IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2019/0192**
on appeal from
THE HIGH COURT OF JUSTICE **CO/3385/2019**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
B E T W E E N

R (on the application of GINA MILLER)

Appellant

- v -

THE PRIME MINISTER

Respondent

THE LORD ADVOCATE
THE COUNSEL GENERAL FOR WALES
THE RT HON SIR JOHN MAJOR
RAYMOND MCCORD
BARONESS SHAMI CHAKRABARTI
THE PUBLIC LAW PROJECT

Interveners

REPLY ON BEHALF OF THE PUBLIC LAW PROJECT

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1. PLP[1] hereby briefly replies to the Respondent's response to PLP's intervention at §§21-25 of his written response dated 17 September 2019 (the "**Response**").

2. First (**Response §21**), the Respondent alleges non-justiciability. PLP relies upon the Appellant's submissions as to justiciability, but avers (for the reasons at **Intervention §31**) that its intervention raises no concerns of justiciability.

3. Second (**Response §22**), the Respondent asserts that he had "*regard to parliamentary scrutiny of EU withdrawal*", because the Cabinet Minutes of 28 August 2019 stated that "*[t]here should be time allowed for other Exit-related parliamentary business*". This does not address PLP's argument, as it is plain from the use already made of the urgency procedure that there will be no time to debate the use of powers under section 8 of the 2018 Act, so no time is being "*allowed*". In fact, there is no evidence that the Respondent was duly cognisant of the fact that the inevitable effect of his advice to prorogue Parliament for five weeks was that the Executive would be forced, due to loss of time, to legislate without the special form of Parliamentary scrutiny Parliament itself devised for section 8. In a period when substantial section 8 legislation amending Acts of Parliament was required to maintain legal coherence in a "No Deal" scenario, the Respondent had no regard to the need (i) to avoid creating, and/or (ii) to minimise the

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[1] Defined terms from PLP's Intervention submissions are adopted here.

duration of, an unnecessary and self-induced state of "urgency" such as to deprive Parliament of its scrutiny function over "Henry VIII" powers. Such consideration played no part whatsoever in any of the papers before the Court leading up to or documenting the advice under challenge.

4. Indeed, on 2 September 2019, Thangam Debbonaire MP asked the Secretary of State for Environment, Food and Rural Affairs "*what estimate he has made of the number of Statutory Instruments (a) laid and (b) proposed by his Department in relation to the UK leaving the EU will be debated before 10 September 2019*". The answer, on 9 September 2019, was simply that "*It has not proved possible to respond to the hon. Member in the time available before Prorogation*".[2] On 5 September 2019, Caroline Lucas MP asked the Secretary of State for Exiting the European Union "*how many Statutory Instruments will not have been enacted in the event that the UK exits the EU on 31 October*".[3] The question has not been answered.

5. Third (**Response §23**), the Respondent denies that the public law concept of mandatory relevant considerations has any application to the prorogation prerogative, because "*it is not a statutory power conferred on the executive*". However, as Lord Hoffmann held in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61 at [35], the exercise of the prerogative is "*subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action*". "Legality" must, in the context of prerogative powers, connote the Court policing the boundaries of the lawful power set by common law, by reference to the effects, function and rationale for the prerogative power, as divined or inferred in part using reasoning from prior or higher constitutional principle. This in turn informs the identification of relevant and irrelevant considerations.

6. The alternative advocated for by the Respondent before this Court – namely that there can be no legal yardstick to assess whether a purpose is proper or a consideration (ir)relevant outside of a statutory scheme – would denude the Courts' ability to review the exercise of the prerogative. Instead, the Courts have recognised the ability to review the exercise of prerogative power, absent a statutory scheme, as to whether the Executive had regard to relevant considerations. See, for example, the judgment of the

[2]https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-09-02/285329/

[3]https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-09-05/287553/

Divisional Court in R (Bentley) v Secretary of State for the Home Department [1994] QB 349 (in relation to the prerogative of mercy), where the Court remitted the exercise of the prerogative to the Home Secretary because "*we are far from satisfied that he gave sufficient consideration to his power to grant some other form of pardon which would be suitable to the circumstances of the particular case*" (at 365E).

7. If the Court accepts that the use of prerogative powers is bounded by the requirement to protect Parliamentary sovereignty (in all of its various forms), a relevant consideration must be the effect of the proposed exercise of the prerogative upon such sovereignty, and upon the capacity and function of Parliament. Such effect might be upon Parliament's own legislative output, its function in debate and calling the Executive to account, and/or its function in approving or scrutinising delegated legislation that amends primary legislation. One does not need a statutory scheme to identify mandatory relevant considerations – the nature of the prerogative power and its constitutional limits dictate the relevant mandatory considerations. That said, once Parliament has itself prescribed the nature of the enhanced scrutiny it requires of section 8 legislation, as it has in Schedule 7 to the 2018 Act, such is then central to assessment of the 'cost' (in terms of lost scrutiny caused by a lengthy period of prorogation prompting or extending a period of "urgency") that must be taken into account and for which there must be some form of countervailing reason.

8. Fourth (**Response §24**), the Respondent alleges that "*during prorogation, affirmative instruments cannot be made*". This is wrong (and the fact that such an error is advanced further undermines the legality of the advice). 'Draft' affirmative instruments cannot be laid during prorogation (because Parliament does not sit), but – crucially – under the urgency procedure, affirmative instruments can be simply 'made' with no Parliamentary input, and already this month 11 have been so made: **JT2 §§9, 11, 13, 18**. Paragraph 5 of Schedule 7 to the 2018 Act provides that, in urgent cases, instruments which would otherwise be mandatorily subject to the draft affirmative procedure, or which would have been laid as such (whether or not after the 'sifting' process), may be made as affirmative instruments. In such circumstances, they are laid before Parliament after being made and debated only subsequently, in all likelihood once they are already in force – see **Intervention §27.1**. The benefit of the 'sift' process will also be entirely lost.

9. Finally (**Response §25**), the Respondent states that the 2018 Act expressly contemplates the potential use of the urgency procedure during prorogation. However, PLP's case is not that Parliament failed to contemplate the possibility of the urgency procedure being used during a period when Parliament is prorogued. Rather, PLP's case is that the Respondent's advice to prorogue for five weeks at this particular time (when substantial legislative activity was required for an orderly Brexit) had no, alternatively no due, regard for the loss of Parliamentary scrutiny thereby caused: the inevitable and unnecessary creation of the situation of self-induced urgency in which the Executive would need to legislate absent Parliamentary scrutiny (**Intervention §§18, 23-31**).

10. Furthermore, it is no answer to rely on the fact that any prorogation of Parliament always leads to some period of reduced Parliamentary scrutiny. The relevant consideration to which the Respondent failed to have regard was the specific loss of Parliamentary scrutiny inevitably effected in these particular circumstances, caused by a prorogation of substantial duration over a period requiring significant legislative activity in order to be prepared for an orderly no-deal Brexit by what was, on the Government's own case, a fixed and loudly ticking clock, namely exit by 31 October 2019. Prorogation eliminated five weeks of the available eight for Parliamentary scrutiny (as well as other as or more important Parliamentary functions) and created a situation of urgency where statutory instruments could be simply made, amending or repealing primary legislation (or EU measures deemed equivalent) – a constitutionally suspect exercise requiring close Parliament scrutiny. Importantly, if Parliament had simply gone into recess for the conference season, without being prorogued, this important scrutiny activity could have continued, as the relevant committees would have been sitting. There had to be regard to this effect of such a lengthy prorogation, and there was not.

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ALISON PICKUP
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17 September 2019