Claim No: CO/3385/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN
on the application of
GINA MILLER

Claimant

- and -

THE PRIME MINISTER

Defendant

- and -

(1) BARONESS CHAKRABARTI (SHADOW ATTORNEY GENERAL)
(2) COUNSEL GENERAL FOR WALES
(3) THE RIGHT HONOURABLE SIR JOHN MAJOR
(4) THE LORD ADVOCATE

Intervenors

SKELETON ARGUMENT FOR THE CLAIMANT

I. INTRODUCTION

1. This claim challenges the decision of the Prime Minister taken on 28 August 2019 to advise Her Majesty the Queen to prorogue Parliament. The Claimant seeks a declaration that the decision was unlawful. The effect of such a declaration is that the Order in Council would also be invalid and could be quashed.[1] The Prime Minister has however accepted, in his Detailed Grounds of Resistance dated 2 September 2019 ("DGR"), that, "*if … the advice was unlawful, the Prime Minister will take the necessary*

[1] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] EWCA Civ 498; [2008] QB 365 at [114]-[116] (Clarke MR), also [34]-[35] (Sedley LJ), [87]. See paragraph 44(2) below.

steps to comply with the terms of any declaration made by the court" and that a quashing order would therefore not be necessary (at [60]).

2. The Order in Council provides that Parliament be prorogued by Commission on a day no earlier than 9 September 2019 and no later than 12 September 2019, until Monday 14 October 2019. The length of prorogation is a period of five weeks, far longer than any modern prorogation period between Parliamentary sessions (which is normally a period of a few days) and far longer than is necessary to close one Parliamentary session and open another. The prorogation is timed to occur at a period of acute political crisis, with the UK scheduled to leave the European Union ("Brexit") on 31 October 2019 but with no agreement having been concluded between the UK and the EU on the terms of its withdrawal.

3. The Claimant submits that the effect of the prorogation, when time is of the essence in the lead up to the 31 October 2019 deadline, has the effect of seriously impeding the exercise of Parliament's functions, as the Prime Minister well knew. There is no justification for closing Parliament in this way and, accordingly, it represents an unjustified undermining of Parliamentary sovereignty which is the bedrock of our constitution.

4. Whilst the Prime Minister has a broad discretion in proroguing Parliament, the power cannot be exercised when its effect is seriously to impede Parliament from exercising its sovereign power. Moreover, it is clear in this case that the Prime Minister's decision has been substantially influenced by a wholly extraneous and improper consideration, namely, that Parliament will be hindered in enacting legislating requiring the Prime Minister to take steps to prevent the UK leaving the EU without a withdrawal agreement, which is legislation the Prime Minister does not want enacted, and from holding the Government to account. Indeed, there would be no possibility of any legislative activity in the period in which Parliament stood prorogued.

5. The Prime Minister's decision turns the UK's constitutional norms on their head because under the UK constitution Parliament is supreme and the Government is subject to, and accountable to, Parliament. By his decision to prorogue Parliament the Prime Minister is asserting the supremacy of the executive over Parliament.

6. Whilst the Prime Minister has raised a number of arguments as to why the court should find that the decision under challenge is non-justiciable, which for reasons explained below are without merit, the Prime Minister has not suggested that this is because he is accountable to Parliament. This is because:

   (1) It is well-established that political accountability to Parliament does not affect the duty of the court to review executive action to ensure it is not contrary to legal principles (e.g. *R v Home Secretary v ex parte Fire Brigades Union* [1995] 2 AC 513 at 572E-H (Lord Lloyd)).

   (2) Moreover, by long-standing convention, any bill which seeks to limit the exercise of a prerogative power, including the power of prorogation, requires the consent of the Crown, which is given or withheld on the advice of Ministers.[2]

7. The Prime Minister's decision to advise Her Majesty to prorogue Parliament is therefore an abuse of power and beyond the proper constitutional limits of the common law prerogative of prorogation.

II. URGENCY AND TIMING OF THE DECISION

8. The Claimant and the Prime Minister have been engaged in pre-action correspondence on the issue of the legality of prorogation since 11 July 2019, when the Claimant first wrote to Mr Johnson when he was a candidate for the leadership of the Conservative Party.

9. Despite this protracted period of correspondence, and despite the Claimant having made requests for notice of any decision to prorogue so as to lessen the urgency of legal proceedings, no notice was given to the Claimant and, moreover, the Prime Minister made no public statements of his intent. On the contrary, at about 4pm on 27 August 2019, the day before the Prime Minister tendered his advice to Her Majesty, the Government Legal Department wrote to the Claimant re-emphasising the Prime Minister's position that the threatened legal claim was entirely academic.

[2] *Erskine May Parliamentary Practice* (25th ed, 2019) at [30.79].

10. The following morning it was reported that the Prime Minister had advised Her Majesty to prorogue Parliament. Upon hearing this news, the Claimant wrote to the Palace requesting a delay before the Prime Minister's advice was acted upon in order to enable the courts to consider the issue. However, the Order in Council had already been made at Balmoral earlier that morning, at a meeting of the Privy Council attended by the Rt Hon Jacob Rees-Mogg, The Rt Hon Baroness Evans of Bowes Park and the Rt Hon Mark Spencer.

11. In short, the Claimant has made reasonable efforts to avoid the extreme urgency of the court resolving the issue which now arises. The Prime Minister has not cooperated with those efforts. On the contrary, the Prime Minister maintained the secrecy of his intentions to prorogue Parliament from everyone, until after the Order in Council had been made.

12. These proceedings were issued on the same day that the advice was tendered, requesting an urgent determination of the legality of the Prime Minister's actions.

III. FACTUAL CONTEXT

13. On 29 March 2017 the UK gave notice of its intention to withdraw from the European Union pursuant to the process set out in Article 50 of the Treaty on European Union ("TEU"), which provides as follows:

> "1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
>
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament."

14. The consequences of such notification are specified in Article 50(3):

"The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

15. Following two extensions of the two year period specified in Article 50(3), the UK is now due to leave the EU on 31 October 2019.

16. It is open to the UK to request a further extension, although it cannot require that an extension is granted. The Court of Justice of the European Union has also held that a State has a unilateral right to withdraw notification under Article 50 at any time up to the date at which it leaves the EU (*Wightman v Secretary of State for Exiting the European Union (C-621/18)* EU:C:2018:999; [2019] QB 199.

17. Despite a withdrawal agreement having been negotiated between the Government of the former Prime Minister Theresa May and the European Council under Article 50(2), House of Commons refused to consent to that agreement, as required by section 13 of the European Union (Withdrawal) Act 2018.

18. Furthermore, the House of Commons has made clear its position that it opposes the UK leaving the EU without there being in place a withdrawal agreement under Article 50:

    (1) On 29 January 2019, the House passed amendments to a motion moved by the then Prime Minister stating that it rejected, "*the United Kingdom leaving the European Union without a Withdrawal Agreement and a Framework for the Future Relationship*" **[___]**.

    (2) On 13 March 2019, the House passed an amended motion in the following terms. "*That this House rejects the United Kingdom leaving the European Union without a Withdrawal Agreement and a Framework for the Future Relationship*" **[___]**.

19. On 8 April 2019 a Bill proposed by Mr Oliver Letwin MP and Ms Yvette Cooper MP was enacted by Parliament as the European Union (Withdrawal) Act 2019. The Bill was opposed by the Government and the then Prime Minister Theresa May.

20. The Act provides in section 1(1) that a Minister must move a motion in the House agreeing to the Prime Minister seeking an extension of the period specified in Article 50(3) of the TEU. It also provided in section 1(4) that, if the motion was agreed without amendment, the Prime Minister "*must seek an extension of the period specified in Article 50(3) of the Treaty on European Union to a period ending on the date included in that motion.*"

21. Further provision was made for the seeking of an extension in circumstances in which the motion was approved in amended form by the House.

22. Following these events, on 24 May 2019 the then Prime Minister Theresa May announced her resignation as leader of the Conservative Party. Mr Johnson won the leadership contest which followed and he was appointed Prime Minister on 24 July 2019.

23. The Prime Minister's Government is a minority Government. Conservative Party MPs do not constitute a majority of members of the House of Commons. A "confidence and supply agreement" with the Democratic Unionist Party gives the two parties an overall working majority of 1 MP in the House of Commons.

24. The Prime Minister has made clear his position on a number of occasions that the UK will now exit the EU on 31 October 2019 and no further extension of the exit period under Article 50 will be sought by the Government. He has said, for example, that the UK will exit on this day, "*do or die, come what may*" **[___]**.

25. During his campaign for the leadership of the Conservative Party, the Prime Minister repeatedly refused to rule out advising Her Majesty the Queen to prorogue Parliament in order to prevent it sitting in the period leading up to 31 October 2019 as a means of preventing Parliament from requiring the Government to seek a further extension or revoke its notification under Article 50. Examples are provided in the witness statement of Ms Miller at paragraph 13 **[___]**.

26. On 26 August 2019, in an interview following the G7 summit, the Prime Minister again declined to rule out proroguing Parliament as a strategy to avoid MPs thwarting his Brexit strategy **[___]**.

27. Notably the Prime Minister made no mention of his intended new legislative programme in any public comments. Nor was there any reference made to such a programme in *inter partes* correspondence in this claim.

28. On 27 August 2019 it was widely reported in the press that MPs opposed to withdrawal from the EU without a withdrawal agreement had agreed a strategy to enact legislation imposing obligations on the Government. The details of the strategy were being kept confidential in order to try to prevent the Prime Minister from frustrating such steps **[__]**.

29. On 28 August 2019 the Prime Minister issued a press release which stated that he had advised Her Majesty the Queen to prorogue Parliament **[___]** from the second sitting week in September to 14 October 2019. He later published a letter that was sent to all MPs **[___]**. These documents asserted that he had advised the Queen to prorogue Parliament in order to introduce a new legislative programme to Parliament at a Queen's Speech to take place on 14 October 2019.

IV. THE PROROGATION OF PARLIAMENT

30. The power to prorogue Parliament is a prerogative power. As with all prerogative power, it is a common law power. By convention, Her Majesty the Queen exercises the power on the advice of her Privy Council. In recent times the advice of the Privy Council has been given by the Prime Minister acting *qua* Privy Counsellor.

31. Prorogation brings to an end the proceedings in both Houses of Parliament and ends a Parliamentary session. Unless Parliament is also dissolved for a General Election to take place (the timing of which is now governed by the Fixed-term Parliaments Act 2011) prorogation typically lasts for a few days. It is unnecessary for it to last any longer.

32. As stated in a House of Commons Library Briefing Paper Number 8589, 11 June 2019:

> "**Length of prorogation in the UK**
>
> The typical recent duration of a UK Parliament's prorogation has been very short. Since the 1980s prorogation has rarely lasted longer than two weeks (and, between sessions during a Parliament, has typically lasted less than a week)." (pages 3-4 **[___]**)

33. The Briefing Paper also states: "*In the last 40 years Parliament has never been prorogued for longer than 3 weeks: in most cases it has been prorogued for only a week or less."* (para. 2.3, page 7).

34. The length of prorogations between sessions (excluding dissolutions) since 1980 has been as follows: 5 days in 2016, 20 days in 2014, 12 days in 2013, 7 days in 2012, 5 days in 2009, 9 days in 2008, 15 days in 2007, 6 days in 2006, 4 days in 2004, 4 days in 2003, 2 days in 2002, 5 days in 2000, 5 days in 1999, 4 days in 1998, 5 days in 1996, 6 days in 1995, 12 days in 1994, 12 days in 1993, 7 days in 1991, 5 days in 1990, 4 days in 1989, 6 days in 1988, 4 days in 1986, 5 days in 1985, 5 days in 1984, 5 days in 1982, 4 days in 1981, and 6 days in 1980. The 20 day prorogation in 2014 was to accommodate European Union elections.

35. While Parliament is prorogued, MPs and Peers cannot debate government policy and legislation in Parliament. Motions set down and orders made for business to be considered on future days fall at prorogation. Parliament, in short, is closed and previous business ends.

36. The prorogation of Parliament involves Her Majesty making an Order in Council several sitting days before the prorogation itself takes place. The Order requires a Commission to be convened to prorogue Parliament on Her Majesty's behalf. It identifies a range of days within which prorogation must commence and specifies the date on which it must end.

37. By proclamation, Her Majesty can reconvene Parliament sooner or, alternatively, extend the period of prorogation. The Meeting of Parliament Act 1797 allows a

proclamation shortening the period of prorogation to be effective without the need for a Commission to be convened:[3]

"**1. His Majesty may issue his Proclamation for the meeting of Parliament in not less than 14 Days from the Date.**

Whenever his Majesty, his heirs or successors, shall be pleased, by and with the advice of the Privy Council of his Majesty, his heirs or successors, to issue his or their royal proclamation, giving notice of his or their royal intention that Parliament shall meet and be holden for the dispatch of business on any day after the date of such proclamation, the same shall be a full and sufficient notice to all persons whatever of such the royal intention of his Majesty, his heirs and successors, and the Parliament shall thereby stand prorogued to the day and place therein declared, notwithstanding any previous prorogation of the Parliament to any longer day, and notwithstanding any former law, usage or practice to the contrary. "

38. The Order in Council in the present case provides as follows **[___]**:

"At the Court at Balmoral

THE 28th DAY OF AUGUST 2019

PRESENT,

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

It is this day ordered by Her Majesty in Council that the Parliament be prorogued on a day no earlier than Monday the 9th day of September and no later than Thursday the 12th day of September 2019 to Monday the 14th day of October 2019, to be then holden for the despatch of divers urgent and important affairs, and that the Right Honourable the Lord High Chancellor of Great Britain do cause a Commission to be prepared and issued in the usual manner for proroguing the Parliament accordingly."

39. The effect of prorogation on 9 September 2019 would be to close Parliament for 34 calendar days, resulting in the loss of 19 ordinary sitting days. The number of sitting days lost will be considerably more if Parliament sits on Fridays or weekends.

40. Moreover, Private Members' bills not passed by the end of a session will lapse. Unlike government bills, the House Standing Orders allow for such bills to be "carried over" into the next session (SO 80A). The House of Commons usually adjourns for a period

[3] The Prorogation Act 1867 sets out a procedure for extending a period of prorogation for at least fourteen days where Parliament has been dissolved or prorogued.

in September but this is a matter for the House itself to decide: *Erskine May* at [17.15-16].

V. ABUSE OF POWER

41. These submissions firstly explain the legal basis for the court's review of the decision to advise Her Majesty to prorogue Parliament. Secondly, they explain the core constitutional principle of Parliamentary sovereignty that is engaged. Thirdly, in the light of those submission, it is explained why decision constitutes and abuse of power requiring this court to intervene.

i. Justiciability

42. The exercise of prerogative power in this case is, in substance, taken by the Prime Minister. The Prime Minister's decision is accordingly justiciable and amenable to judicial review with the consequence that, if it is unlawful, the Order in Council is also unlawful. Case law supports these propositions.

43. First, case law establishes that prerogative powers are justiciable: the source of power is legally irrelevant to justiciability. This was established by the House of Lords' decision in *Council of Civil Service Unions v Minister for the Civil Service* ("*GCHQ Case*") [1985] AC 374. Following the *GCHQ Case*, review of prerogative powers is no longer limited to ascertaining whether the prerogative power exists and determining its extent. Lord Scarman held *"this limitation has now gone, overwhelmed by the developing modern law of judicial review"* (p. 407D-E). Lord Diplock held that because a power is derived from the common law prerogative it is not for that reason immune from the ordinary grounds of judicial review (pp. 410C-411H). Lord Roskill held that there was no logical reason to regard the fact that the source of the power was the prerogative as affecting the legal issue (p. 417G-H).

44. Second, case law also establishes that the fact that the power is exercised in the form of an Order in Council made by Her Majesty the Queen on the advice of the Privy Counsel does not affect the justiciability of the prerogative power. The law on this point is now equally clear and well-settled:

(1) In the *GCHQ Case* itself, the decision of the Prime Minister had been taken under the terms of an Order in Council made on advice of the Prime Minister. Lord Scarman, Lord Diplock and Lord Roskill each reasoned that all powers, whatever their formal nature, are subject to judicial review, which included the Order in Council itself.[4] Lord Roskill stated in respect of prerogative powers formally exercised by the Queen, but done on advice of Ministers, as follows:

> "To speak today of the acts of the sovereign as "irresistible and absolute" when modern constitutional convention requires that all such acts are done by the sovereign on the advice of and will be carried out by the sovereign's ministers currently in power is surely to hamper the continual development of our administrative law by harking back to what Lord Atkin once called, albeit in a different context, the clanking of mediaeval chains of the ghosts of the past …"

(2) Applying the reasoning of Lord Roskill, Lord Diplock and Lord Scarman, the Court of Appeal and Supreme Court in *R (Bancoult) v Secretary of State for Foreign Affairs (No 2)* held that Orders in Council made on ministerial advice are amenable to judicial review in the same way as other prerogative acts. See in the Court of Appeal [2007] EWCA Civ 498; [2008] QB 365 per Sedley LJ at [33]-[36], Waller LJ at [87]-[89] & Sir Anthony Clarke MR at [114]-[118]. See in the House of Lords [2008] UKHL 61; [2009] 1 AC 453 per Lord Hoffmann at [35], Lord Bingham at [71], Lord Rodger at [105], Lord Carswell at [122] & Lord Mance at [141]. See also *R (Barclay) v Lord Chancellor (No 2)* [2014] UKSC 54; [2015] AC 276.[5]

(3) Baroness Hale referred to these authorities in *Mohammed (Serdar) v Minister of Defence* [2017] UKSC 1; [2017] AC 649, stating that "*the exercise of prerogative powers, including prerogative legislation in the form of an order in council, has not enjoyed any general immunity from judicial scrutiny*" (at p. 805A-D, [56]; Lord Wilson and Lord Hughes JJSC agreed).

[4] Lord Fraser and Lord Brightman left this question open (p. 398G, pp. 423H-424A).

[5] In the Supreme Court the Government put their case differently from the Court of Appeal, contending that the Orders in Council at issue were akin to primary legislation and non-justiciable for this reason. The Court rejected this argument.

45. Third, in granting a prorogation, the Queen must follow the advice of her Ministers. The Queen has no discretion to refuse prorogation as to do so would necessarily bring her into constitutional controversy, which above all must not occur. Thus:

(1) In Barclay, Baroness Hale stated: "*The Queen never acts except on the advice of a government minister who is responsible to the legislature (save in the rare case where she may have to choose a Prime Minister).*" (at [52]; see also Bancoult, CA, at [87] per Waller LJ).

(2) *The Cabinet Manual* states at p. 16, [2.24]: "*It is the Sovereign who prorogues Parliament on the advice of his or her ministers*." (emphasis supplied)

(3) Constitutional law texts make clear that Her Majesty must follow the advice of Her Ministers in proroguing Parliament. The Queen's role is limited: to be informed, to counsel and to warn: see RFV Heuston, *Essays in Constitutional Law* (2nd ed, 1964) at pp. 75-81; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (16th ed, 2014) at pp. 242-248; C Turpin and A Tomkins, *British Government and the Constitution* (7th ed, 2011) at pp. 379-386; H. Street and R. Brazier *Constitutional and Administrative Law: de Smith* (5th ed, 1985) at pp. 127-134; HWR Wade & CF Forsyth, *Administrative Law* (11th ed, 2014) at p. 35.

(4) Furthermore, as a matter of fact it is clear that the decision to prorogue Parliament was taken by the Prime Minister, and the Queen had a merely formal role.[6] On 29 August 2019 Mr Rees Mogg, Lord President of the Privy Counsel, described the how the Queen merely formally approved a request to prorogue Parliament at a meeting of the Privy Council. He said it was, "*a Prime Ministerial decision, it's not a decision of the Sovereign…."* (Today, BBC Radio 4 **[___]**).

46. Fourth, whilst the subject matter of the decision is certainly one calling for the courts to "*proceed with caution*", it is not such as to render it immune from judicial review: *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3;

[6] In *Bancoult* the manner in which the Order in Council had actually been made was considered (see CA [2008] QB 365 per Sedley LJ at [16], Waller LJ at [94]-[95] & Sir Anthony Clarke MR at [106], [114]-[115]).

[2016] AC 1457 at [24]. If the decision was immune from judicial review, it would mean that the Prime Minister had entirely unfettered power over Parliament. He could dispense with Parliament for long periods without justification. Whilst the Government has a broad discretion as to the timing of prorogations, that does not mean that the decision to prorogue is not susceptible to judicial review. That would not be consistent with the rule of law:

(1) In the *GCHQ Case* Lord Roskill gave several examples of prerogative acts that might be immune from judicial review on the basis of their subject matter (making treaties, defence of the realm, prerogative of mercy, grant of honours, dissolution of parliament and the appointment of ministers). Lord Roskill did not refer to prorogation as one of these examples (p. 418B).

(2) Lord Roskill does refer to the prerogative to dissolve Parliament but this is a quite different power, and closely bound-up with the choice and appointment of a Prime Minister who has the confidence of the House of Commons (see RFV Heuston, *supra*, pp. 79-80). It is one of the few examples of prerogative powers where it has been suggested the Queen could act contrary to advice: see texts cited in paragraph 45(3) above). Dissolution is in any event now governed by the Fixed-term Parliaments Act 2011 and the prerogative has been replaced by a justiciable legal regime.

(3) Lord Roskill's (obiter) comments have been departed from in later case law: indeed, the main thrust of Lord Roskill's own speech in the *GCHQ Case* was to the effect that administrative law evolves to meet the needs of modern society. Thus, since the *GCHQ Case*, the courts have demonstrated that whilst the Government will be afforded a broad margin of discretion where the subject matter demands this, such as the grant of pardons, foreign affairs and national security, even in such contexts judicial review is available: *R v Secretary of State for the Home Department, ex p. Bentley* [1994] QB 349 (grant of pardons reviewable); *Lewis v Attorney General of Jamaica* [2001] 2 AC 50 (prerogative of mercy); *R v Secretary of State for Foreign and Commonwealth Affairs, ex. p Everett* [1989] QB 811 (refusal of passports); *R (Abassi) v Secretary of State for the Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; [2003] UKHRR 76 (foreign relations/diplomatic representations;

approved by the Supreme Court in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44; [2014] 1 WLR 2697 at [50]ff). In *Youssef*, *supra*, the Supreme Court held that the prerogative power for the conduct of foreign relations in the UN Security Council is capable of being subject to judicial review but courts had to "*proceed with caution*" (Lord Carnwath at [24]) See further Lord Mance, 'International Law in the UK Supreme Court', King's College, London, 13 February 2017, [32]-[33].

(4) These developments reflect the recognition by the courts that executive power cannot be unlimited consistently with the rule of law, certainly not where it has serious consequences for individuals or institutions. Lord Steyn stated in *R (Jackson) v Attorney General* [2005] UKHL; [2006] 1 AC 262, "*[w]e do not in the United Kingdom have an uncontrolled constitution*" ([102]). Lord Hope stated that the rule of law enforced by the courts is the "*ultimate controlling factor on which our constitution is based*" (at [107]). As the Divisional Court stated in *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); [2017] UKSC 5; [2018] AC 61 at [18]:

> "The UK is a constitutional democracy framed by legal rules and subject to the rule of law. The courts have a constitutional duty fundamental to the rule of law in a democratic state to enforce rules of constitutional law in the same way as the courts enforce other laws."

47. There can therefore be no doubt that the prerogative power to prorogue Parliament is amenable to judicial review. The Claimant accepts that the court must proceed with "caution" in such a context and that the Prime Minister has a broad discretion as to the timing of prorogations. Nonetheless, it is a justiciable power and must be to ensure that Government is subject to the rule of law, and subject to ordinary principles of judicial review.

ii. Parliamentary sovereignty

48. Parliamentary sovereignty sits, alongside the rule of law, as the fundamental principle of the UK's constitution. In *Miller* the majority judgment of the Supreme Court stated that *"Parliamentary sovereignty is a fundamental principle of the UK constitution"* (at

[43]). In *Jackson*, Lord Bingham of Cornhill stated that, *"[t]he bedrock of the British constitution is … the supremacy of the Crown in Parliament"* (at [9]).

49. The principle of Parliamentary sovereignty entails the right of Parliament to make any law it sees fit. In *Miller*, sovereignty was held to be: "*the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.*" (at [43] endorsing AV Dicey's description). In the same case, the Master of the Rolls, the Lord Chief Justice and Sales LJ in the Divisional Court, had stated:

> "20. It is common ground that the most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme … Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses." (emphasis supplied)

50. This principle is recognised by the courts because of the democratic credentials of Parliament. Parliamentary sovereignty exists and is upheld in order to uphold democracy. In *Bancoult*, at [35] Lord Hoffmann stated that the principle of the sovereignty of Parliament, as it has been developed over the past 350 years, "*is founded upon the unique authority Parliament derives from its representative character.*" See also *Jackson* at [126] per Lord Hope.

51. The principle of Parliamentary sovereignty also has legal consequences beyond the supremacy of Acts of Parliament. Because Parliament is sovereign and because of its democratic character, the courts recognise Parliamentary privileges (beyond those required by the Bill of Rights 1688): e.g. *R v Chaytor* [2010] UKSC 52; [2011] 1 AC 684. The sovereignty of Parliament is also a core justification for protecting the rights of individuals to access to courts:

> "At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them … Without [access to courts], laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade."

(*R (Unison) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409 at [68] (Lord Reed JSC))

52. A further consequence of Parliamentary sovereignty is that, as has been clear since 1688, the executive is subordinate to Parliament:

    (1) The Government derives its authority to govern only from the authority it derives from Parliament. *The Cabinet Manual* states that Parliament is "*supreme to all other government institutions"* and the "*government of the day holds office by virtue of its ability to command the confidence of the House of Commons*" (at p. 2, [1]-[2]).

    (2) The Government is accountable to Parliament and must act in accordance with legislation:

> "The Crown's administrative powers are now exercised by the executive, i.e. by ministers who are answerable to the UK Parliament. However, consistently with the principles established in the 17th century, the exercise of those powers must be compatible with legislation and the common law. Otherwise, ministers would be changing (or infringing) the law, which, as just explained, they cannot do." (*Miller* at[45])

53. However, Parliament can only exercise its sovereign power to enact primary legislation when it is in session. Between Parliamentary sessions Parliament is suspended and has no powers unless and until the end of the period of prorogation (or unless it is required to reconvene under pre-existing statute): see paragraph 35 above. It follows that Parliament can only exercise its sovereign power when Parliament is sitting.

54. It is for this reason that the Scottish Claim of Right 1689 (one of the statutes identified in *Miller* at [43] as having "*conclusively established*" Parliamentary sovereignty), states that "*for redress of all grievances and for the amending strengthening and preserving of the laws Parliaments ought to be frequently called and allowed to sit and the freedom of speech and debate secured to the members.*" (emphasis supplied)

55. Similarly, the Bill of Rights 1688 states that parliaments ought to be held *"frequently"* for the *"redress of all grievances".*

56. These provisions, of constitutional statutes, demonstrate that the issue raised by this case is a fundamental matter of constitutional law.

iii. Abuse of power

57. The Claimant submits that the effect of the prorogation for a period of five weeks, when time is of the essence in the lead up to the 31 October 2019 deadline, has the effect of seriously and unjustifiably impeding the exercise of Parliament's functions. There is no justification for closing Parliament in this way and, accordingly, it represents an unjustified undermining of Parliamentary sovereignty, which is the bedrock of our constitution.

58. Whilst the Claimant accepts that the Prime Minister has a broad discretion in proroguing Parliament, the power cannot be exercised in a manner that impedes Parliament from exercising its sovereign power:

    (1) Executive power must be exercised in accordance with constitutional principles, unless an Act of Parliament provides clear authority for such action: *R v Secretary of State for the Home Department, ex. p Pierson* [1998] AC 539 per Lord Brown-Wilkinson at p. 575 & Lord Steyn at p. 587; *R (Evans) v Attorney General* [2015] UKSC 21; [2015] AC 1787 at [51]-[52], [58] (Lord Neuberger; Lords Kerr and Reed JJSC agreeing).

    (2) Those constitutional principles include, above all, the sovereignty of Parliament.

    (3) A decision interfering with a constitutional principle should go no further than reasonably necessary to achieve a legitimate objective: e.g. *Unison* at [80]-[82]: "*a degree of intrusion as is reasonably necessary to fulfil the objective*" (Lord Reed JSC).

59. The reason given by the Prime Minister for proroguing Parliament is the desire to bring the long parliamentary session to a close, and to bring forward a legislative programme in a Queen's Speech (see Prime Minister's letter to MPs, 28 August 2019 **[__]**). Closing one parliamentary session and opening another is the purpose of the prerogative power to prorogue Parliament when used in the course of a Parliament. But such reasons do not explain why the Prime Minister has prorogued Parliament for a period that would

be extraordinary in normal times, still more so in the present circumstances where Parliament is faced with a major political crisis where time is of the essence.

60. It is clear from an examination of the way the prerogative power of prorogation has been used in the past that no more than a few days is required to end one Parliamentary session and begin another: see paragraphs 32-34 above.[7] Even allowing for a broad discretion as to the timing and precise length of a prorogation, the advice given by the Prime Minister, which is embodied in the Order in Council dated 28 August 2019, has no reasonable foundation. Put another way, the prorogation is not reasonably necessary to fulfil its stated objective.

61. In the circumstances in which the Order in Council has been made, namely, a period of acute political crisis where Parliament is likely to seek to legislate against the Government's wishes, as it has done already once this year, the impact on Parliamentary sovereignty is extremely grave. Closing Parliament at this time cannot be justified: it exceeds the margin of discretion afforded to the Prime Minister in selecting the timing and precise length of a prorogation for the purpose of commencing a new Parliamentary session.

62. Ultimately, as Lord Donaldson MR held in *R v Panel of Take-overs and Mergers, ex. p Guinness Plc* [1990] 1 QB 146, "*the ultimate question, would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court*" (at p. 160C). This is undoubtedly such a case. The courts must be vigilant to scrutinise a decision to prorogue Parliament for such an exceptionally long period of time. In the present case, the justification for the prorogation is not present.

63. The Claimant submits, secondly, that in this case that the Prime Minister's decision has been substantially influenced by an extraneous and improper consideration. Namely, that Parliament, standing prorogued, will be unable to legislate to require the Prime Minister to take steps to prevent the UK leaving the EU without a withdrawal agreement, which is legislation the Prime Minister does not want to be subject to. The Prime Minister does not want to be subject to such legislation because he considers it

[7] The examination of the purpose and historic usage of prerogative power is a perfectly legitimate and manageable task for a court to perform in ascertaining the scope and purpose of the power (see e.g. *Bancoult*, SC, Lord Bingham at [69] & Lord Mance at [149]).

will weaken his negotiating position with the EU and prevent him from ensuring that the UK leaves the EU on 31 October 2019 "*come what may"*.

64. The fact that this extraneous consideration has been taken into account is clear:

(1) The Prime Minister himself linked the issue of prorogation to accountability for the Government's Brexit strategy in his letter to MPs **[__]**. He stated that the debate on the Queen's Speech would be "*an opportunity for Members of Parliament to express their view on this Government's … approach to, and the result of, the European Council on 17-18 October.*" He also went on to state that he believed that it was "*vitally important*" that votes on "*any deal with the EU*" fall at that time, and not earlier. He then stated:

> "Member States are watching what Parliament does with great interest and it is only by showing unity and resolve that we stand a chance of securing a new deal that can be passed by Parliament."

The Prime Minister expressly referred to the fact that, in the weeks leading up to the European Council on 17-18 October, other Member States will be "*watching*" Parliament. The prorogation of Parliament in that period was thus intended to send the message that Parliament was closed.

(2) On 30 August 2019 the Prime Minister went further still and defended the prorogation on the basis that it assisted the UK's negotiating position with the EU:

> "*Interviewer:* When people voted for Brexit in 2016, they were voting for Parliament to take back control. But now you as Prime Minister are trying to limit the ways in which Parliament can express its view because you disagree with them. How is that bringing the country back together again as you promised on the steps of Downing Street?"
>
> *Johnson:* "… what I want to do now, which is what I think most people in this country want the government to do, is get on and try to get an agreement, but if we can't get an agreement, get ready to come out anyway. It's by getting ready to come out anyway that we've greatly strengthened our relationship with our friends and partners in the EU. Because they see that we're serious. And just to get back to Parliament, which I bet you were going to ask me about, just to get back to Parliament, I'm afraid that…the more our friends and partners think that, at the back of their minds that Brexit could be stopped, that the UK could be kept in by Parliament, the less likely they are to give us the deal that we need …" (Transcript of interview with the Prime Minister by Sky News on 30 August 2019) **[___]**

(3) The Defence Minister, Mr Ben Wallace MP, a Cabinet Member and Privy Counsellor, was explicit when he stated, at a meeting of EU Defence Ministers on 29 August 2019, that the prorogation was caused by the fact that the Government was a minority Government and therefore was not in control of Parliament. He did not suggest it was motivated by a new legislative programme **[___]**. The Prime Minister was invited in correspondence to file evidence in this case addressing Mr Wallace's comments. The Prime Minister has chosen not to do so.

(4) Such statements must, of course, also be viewed in the factual context referred to in paragraphs 19-20 above, in which Parliament has previously enacted legislation against the wishes of the Government imposing an obligation to seek an extension of time under Article 50(3) TEU, in which Parliament has made clear its opposition to Brexit without a withdrawal agreement, and in which MPs announced on 27 August 2019 a strategy to enact legislation to prevent Brexit without a withdrawal agreement.

65. Defendants in judicial review proceedings are required to provide a full and candid account of the considerations that led to an impugned decision. Defendants are expected to provide a "*full*" and "*comprehensive*" account of how a decision was arrived at an the considerations that were taken into account: *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at [50], *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, [2018] 4 WLR 123 at [76].

66. In the present case, the Prime Minister has not filed evidence from anyone privy to the decision providing a full and comprehensive account of the considerations that were taken into account. That is an omission to which the court can and should have regard.

67. The Prime Minister has instead provided a small miscellany of documents that appear to have been carefully drafted to ensure they are politically and legally "*on message*". But what is strikingly absent from these documents is any legally valid justification for the length of prorogation at such a critical time. If the Prime Minister wanted to have a Queen's speech this entirely fails to explain why Parliament was prorogued for such a lengthy period.

68. Indeed, the documents show that the Prime Minister has regarded Parliament as an irrelevance, as having no constitutionally legitimate role to play, and therefore as being at most a thorn in his side. It is an abuse of power to treat Parliament as an irrelevance and to fail take into account the important constitutional role, particularly at the present time of political crisis, that it performs. A handwritten note of the Prime Minister on the proposal to end the Parliamentary session, dated 16 August 2019, states that the "*whole September session"* is no more than a "*rigmarole"*, to "*show the public"* that MPs earn *"their crust"*. He concludes: "*So I don't see anything specially shocking about this prorogation."*

69. These comments reveal that the Prime Minister regarded Parliament as a constitutional irrelevance and entirely failed to recognise its fundamental constitutional role, both generally and in this time of political importance. That demonstrates that the Prime Minister's decision was based on a constitutionally flawed and improper basis.

70. The note also states that the prorogation is over the party conference season, a comment which shows that the Prime Minister also wrongly had regard to an assumption that Parliament would adjourn. It is not however for the Prime Minister to base his decision on such an assumption, for it takes the decision whether and for how long to adjourn out of the power of each House of Parliament itself. This is also is an improper consideration vitiating the decision.

71. The fact that the power to prorogue Parliament is not a statutory power does not mean that the power can be used for any purpose that the Prime Minister sees fit or on the basis of any considerations, however constitutionally flawed. Even non-statutory powers must be exercised for relevant consideration and proper purposes, and not at the whim of government ministers.[8]

72. Where an extraneous consideration exerts a significant influence or is "*inextricably mixed up"* with another purpose, this will have the effect of *"vitiating the decision as*

[8] *R v Secretary of State for Health, ex p. C* [2000] 1 FCR 471 at [22]-[24] (Hale LJ; Lord Mustill and Lord Woolf MR agreed); *Shrewsbury & Atcham BC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148; [2008] 3 All ER 548 at [48] (Carnwarth LJ), [78]-[81] (Waller LJ); *Laker Airways Ltd v Department of Trade* [1977] QB 643, p. 705 (Lord Denning MR).

a whole" unless the court can be satisfied that the decision-maker would have been bound to come to *"precisely the same conclusion"* (*R v London Borough of Lewisham, ex parte Shell UK Ltd*, [1990] Pens. LR 241, Neil LJ at [70], [72], *R v Broadcasting Complaints Commission, ex parte Owen* [1985] QB 1153, May LJ at 1177).

73. In the present case, it is not legitimate for the Prime Minister to take into account the fact that proroguing Parliament will impede Parliament from exercising its sovereign right to enact legislation against the wishes of the Government and to hold the Government to account. Whilst such action is not in *direct* conflict with Parliamentary sovereignty, in the sense of being contrary to an Act of Parliament, it *is* contrary to the principle of Parliamentary sovereignty in a yet more fundamental sense: it subverts the principle by seeking to prevent Parliament from exercising its sovereignty in the first place.

74. Indeed, the Prime Minister's decision to prorogue Parliament seeks to turn the UK's constitutional norms on their head. Under the UK constitution, the Government is subject to law and accountable to Parliament. Parliamentary supremacy over the executive has been recognised since the Bill of Rights 1688. Allowing the Government to prorogue Parliament for an extended period, influenced by the fact that it will prevent Parliament from enacting legislation with which the Prime Minister disagrees is to subject Parliament to the wishes of the Prime Minister.

75. Furthermore, the key cases that have defined the limits of prerogative power have all upheld the principle of Parliamentary sovereignty, and in doing so they have gone beyond narrowly enforcing Acts of Parliament. The cases recognise Parliament's supremacy under the constitution and make clear that it is an abuse of power for the executive to use prerogative power in a way which is intended to or does run counter to the supremacy of Parliament:

    (1) In the *Case of Proclamations* (1611) 12 Co Rep 74, 76; 77 ER 1352 it was held that "*the King hath no prerogative, but that which the law allows him*", and that the King could not, by his proclamation, change the law of the land.

(2) In *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 the House of Lords held that statutory powers suspend prerogative powers, even where the latter are not expressly revoked. Lord Parmoor stated at p. 575, in a passage approved by the Supreme Court in *Miller* at [48]:

> "The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject."

Lord Parmoor continued to explain, "*In this respect the sovereignty of Parliament is supreme.*" (p. 576).

(3) In the *Fire Brigades Union Case*, prerogative power was limited not only by reference to the words of primary legislation but because it would be an abuse of power "*to pre-empt the decision of Parliament whether to continue with the statutory scheme…."* (at 552 D-E per Lord Browne-Wilkinson).

(4) In *Miller* itself, the Supreme Court (building on *Laker Airways Ltd v Department of Trade* [1977] QB 643), held that prerogative powers cannot be used to "*frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation*", even where the Act does not itself exclude the prerogative (at p. 140E-G, [51]).

76. None of these cases address directly the situation of a Prime Minister proroguing Parliament to impede Parliament exercising its sovereignty, but as a matter of principle such an indirect challenge to Parliament's sovereignty, like the indirect challenges in the cases cited above, is no less constitutionally abusive than the executive exercising prerogative powers to avoid the operation of a statute that it does not wish to follow.

77. Moreover, just as the need to make Parliamentary sovereignty effective requires that individuals have access to courts in order to enforce statutory rights (*Unison*, (paragraph 51 above)), so the need to ensure that Parliamentary sovereignty is effective

means that courts must ensure that Parliament is not prevented from sitting. The courts will ensure that Parliamentary sovereignty is effective.

78. Professor Paul Craig has cogently explained why the Prime Minister's use of prerogative power to prorogue Parliament is an abuse of power; and why it is no less an abuse of the principle of Parliamentary sovereignty than occurred in the *Case of Proclamations*, *De Keyser*, and *Miller*:

> "*Proclamations* protects parliamentary sovereignty directly, by preventing recourse to the prerogative where it would change the law. *De Keyser* and *Miller* protect sovereignty indirectly: the former by precluding use of the prerogative where the formal law is left intact, but the executive seeks to circumvent it by use of the prerogative; the latter case by preventing a constitutional statute from being emasculated through executive action, even if it remained formally on the statute book.
>
> The salient issue in relation to prorogation is whether the Prime Minister's discretionary power should be limited pursuant to the principles underlying the case law set out above. The argument for an affirmative answer is compelling. This is so for two related reasons.
>
> First, to contend that there is some difference between the existing case law and the present situation does not withstand normative examination. The reality is to the contrary, the rationale for intervention to protect parliamentary sovereignty is even stronger than in the preceding cases. Consider the following two propositions. Parliament has enacted a statute, the executive seeks to circumvent it by recourse to the prerogative, and the court intervenes to protect parliamentary sovereignty via the *De Keyser* principle. Parliament wishes to exercise its legitimate authority through enactment of a statute, or in some other way, the executive precludes this through prorogation, and the court is said to be powerless to intervene.
>
> This distinction makes no principled sense, more especially because the latter abuse of discretionary power is more far-reaching and significant than the former. The former impacts only on a particular statute. The latter constitutes a pre-emptive strike that takes Parliament out of the entire game for the crucial period during which it is prorogued. It affects not merely one piece of legislation, but its capacity to exercise the totality of its legislative authority, thereby severely curtailing the opportunity for parliamentary voice on an issue that, whatsoever one's views about Brexit, is of major importance for the UK's future. This is, moreover, the reason why judicial intervention in this instance would not signal some general judicial intrusion in this terrain. The use of prorogation in this instance is singular, and warrants judicial intervention.
>
> Secondly, the case for judicial intervention is also compelling because of the impact of the abuse of power in relation to prorogation on the sovereignty principle itself. The sovereignty of Parliament is the foundational principle underlying the unwritten UK constitution. This sovereignty resides with Parliament, not with the executive…." (P Craig, 'Prorogation: Constitutional Principle and Law, Fact and Causation', *UK*

Constitutional Law Association Blog, 2 September 2019, see also Professor Meg Russell et al, *Letter to the Editor of the Times*, 3 September 2019)

79. The power to prorogue parliament is not a political weapon. Nor is it a mechanism for the Government to take control of Parliament. In modern times, the power to prorogue Parliament exists to bring one Parliamentary session to a close and to start another. The Prime Minister has seized this mundane power and used it improperly, unjustifiably impeding sovereignty and, moreover, for extraneous considerations.

VI. RESPONSE TO THE PRIME MINISTER'S GROUNDS OF RESISTANCE

80. In his DGR dated 2 September 2019, the Prime Minister resists the claim on three grounds. A number of the submissions made by the Prime Minister are already addressed above. The points below supplement those submissions.

i Constitutional convention

81. The Prime Minister submits (DGR at [3] and [41]-[43]) that the Claimant seeks to give effect to a convention. The Claimant does not. There is no relevant convention relied upon by the Claimant. The Claimant does not submit, as suggested at DGR at [41], that there should be a new Parliamentary session once a year.

82. Nor does the Claimant submit that the Prime Minister is required by convention not to prorogue Parliament for five weeks. The Claimant submits that a prorogation of this length is not required to bring to and end one session and commence a new one, and therefore unjustifiably restricts the legal principle of Parliamentary sovereignty.

ii. No judicial or manageable standards

83. The suggestion that the power to prorogue Parliament is entirely incapable of being subject to judicially management standards is wrong.

84. The Prime Minister repeatedly states that the issue is one of "*high policy*" and "*politics*". But issues of policy might or might not be justiciable depending on the context. *Miller*, involved a decision of the highest policy – whether to trigger withdrawal from the EU - but the court adjudged the Prime Minister's proposed actions unlawful and unconstitutional.

85. Moreover, the Prime Minster's submissions fail to recognise the manner that the courts have accepted that prerogative powers even in contexts such as foreign relations and national security are justiciable: see paragraph 46(3) above.

86. The court must examine the precise grounds of challenge relied upon, recognising the need for "*caution*" and accepting that the Prime Minister has a broad discretion. The grounds of judicial review in the present case, as set out above, are based on recognised constitutional principles, in particular the principle of Parliamentary sovereignty. Judicial determination of the compatibility of the exercise of the prerogative with Parliamentary sovereignty is perfectly manageable, indeed vital for the rule of law. The issue may be novel, but so were the circumstances of the *Case of Proclamations*, *De Keyser's Royal Hotel*, *Fire Brigades Union*, *Miller* et al., in which in different ways the scope of prerogative power was tested against the principle of Parliamentary sovereignty.

87. In support of his submission, the Prime Minister quotes Dicey (8th ed. p. 293, Liberty Fund Edition) quoted DGR at [35]) who wrote that if Parliament was not summoned for over a year there is "*no court in the land before which one could go"*. This quote, however, does not support the Prime Minister; rather, it supports the Claimant:

    (1) Dicey states unequivocally that such exercise of the power would be "*of the most unconstitutional character"*. Far from supporting the suggestion that there are no judicially manageable standards, Dicey makes plain that the opposite is true: this example is easily adjudged to be unconstitutional.

    (2) By stating that one could not complain to a court, Dicey was not saying that the matter involved unmanageable standards. He was merely stating the obvious. He was writing a hundred years before the *GCHQ Case*, when the prerogative was not capable of judicial review and so the decision was, as he said, not governed by law.

    (3) Given that today Her Majesty the Queen must act on the advice of her Ministers, if the Government's submission is correct the Prime Minister could suspend Parliament for over a year without any constitutional safeguard or remedy. That, plainly, would not be consistent with modern notions of the rule of law. Since

the *GCHQ case*, the situation envisaged by Dicey would be unlawful and amenable to judicial review.

88. Next the Prime Minister suggests that prorogation is "*closely linked*" (DGR at [40]) to dissolution. In fact, as the authorities cited by the Claimant at paragraph 45(3) above make clear, there are substantial and important differences between dissolution and prorogation. The former is more closely linked to the prerogative of appointing or dismissing a Prime Minister.

iii. Parliamentary sovereignty

89. The Prime Minister argues that only executive actions which are contrary to the words of an Act of Parliament engage Parliamentary sovereignty. On the contrary, the principle of Parliamentary sovereignty has wider effects on the exercise of executive power, especially prerogative power: see paragraph 51 above.

iv. Northern Ireland (Executive Formation) Act 2019

90. The Prime Minister submits (DGR at [19(c)]) that Parliament contemplated that it might be prorogued when it enacted the Northern Ireland (Executive Formation) Act 2019 ("NIEFA 2019"). Parliament recognised that it might be lawfully prorogued but it did not permit prorogation still less unlawful prorogation.

91. The Prime Minister also submits (DGR at [53(a)]) that the NIEFA 2019 renders this claim academic. However, the Prime Minister is careful not to say that section 3 of that Act would require Parliament to sit during the period of prorogation. If this is the Prime Minister's position, he should make this clear, and explain it. Otherwise, the court should proceed on the basis that section 3 is intended to be complied with in a manner which would not affect the period of prorogation.

v. Parliament can sit before and after prorogation

92. It is said that the claim is academic because Parliament can sit before and after prorogation (DGR at [53 (b)]). This point makes no sense: Parliament is impeded in

exercising its legislative functions when prorogued, a period of five weeks during a critical period in the country's history.

vi. The power to quash

93. Finally, the Prime Minister states that it would not be open to the court to quash the Order in Council (DGR at [60]). That is incorrect: see *Bancoult* where an Order in Council passed by Her Majesty the Queen on the advice of Ministers was quashed by the Divisional Court and the jurisdiction to do so was upheld by the Court of Appeal and Supreme Court. However, it is welcome that the Prime Minister accepts at DGR 60 that he would comply with any declaration made.

VI. CONCLUSION

94. The Prime Minister's decision to prorogue Parliament is contrary to constitutional principle and constitutes an abuse of power. The effect of the decision is to shut down the operation of the UK's sovereign body at a time of political upheaval and crisis, and in particular to impede Parliament from enacting laws against the wishes of the Prime Minister and holding the Government to account.

95. The proper and lawful course for the Prime Minister is to seek to persuade Parliament not to enact such laws. If he does not want to do so, or fears he cannot do so, then it is not open to him constitutionally or lawfully to prorogue Parliament instead. Such action constitutes an abuse of power.

96. The court is requested to declare that the Prime Minister's advice to Her Majesty the Queen that Parliament should be prorogued was unlawful.

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LONDON
3 September 2019