

IN THE SUPREME COURT
ON APPEAL FROM
THE QUEEN'S BENCH DIVISION
DIVISIONAL COURT

UKSC 2019/0192

BETWEEN:

THE QUEEN

on the application of

GINA MILLER

Appellant

and

THE PRIME MINISTER

Respondent

and

- (1) **BARONESS CHAKRABARTI CBE, PC**
- (2) **COUNSEL GENERAL FOR WALES**
- (3) **SIR JOHN MAJOR KG, CH**
- (4) **THE LORD ADVOCATE ON BEHALF
OF THE SCOTTISH GOVERNMENT**

Interveners

WRITTEN CASE FOR THE APPELLANT, MRS GINA MILLER

Introduction

- 1 This appeal raises fundamental questions of constitutional law on which the Divisional Court and the First Division, Inner House of the Court of Session have disagreed.

- 2 The Appellant submits:
 - (1) The legal principle of Parliamentary sovereignty requires that the Executive must comply with the enacted will of Parliament.

 - (2) It is implicit in that legal principle of our constitutional law that there must be legal limits on the power of the Executive to prevent Parliament from sitting so that Parliament can decide whether, and if so how, to exercise its constitutional power to enact legislation and hold the Executive to account.

 - (3) Because the legal principle of Parliamentary sovereignty is engaged by a decision of the Prime Minister to exercise a prerogative power to advise Her Majesty to prorogue Parliament, public law makes it unlawful for the Prime Minister to abuse that power (on basic public law principles).

 - (4) In the circumstances of this case, the Prime Minister's advice to Her Majesty to prorogue Parliament for a period of 5 weeks is an unlawful abuse of power:
 - (a) There has been no prorogation for longer than 3 weeks in the past 40 years and prorogation is typically for a week or less.

 - (b) To prorogue Parliament for such a lengthy period removes the ability of Parliament to take such action as it sees fit on issues of public policy relating to the arrangements for the UK to leave the EU when time is very much of the essence because of the existing deadline of 31 October

for the UK to leave the EU. It also prevents Parliament from performing its other scrutiny functions which inform its decisions on whether and how to legislate (asking questions of Ministers, debating issues and being informed by the reports of Parliamentary Committees) in relation to those issues of public policy.

- (c) To prorogue Parliament for such a lengthy period is not required to enable a new session of Parliament to commence with a Queen's Speech, as is demonstrated by the experience of the past 40 years. No rational reason has been advanced for a prorogation of such length.
 - (d) The Prime Minister's reasons for advising on a 5 week prorogation were improper in that they were infected by factors inconsistent with the concept of Parliamentary sovereignty, in particular his belief that Parliament does nothing of value at this time of year and his concern that Parliament might take steps which would undermine the Government's negotiating position with the EU.
- (5) It is well-established that
- (a) The fact that the relevant power of the Prime Minister derives from the prerogative does not of itself exclude judicial review.
 - (b) The relevant question in assessing justiciability in relation to the exercise of a prerogative power is whether there are legal principles and standards which can be applied by the Court.
 - (c) The constitutional powers of the Court are not excluded because the

decision under challenge is of political sensitivity.

(6) In the present context, there are legal principles and standards: the legal principle of Parliamentary sovereignty and the general public law principles concerning abuse of power.

(7) If the judgment of the Divisional Court were to be upheld, the courts would have no power to review a Prime Minister's advice to Her Majesty to prorogue Parliament for a period of 6 months or 1 year or longer, irrespective of the impact on Parliamentary sovereignty and whatever the motive of the Prime Minister. The Appellant respectfully submits that such a conclusion would be incompatible with the rule of law and destructive of the basic principle of our constitutional law that the Executive is answerable to Parliament and not vice versa.

3 The Appellant respectfully submits that the Divisional Court Judgment failed to recognise and apply these principles.

4 The Divisional Court (at paragraph 41 of the Judgment) rejected the Appellant's submission that it should first consider whether there was a public law error and then address justiciability. The Divisional Court stated that "[t]he question of justiciability comes first, both as a matter of logic and of law". The Appellant respectfully disagrees. The Court can best assess whether this case does involve legal principles and standards by considering the issues not in the abstract but by reference to the substantive submissions on the relevant legal principles and the allegation of abuse of power made by the Appellant in the context of those principles.

- 5 The Appellant emphasises what these proceedings are not about:
- (1) This Court is not being asked to express any view about the wisdom of the UK leaving the EU or about the terms on which the UK may leave the EU.
 - (2) The Court is not concerned with what action if any, Parliament should take prior to 1 November. If the prorogation is declared unlawful. It will be for Parliament to decide what to do when it sits.
- 6 The submissions summarised in paragraph 2 above will be developed in the following paragraphs. The Appellant invites the Court to read the fuller statement of the background facts and law to be found in the Appellant's Skeleton Argument (Trial Bundle 4/42).

Background facts

- 7 Prorogation is the term which describes the end of a Parliamentary session brought about other than by the dissolution of Parliament leading to a general election.
- 8 On 28 August 2019, Her Majesty accepted the advice of the Prime Minister that Parliament should be prorogued for a period of 5 weeks, from a date no earlier than 9 September and no later than Thursday 12 September until Monday 14 October. The Order in Council is in the Trial Bundle at 49/362. There is no dispute between the parties that Her Majesty enjoys no personal prerogative in this context and so is obliged to accept the advice from the Prime Minister.
- 9 Pursuant to the Order in Council, Parliament was prorogued on Monday 9 September.
- 10 The effect of the prorogation on 9 September is to close Parliament for 34 of the 52

calendar days prior to 1 November 2019, resulting in the loss of 19 ordinary sitting days. The number of sitting days lost would be considerably more if Parliament were to sit on Fridays or weekends.

- 11 As stated in the Briefing Paper from the House of Commons Library (Trial Bundle 29/175) at paragraph 2.3:

"In the last 40 years Parliament has never been prorogued for longer than three weeks: in most cases, it has been prorogued for only a week or less".

Box 2 in the Briefing Paper (Trial Bundle 29/176) sets out the periods of prorogation for each year back to 2017 (there was no prorogation in 2018). The periods of prorogation back to 1980 are set out in paragraph 34 of the Appellant's Skeleton Argument in the Divisional Court (Trial Bundle 4/42A.7).

- 12 The consequences of prorogation are summarised in paragraph 2.8 of the House of Commons Library Report (Trial Bundle 29/180):

"During prorogation Parliament does not meet. This means that legislation cannot be considered or introduced by MPs and Peers. Debates in the Chambers or in Westminster Hall are not held, written and oral parliamentary questions cannot be asked, and Committees do not carry out their usual business of inquiries and evidence-taking.

This temporary suspension of activity is not normally significant, as a new session typically begins shortly thereafter. For a longer prorogation, however, this suspension of activity weakens the ability of Parliamentarians to hold the Government to account".

- 13 The Prime Minister has a prerogative power to advise Her Majesty to prorogue Parliament. That power is recognised by section 6 of the Fixed-term Parliaments Act 2011 (Authorities 4/57).

14 It is a remarkable feature of these proceedings that the Prime Minister has not made a witness statement explaining why he decided to advise Her Majesty to prorogue Parliament for a period as long as 5 weeks, and there is no evidence from the Cabinet Secretary or any other official explaining that matter. On 9 September 2019, the House of Commons approved a Motion requiring Ministers to lay before the House all correspondence and other communications to, from or within the Government relating to the prorogation. The Appellant wrote to the Prime Minister on 10 September repeating her request for such disclosure ([]). No response has yet been received.

The legal principle of Parliamentary sovereignty

15 The courts have recognised that Parliamentary sovereignty is one of the fundamental principles of our constitutional law.

16 In R (Miller and another) v Secretary of State for Exiting the European Union [2018] AC 61 (Authorities 3/29), the majority judgment of this Court stated at paragraph 43 that

"Parliamentary sovereignty is a fundamental principle of the UK constitution".

The Court added, quoting Dicey, that Parliamentary sovereignty means

"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".

In the same case, in the Divisional Court, the Lord Chief Justice, the Master of the Rolls, and Lord Justice Sales stated at paragraph 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."

17 The courts have therefore held that Parliamentary sovereignty limits and regulates prerogative power in various ways:

(1) In the Case of Proclamations (1611) 12 Co Rep 74, 76; 77 ER 1352 (Authorities 1/10), Chief Justice Coke held that

"the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm"

and

"the King hath no prerogative, but that which the law of the land allows him".

(2) Prerogative powers lapse when the subject-matter is addressed by statute. See Miller (Authorities 2/29) at paragraph 48 where the Court approved the statement by Lord Parmoor in Attorney-General v De Keyser's Royal Hotel [1920] AC 508, 575 (Authorities 1/4):

"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".

(3) Prerogative powers may not be used to frustrate an Act of Parliament, even where the conduct is not inconsistent with the express terms of the Act, or even where the Act is not yet in force. See, for example, R v Secretary of State for the Home Department ex parte Fire Brigades Union [1995] 2 AC 513 (Authorities 3/42), where the Appellate Committee held that the Home Secretary was acting

unlawfully by deciding not to bring into force a statutory scheme for criminal injuries compensation but to exercise prerogative powers to implement his own different scheme. Prerogative power was limited not only by reference to the words of the enacted legislation but also - see Lord Browne-Wilkinson at p.552D-E - because it would be an abuse of power to

"pre-empt the decision of Parliament whether or not to continue with the statutory scheme ...".

- (4) These principles were applied by the Court in Miller (Authorities 3/29). The Court held that the principle of Parliamentary sovereignty meant that the Executive could not use prerogative powers to notify to the EU the United Kingdom's intention to withdraw under Article 50 because that would conflict with enacted legislation - that is the European Communities Act 1972. The Court stated at paragraph 45:

"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."

The Court said at paragraph 51 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".

- 18 If the legal principle of Parliamentary sovereignty requires statutory support, it can be found in the statutes to which the Court referred in Miller (Authorities 3/29) at

paragraphs 41 and 43. See in particular the Bill of Rights 1688 (Authorities 4/50/p.4):

"Frequent Parliaments

And that for redress of all grievances and for the amending strengthening and preserving of the laws Parliaments ought to be held frequently".

And the Scottish Claim of Right Act 1689 (Authorities 4/50/p.4):

"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 added).

19 The legal principle of Parliamentary sovereignty does not only mean that Acts of Parliament are the supreme law of the land. The courts have recognised that Parliamentary sovereignty has further legal consequences:

(1) Because Parliament is sovereign, the courts recognise Parliamentary privileges (beyond those required by the Bill of Rights 1688) - that is the exclusive right of Parliament to regulate its own internal proceedings. See Pickin v British Railways Board [1974] AC 765, 798-799 (Lord Simon of Glaisdale) (Authorities 2/19). This legal recognition of the implications of Parliamentary sovereignty is not dependent on the enactment by Parliament of any specific statutory provision.

(2) The Court has also recognised that Parliamentary sovereignty is a core justification for recognising a legal principle of a right of individuals of access to the courts. See R (Unison) v Lord Chancellor [2017] 3 WLR 409 at paragraph 68 (Lord Reed for the Court) (Authorities 3/33):

"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."

- 20 The Appellant submits that the prorogation of Parliament may, depending on the facts, also involve a breach of the legal principle of Parliamentary sovereignty.
- 21 If (as is the case) the legal principle of Parliamentary sovereignty is breached because the Executive has ignored or sought to frustrate that which Parliament has enacted, the legal principle of Parliamentary sovereignty must also be engaged where the Executive takes action to prevent Parliament from deciding what the law of the land is to be. Just as the need to make Parliamentary sovereignty effective requires the exclusive right of Parliament to regulate its own internal proceedings and that individuals have access to courts in order to enforce statutory rights, so the need to ensure that Parliamentary sovereignty is effective means that the courts will ensure that Parliament is not prevented from sitting by a Prime Minister who seeks to abuse his power by frustrating the very concept of Parliamentary sovereignty. Indeed, the protection of the freedom of Parliamentary debates would be undermined if the Executive were to have an unconfined prerogative power to prevent those debates from taking place.
- 22 Indeed it might, depending on the circumstances of the case, be a much graver breach of the legal principle of Parliamentary sovereignty for the Executive to prevent Parliament from sitting than for the Executive to frustrate a specific statutory provision. To prevent Parliament from sitting impedes its general ability to make laws and to perform all its other scrutiny functions which help to inform it in considering whether

to approve a Bill. See the analysis by Professor Paul Craig Prorogation: Constitutional Principle and Law, Fact and Causation (OxHRH Blog, 31 August 2019) (Authorities 5/79).

- 23 The Appellant therefore submits that it cannot be right that the legal principle of Parliamentary sovereignty is not engaged by the decision of the Executive to prorogue Parliament so that it is prevented from enacting laws (and informing itself in order to decide whether and how to do so), however lengthy the prorogation and whatever the motive for which the Prime Minister advises prorogation and whatever the effect on Parliament's ability to address important issues which are time sensitive. The legal principle of Parliamentary sovereignty is therefore engaged by the prorogation of Parliament. The question is whether, in the circumstances of the individual case, and having regard to the broad discretion which the Prime Minister enjoys in such a context, the advice given to Her Majesty on the subject of prorogation is a breach of Parliamentary sovereignty by being an abuse of power.

The advice from the Prime Minister to Her majesty breaches Parliamentary sovereignty in the circumstances of this case.

- 24 The Appellant recognises and accepts that the Prime Minister enjoys a broad discretionary power to advise Her Majesty to prorogue Parliament to end a session of Parliament and to commence a new session with a Queen's Speech. In normal circumstances, prorogation involves no undermining of Parliamentary sovereignty.
- 25 But this is an extraordinary exercise of the Prime Minister's power to advise Her Majesty to prorogue Parliament. The Appellant challenges not the advice to prorogue but the length of the prorogation, and she does so because the evidence demonstrates that the Prime Minister is abusing his power by acting by reference to improper considerations which are inconsistent with the very notion of Parliamentary

sovereignty:

- (1) The prorogation is for an exceptional length of time. See paragraph 11 above.
- (2) Parliament will be silenced for a substantial part of the period leading up to the deadline of 31 October when issues of grave national importance are being addressed (or not addressed) by the Government.
- (3) The wish to end a Parliamentary session and start a new Session with a Queen's Speech setting out the Government's legislative programme does not require a prorogation for 5 weeks. The Prime Minister has given no coherent explanation of why Parliament needs to be prorogued for such a lengthy period. The factors to which the Prime Minister and his advisers have drawn attention go to why there is a need for a prorogation of Parliament. They do not explain why a prorogation for 5 weeks is required.
- (4) The Prime Minister has produced no witness statement, either from himself or from the Cabinet Secretary (or indeed anyone else), addressing the reasons for his advice to Her Majesty that such a lengthy prorogation is required.
- (5) The evidence shows that the Prime Minister was in fact strongly influenced by improper factors which are inconsistent with the concept of Parliamentary sovereignty. See paragraphs 26-27 below.

26 The evidence shows that the Prime Minister, at best, improperly regards Parliament as an irrelevance. His handwritten Note dated 16 August 2019 (Bundle 39/316) states that the "whole September session" is no more than a "rigmarole" to "show the public" that MPs earn "their crust". The Prime Minister therefore concludes:

"So I don't see anything specially shocking about this prorogation".

This demonstrates that the Prime Minister's reasoning was fatally infected by a failure to understand the constitutional importance of Parliamentary sovereignty, especially at a crucial time. Parliament should not be prevented from sitting when it may decide (it is a matter for Parliament) that there is legislation which needs urgently to be enacted, which decision depends on Parliament being able to carry out its scrutiny functions. Given that time is of the essence, it is no answer for the Prime Minister to say that Parliament will be able to express its views from 14 October. If Parliament is only to sit for the final two and a half weeks before 31 October, and not for the previous 5 weeks, it is plainly going to be substantially impeded in its consideration of what legislation should be enacted before 31 October. Parliament may wish to decide that further legislation is urgently required before 14 October.

- 27 The evidence also shows that the Prime Minister's decision to advise Her Majesty to prorogue Parliament was strongly influenced by his improper view that Parliament is not merely an irrelevance but is a positive handicap to the furtherance of the Government's policies. In a BBC interview on 30 August 2019 (Trial Bundle 55/410), the Prime Minister justified the prorogation by stating:

"The best way to [leave with a deal] is if our friends and partners over the Channel don't think that Brexit can be somehow blocked by Parliament. As long as they think in the EU that Parliament might try to block Brexit, or might even succeed in blocking Brexit, the less likely they are to give us the deal we want".

In an interview on Sky News (Trial Bundle 54/400) on the same day, defending the prorogation, the Prime Minister said:

"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 ...".

In his letter to MPs dated 28 August 2019 (Trial Bundle 47/355), the Prime Minister stated that he believed it was "vitally important" that votes in Parliament on "any deal with the EU" take place after the European Council meeting on 17-18 October. He added:

"I want to reiterate to colleagues that these weeks leading up to the European Council of 17/18 October are vitally important for the sake of my negotiations with the EU. 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 was there explaining that the closure of Parliament in the period leading up to 17/18 October is needed to ensure that Parliament does not impede his negotiations with the EU. The Appellant does not invite the Court to assess whether the Prime Minister's political judgment is right or wrong. The Appellant's complaint is that it is inconsistent with the legal principle of Parliamentary sovereignty for the Prime Minister to advise Her Majesty to prorogue Parliament because (rightly or wrongly) he perceives Parliament to be an obstacle to the promotion of his Government's policies.

- 28 The Prime Minister's handwritten Note (Trial Bundle 39/316) refers to the fact that part of the prorogation would be over the party conference season. The Appellant points out that, as the Divisional Court stated at paragraph 6 of the Judgment, Parliament itself decides whether to sit during the party conference season. But for the prorogation, Parliament would have decided whether to recess for the whole or part of the conference season this year, in the light of the deadline of 31 October. Prorogation has taken that decision out of the hands of Parliament. The Divisional Court also correctly noted at paragraph 6 of the Judgment that during a recess for party

conferences, or for any other reason, written questions can still be tabled and must be answered, and Parliamentary committees continue to sit.

29 The Divisional Court noted at paragraph 55 of the Judgment that Parliament may be prorogued for various reasons. But these proceedings are not a challenge to the decision to prorogue. They are a challenge to the advice on the length of the prorogation.

30 The Divisional Court said at paragraph 54 of the Judgment that

"it is impossible for the court to make a legal assessment of whether the duration of the prorogation was excessive by reference to any measure. There is no legal measure of the length of time between Parliamentary sessions".

Similarly at paragraph 56 of the Judgment. The Appellant responds that the absence of a specific measure does not prevent the Court from performing the function which it performs in all other judicial review cases where abuse of power is alleged. The Court considers, by reference to the applicable legal principles, the reasons given for the decision, and the context, whether the decision is an abuse of power. It was no answer to the complaint about the tribunal fees in the Unison case (Authorities 3/33) that some level of fees would be lawful and there was no specific measure which could be applied to address legality. The Court said at paragraph 80 of the Judgment that

"Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question".

31 The Divisional Court referred at paragraph 57 to the speedy consideration and enactment of the European Union (Withdrawal) (No. 6) Bill - now the European Union

(Withdrawal) (No.2) Act 2019 - which completed all its Parliamentary stages between Wednesday 4 and Friday 6 September and received Royal Assent on Monday 9 September. Contrary to the suggestion by the Divisional Court, this has not

"undermined the underlying premise of the cases advanced by both the claimant and the interveners, namely that the prorogation would deny Parliament the opportunity to do precisely what it has just done".

The Appellant's complaint is that Parliament will be prevented, for 5 weeks from Tuesday 10 September, from legislating (speedily if it thinks it appropriate) in the light of developments during that period - and informing itself by Parliamentary questions, debates and Parliamentary Committee reports in order to decide whether, and if so how, to legislate during that period. The passage of the Bill to which the Divisional Court refers does not preclude further legislation, as circumstances require (in the view of Parliament, were it not prorogued). Indeed one of the matters which Parliament may wish to have addressed but for prorogation is whether further legislation is required to ensure that the Prime Minister complies with the obligations imposed on him by the recent Act. So the events in Parliament between 4-6 September do not assist the Prime Minister. On the contrary, they show (if it were to be disputed) that Parliament is ready and willing to legislate urgently as (in its opinion) the occasion demands.

- 32 In all these circumstances, the advice from the Prime Minister to Her Majesty to prorogue Parliament for 5 weeks was a manifest abuse of power in the context of the legal principle of Parliamentary sovereignty.

Jurisdiction

- 33 The Appellate Committee of the House of Lords held in Council of Civil Service Unions v Minister for the Civil Service ("the GCHQ Case") [1985] AC 374 (Authorities 1/11) that

the fact that the source of a power is to be found in the prerogative does not, of itself, exclude judicial review.

- 34 This Court has confirmed that the fact that a prerogative 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 of itself exclude the justiciability of the prerogative power. See R (Bancoult) v Secretary of State for Foreign Affairs (No 2) [2009] 1 AC 453 (Authorities 2/23): Lord Hoffmann at paragraph 35, Lord Bingham at paragraph 71, Lord Rodger at paragraph 105, Lord Carswell at paragraph 122, and Lord Mance at paragraph 141.
- 35 In each of those cases, the courts accepted jurisdiction even though the subject-matter concerned issues of high policy: whether those employed at GCHQ could be denied trade union membership for national security reasons without consultation, and whether the Chagos Islanders could be prevented from returning to their homes because of the United Kingdom's support for the wish of the United States Government to use Diego Garcia as a military base. In the GCHQ case (Authorities 1/11), the Appellate Committee emphasised the need for adequate evidence that the decision had been taken for relevant reasons of national security and that it was not Wednesbury unreasonable. See Lord Scarman at p.406G-H and Lord Roskill at pp.420E-423D.
- 36 Since the GCHQ case, the courts have accepted jurisdiction in a number of contexts relating to the exercise (or non-exercise) of prerogative powers: for example R v Secretary of State for the Home Department ex parte Bentley [1994] QB 349 (Authorities 3/41) on the refusal by the Home Secretary to grant a posthumous pardon; Lewis v Attorney General of Jamaica [2001] 2 AC 50 (Authorities 1/14) on the prerogative of mercy; R v Secretary of State for Foreign and Commonwealth Affairs ex

parte Everett [1989] QB 811 (Authorities 3/40) on the refusal of passports; and R (Abassi) v Secretary of State for the Foreign and Commonwealth Affairs [2003] UKHRR 76 (Authorities 2/21) on foreign relations and diplomatic representations, approved by this Court in R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs [2014] 1 WLR 2697 (Authorities 3/32) and R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs [2016] AC 1457 (Authorities 3/34).

37 The essential criteria for assessing justiciability were addressed by Lord Neuberger, Lord Sumption and Lord Hodge for the Court in Shergill v Khaira [2015] AC 359, paragraphs 41-43. As there explained, non-justiciability "refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter". Such cases were said to fall into one of two categories:

(1) Cases where "the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers".

Cases under this category

"are rare, and rightly so, for they may result in a denial of justice The paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament".

The present case does not involve such factors.

(2) The second category of non-justiciable cases

"comprises claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. ... Some issues might well be non-justiciable in this sense if the court were asked to decide them in the abstract. But they must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable. The best-known examples are in the domain of public law".

38 The Divisional Court said at paragraph 47 of its Judgment that:

"In the present context of non-justiciability, the essential characteristic of a 'political' issue is the absence of judicial or legal standards by which to assess the legality of the Executive's decision or action".

39 The Appellant submits:

- (1) Here the Appellant raises a justiciable issue of law: whether the advice to prorogue for 5 weeks is an unlawful abuse of power in public law in the context of the legal principle of the sovereignty of Parliament.
- (2) There are judicial standards: the legal principle of Parliamentary sovereignty and the public law principles of abuse of power.
- (3) The courts have expertise in assessing whether the legal principle of Parliamentary sovereignty is engaged and whether, in the relevant context, a discretionary power has been abused. The Court is being invited to apply principles well-established in public law. See Professor Paul Craig Prorogation: Three Assumptions (OxHRH Blog, 9 September 2019) (Supplemental Authorities/13).
- (4) The jurisdiction of the Court is not excluded because the issue of law arises in a "political" context or concerns important matters of policy. The context of the Miller case in 2016-2017 involved an issue of the greatest political controversy and high policy: whether the UK should leave the EU in the light of the referendum result. The issue in the GCHQ case was also of considerable political

controversy and indeed arose in the context of the Government's reliance on national security as the justification for the impugned decision. A v Secretary of State for the Home Department [2005] 1 AC 68 (Authorities 1/1) - cited by the Divisional Court at paragraph 43 of the Judgment - concerned Parliament's response to 9/11, and, in particular, the detention without trial of foreign nationals suspected of involvement in terrorism, a highly political matter. Lord Bingham, and the other members of the Appellate Committee, nevertheless accepted that the courts had jurisdiction because there was a legal standard to be applied under the Human Rights Act 1998.

- (5) In any event, the period for which Parliament is prorogued is typically a mundane issue and not a question of high policy. And in this case, the decision is infected by improper considerations which are inconsistent with the very principle of Parliamentary sovereignty.

- (6) This is not a matter in respect of which Ministers are accountable to Parliament. On the contrary, this is a context in which Ministers are able, by the use of the prerogative power, to prevent Parliament from sitting to scrutinise the conduct of Ministers and to enact legislation concerning Ministerial policies. In any event, political accountability to Parliament is not a substitute for the role of the courts in assessing the legality of decisions. See Lord Lloyd of Berwick in R v Secretary of State for the Home Department ex parte Fire Brigades Union [1995] 2 AC 513 (Authorities 3/42) at pp.572H-573C citing Lord Diplock's statement in R v Inland Revenue Commissioners ex parte Federation of Self-Employed [1982] AC 617, 644F-G:

"It is not, in my view, a sufficient answer to say that judicial review of

the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are accountable to a court of justice for the lawfulness of what they do, and of that the court is the only judge".

In any event, Crown consent is required for any Bill addressing prerogative powers and Her Majesty would be advised not to consent by a Prime Minister who wishes to prorogue. See Erskine May (Authorities 5/73) at paragraph 30.79.

- (7) Paragraph 60 of the Divisional Court Judgment suggests that non-justiciability is supported by the constitutional principle of the separation of powers. But the separation of powers requires that it is for the courts to determine the legality of Ministerial decisions. That constitutional responsibility is all the more important when the Ministerial decision under challenge suspends the operation of Parliament and so prevents it from performing its constitutional functions of scrutinising the conduct of Ministers and enacting such legislation as it thinks appropriate. So in this case, the Court is being asked to uphold the separation of powers by ensuring that the Executive is not able to prevent Parliament from exercising its constitutional functions.

40 If (as the Appellant submits) the legal principle of the sovereignty of Parliament is here engaged, the Court should be very slow to conclude that it lacks jurisdiction to assess whether the discretionary prerogative power has been abused. That is because of a constitutional principle as important as Parliamentary sovereignty: the rule of law. Under the rule of law, it is the courts which decide whether the Prime Minister, or any other Minister, has exercised his or her powers unlawfully. As the Divisional Court said

in Miller (Authorities 3/29) at paragraph 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."

- 41 The conclusion reached by the Divisional Court that the Prime Minister's advice to Her Majesty to prorogue Parliament is not justiciable means that there would be no legal remedy if the Prime Minister were to advise prorogation for 6 months or 1 year or longer, however grave the impact on the exercise of Parliamentary sovereignty and whatever the motive of the Prime Minister. The Appellant submits:
- (1) The Divisional Court said at paragraph 65 that this was a "spectre raised in argument". But the Divisional Court's conclusion as to non-justiciability should be assessed, in part, by reference to its implications for our constitutional law.
 - (2) The Divisional Court referred at paragraph 65 to "a series of technical arguments" raised on behalf of the Prime Minister "to point to the practical impossibility of such a course, including the need for the vote of funds to govern and the need annually to extend the Armed Forces Act 2006". But once the Government had persuaded Parliament to vote for necessary funding, there would be no practical constraints on the Prime Minister advising Her Majesty to agree to a lengthy prorogation.
 - (3) The Divisional Court suggested at paragraph 66 of the Judgment in relation to what it described as "extreme hypothetical examples" that "it is impossible to predict how the flexible constitutional arrangements of the United Kingdom, and Parliament itself, would react in such circumstances". This is, with respect,

no answer. There would, on the Divisional Court's analysis, be no legal constraints on the advice to be given by the Prime Minister. And "Parliament itself" would have no power to intervene, both because it would be prorogued and because, prior to prorogation, it would not (even if it had time) be able to legislate to prevent prorogation - there being a need for Crown consent in relation to a Bill addressing prerogative powers. See paragraph 39(6) above.

Remedy

42 The Appellant seeks a declaration in the same terms as that granted by the Inner House of the Court of Session: that the Prime Minister's advice to Her Majesty was unlawful and so null and void and of no legal effect.

43 Paragraph 60 of the Prime Minister's Detailed Grounds and Skeleton Argument (Trial Bundle 3/41) states in the penultimate sentence:

"If (which is denied) the advice was unlawful, the Prime Minister will take the necessary steps to comply with the terms of any declaration made by the court. In those circumstances, it is denied that there is any basis for quashing the Order in Council".

44 The Appellant understands paragraph 60 to contain an undertaking to the Court that if the Court were to declare the advice to be unlawful, the Prime Minister would immediately advise Her Majesty to revoke the Order in Council so Parliament can be recalled without delay.

45 Otherwise, the Appellant would seek a mandatory order. The Appellant does not agree with the statement in paragraph 60 that it would not be open to the Court to quash the Order in Council. In Bancoult (Authorities 2/23), an Order in Council approved by Her

Majesty 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 the Supreme Court.

Conclusion

46 The Appellant therefore invites the Court to allow this appeal for the following

REASONS

- (1) The Divisional Court erred in law in concluding that the legal principle of Parliamentary sovereignty is not engaged by the decision of the Prime Minister to advise Her Majesty to prorogue Parliament for a period of 5 weeks.
- (2) The Divisional Court erred in law by failing to find that the advice of the Prime Minister was an unlawful abuse of power in the circumstances of this case.
- (3) The Divisional Court erred in law in concluding at paragraph 51 of its Judgment that the decision to advise Her Majesty to prorogue for a period of 5 weeks was "inherently political in nature and there are no legal standards against which to judge [its] legitimacy".

LORD PANNICK QC

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WARREN FITT