*Defendant/Respondent*

*Respondent/Appellant*

-and-

(1) THE LORD ADVOCATE

(2) THE COUNSEL GENERAL FOR WALES

(3) RAYMOND McCORD

(4) RT HON. SIR JOHN MAJOR KG CH

(5) BARONESS CHAKRABARTI CBE PC

(6) THE PUBLIC LAW PROJECT

*Interveners*

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**THE PRIME MINISTER AND ADVOCATE GENERAL FOR SCOTLAND'S  
NOTE ON THE EFFECT OF PROROGATION ON LEGISLATION**

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**INTRODUCTION**

1. This note is filed by the Prime Minister and the Advocate General for Scotland, in response to questions from the Court, to set out the effect of the prorogation on the passage of Government legislation through Parliament and the scrutiny of Statutory Instruments

(“SIs”) made in connection with the UK’s exit from the EU under the European Union (Withdrawal) Act 2018 (EUWA).

## **GOVERNMENT BILLS**

2. At the point that prorogation occurred on 9 September 2019, there were 15 Government Bills progressing through Parliament. Three were carried over: the Birmingham Commonwealth Games Bill (First House, Report stage), the Sentencing (Pre-consolidation Amendments) Bill (First House, Report stage) and the High Speed Rail (West Midlands – Crewe) Bill (Second House, Second Reading). The remaining twelve fell. They are listed, together with the stage they had reached, in the Annex to this Note.
3. In paragraph 5 of his second witness statement, Dr Joe Tomlinson (for the Sixth Intervener, the Public Law Project) suggests that “*all Brexit Bills from the last Parliamentary session have fallen*” [Miller SC Bundle, tab 11, electronic p.265]. In so far as that statement suggests that *all* Brexit-related Bills from the last parliamentary session fell at prorogation, that is not correct.
4. In the last parliamentary session, eleven Brexit-related bills, dealing with different scenarios, were introduced. Six Brexit-related Bills received Royal Assent. These were:
  - (1) The European Union (Withdrawal) Act 2018;
  - (2) The Sanctions and Anti-Money Laundering Act 2018;
  - (3) The Nuclear Safeguards Act 2018;
  - (4) The Haulage Permits and Trailer Registration Act 2018;
  - (5) The Taxation (Cross-border Trade) Act 2018; and
  - (6) The Healthcare (European Economic Area and Switzerland Arrangements) Act 2019.
5. Five Brexit-related Bills did not receive Royal Assent before the end of the parliamentary session:
  - (1) The Agriculture Bill;
  - (2) The Financial Services (Implementation of Legislation) Bill;
  - (3) The Fisheries Bill;

- (4) The Immigration and Social Security Co-ordination (EU Withdrawal) Bill; and
- (5) The Trade Bill.
6. It is not necessary for any of these five Bills to receive Royal Assent by 31 October, even in a no-deal scenario. The Government would propose to introduce the necessary legislation in the next session. A variety of measures have been introduced, or are already available, that may be relied on in these areas. For example:
- (1) In the area of fishing, the Sea Fish Licensing (England) (EU Exit) Regulations 2019, along with equivalent legislation for Scotland, Wales and Northern Ireland, prohibits fishing in UK waters by a foreign fishing boat unless authorised by the UK authorities. Instead of relying on retained EU law, the UK will use domestic law to control access to UK waters.
  - (2) In the area of trade, the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 provide the Department for International Trade with the powers necessary to establish the Trade Remedies Investigations Directorate within the Department. The Regulations give the Secretary of State for International Trade the relevant powers until primary legislation establishes the Trade Remedy Authority as an independent body.
  - (3) In the immigration area, the Immigration Acts may be applied.
7. The Government considers that the necessary Brexit-related primary legislation is already in place for dealing with a no-deal scenario on 31 October 2019.

#### **EXIT-RELATED STATUTORY INSTRUMENTS AND PROROGATION**

8. The Government is, and has for a considerable period, been alive to the need to ensure that the statute book is prepared for exit from the EU and has taken extensive steps to achieve that result. The Government has also acted to ensure that the subordinate legislation necessary to achieve that result is scrutinised by each House of Parliament in accordance with the EUWA. The result is that, as appears below, the necessary SIs either are already or will be in place in the event of an exit on 31 October; and either have been or will be the subject of scrutiny in the manner Parliament has decided is appropriate. There will be no ‘irremediable’ (to use the concern expressed by Lord Lloyd-Jones) scrutiny deficit.

9. To date, the Government has made over 600 statutory instruments, the majority of which have been under EUWA, to prepare the UK for leaving the EU in any scenario. Had the UK left the EU on 12 April 2019, all the necessary regulations would have been made to ensure a functioning statute book at that date. This was achieved in almost all cases, without use of the urgent procedure under §5 of schedule 7 to EUWA. The vast majority of these instruments were subject to affirmative or negative parliamentary scrutiny, including the extensive “*sift requirements*”, pursuant to §3 of schedule 7 to EUWA. These requirements only apply to SIs under ss.8, 9 and 23(1), for which the Government proposes to use the negative procedure.
10. EUWA also contains a procedure for making SIs on an urgent basis (which is conveniently set out at §11 of PLP’s written case). There are two parts to the urgent procedure in the EUWA:
  - (1) The “*made-affirmative*” procedure. This procedure ensures there is a debate. It is contained in §5(4) of schedule 7 to EUWA.
  - (2) The “*made-negative*” procedure without sifting. This allows the Government to put aside the sifting process which Parliamentary Committees perform, as required by the EUWA. This is contained in §5(7)-(8) of schedule 7 to EUWA.
11. Parliament did not impose any requirement that it sit when urgent SIs are made under the EUWA, in contrast to the position, for example, in respect of emergency regulations under the Civil Contingencies Act 2004. The EUWA expressly contemplates that Parliament may be prorogued when urgent subordinate legislation is made: see §5(5)(a) of schedule 7. Parliament has thus itself spelt out what the consequences should be: namely that urgent legislation will cease to have effect unless approved by a resolution of each House within 28 days (which does not include any period of adjournment of either House longer than four days, prorogation or dissolution): §5(4). That represents Parliament’s policy choice.
12. Before the extension in April 2019, 10 SIs were made using the urgent, made-affirmative procedure under the EUWA. No SIs were made using the urgent, made-negative procedure. The urgent procedure was thus also used while Parliament was in session.
13. The Government is well prepared for departure on 31 October 2019. A small number of further SIs are required in the event of exit on that date. In some cases, this will require the use of the urgent procedure. The Government is only using the urgent, made-affirmative

procedure for the limited number of SIs which are considered critical for day one of Exit. In September 2019, the Government used the urgent, made-affirmative urgent procedure 11 times. Approximately 35 further SIs are planned to be laid under this procedure in October.

14. The vast majority of the SIs which will be made under the urgent procedure could not have been laid or made earlier as they account for changes to EU law made during the extension period. In many cases, these changes have been made recently and, as such, there has been very limited time to respond to them. The SIs are, in many cases, of a technical character.
15. All SIs made under the urgent procedure will be debated, given the Government's decision to use the "*made affirmative*" procedure rather than the made-negative procedure, enabling greater parliamentary scrutiny. As a result, such statutory instruments *must be* debated and approved within 28 days (not including any period of prorogation); otherwise the statutory instrument falls. Thus the use of the urgent procedure does not prevent debates from taking place ahead of Exit Day. The scheduling of debates is subject to agreement in the usual parliamentary channels, and is not entirely within the Government's gift. However, where usual channel agreement is forthcoming, there is no reason these instruments cannot be debated before 31 October. All of these instruments will be debated in any event or lapse in accordance with the terms of EUWA.
16. The Government's position is consistent with the commitments made to Parliament and to the relevant scrutiny Committees since the EUWA was passed, going further than the requirements of that Act to assist Parliament in its scrutiny. For example:
  - (1) All recommendations made by the sifting Committees have been followed and proposed negative statutory instruments have been changed and laid as affirmatives where one or both sifting Committees have recommended this;
  - (2) The Leader of the House of Commons and the lead EU Exit Minister have kept the Committees up to date as far as possible on the Exit SI programme, including, for the first time ever, providing projections of the number of SIs to be laid; and
  - (3) The Committees were notified that the Government intended to use the urgent procedure for the limited number of SI critical to be in force for day one and where it was necessary to provide certainty to the public and businesses.

**THE RT HON. LORD KEEN OF ELIE QC**  
**ANDREW WEBSTER QC**

*For Advocate General for Scotland*

*19 September 2019*

**SIR JAMES EADIE QC**  
**DAVID BLUNDELL**  
**CHRISTOPHER KNIGHT**  
**RICHARD HOWELL**

*For the Prime Minister*

## **ANNEX**

### **Agriculture Bill**

Introduced: 12 September 2018

Stage reached: Completed Committee stage in the House of Commons (First House)

### **Animal Welfare (Sentencing) Bill**

Introduced: 26 June 2019

Stage reached: Completed Committee stage in the House of Commons (First House)

### **Courts and Tribunals (Online Procedure) Bill**

Introduced: 1 May 2019

Stage reached: Completed Committee stage in the House of Commons (Second House)

### **Census (Return of Particulars and Removal of Penalties) Bill**

Introduced: 1 May 2019

Stage reached: Completed Second Reading in the House of Commons (Second House)

### **Divorce, Dissolution and Separation Bill**

Introduced: 13 June 2019

Stage reached: Completed Committee stage in the House of Commons (First House)

### **Domestic Abuse Bill**

Introduced: 16 July 2019

Stage reached: Completed First Reading in the Commons (First House)

### **Financial Services (Implementation of Legislation) Bill**

Introduced: 22 November 2018

Stage reached: Completed Committee stage in the House of Commons (Second House)

### **Fisheries Bill**

Introduced: 25 October 2018

Stage reached: Completed Committee stage in the House of Commons (First House)

### **Immigration and Social Security Co-ordination (EU Withdrawal) Bill**

Introduced: 20 December 2018

Stage reached: Completed Committee stage in the House of Commons (First House)

### **Non-Domestic Rating (Lists) Bill**

Introduced: 12 June 2019

Stage reached: Completed First Reading in the House of Lords (Second House)

### **Non-Domestic Rating (Public Lavatories) Bill**

Introduced: 18 June 2019

Stage reached: Completed Second Reading in the House of Lords (First House)

### **Trade Bill**

Introduced: 7 November 2017

Stage reached: Completed Third Reading in the House of Lords (Second House)