**IN THE HIGH COURT OF JUSTICE** **Claim No CO/3385/2019**

**QUEEN'S BENCH DIVISION**

**ADMINISTRATIVE COURT**

**BETWEEN:**

**THE QUEEN on the application of GINA MILLER**

**Claimant**

**And**

**THE PRIME MINISTER**

**Defendant**

**And**

**THE RT HON SIR JOHN MAJOR KG CH**

**Proposed Intervener**

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# WRITTEN SUBMISSIONS ON BEHALF OF THE RT HON SIR JOHN MAJOR KG CH

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1. The Proposed Intervener, The RT Hon Sir John Major KG CH, seeks the Court's permission to file these brief written submissions in support of the Claimant's claim, together with a short witness statement and exhibit. He also seeks permission to make brief oral submissions through his Counsel at the hearing.

2. As explained in the application for permission, these written submissions address two issues:

   2.1 the question of legitimate and illegitimate purpose in the context of the review of the exercise of a prerogative power of this kind; and,

   2.2 the question of the Prime Minister's purpose in making the particular decision under challenge in these proceedings ("**the Decision**").

3. These submissions are supported by the accompanying witness statement in which Sir John gives evidence based on his extensive experience as, among other things, a long-serving Parliamentarian and a former Prime Minister who previously had responsibility for advising the Queen in relation to the prorogation of Parliament.

4. His witness statement also contains evidence about his interest in the subject matter of these proceedings, and his grave concerns about the implications of the prorogation of Parliament for the rights of citizens at a time of critical national importance. In the interests of limiting the material the Court is required to read in these very expedited proceedings, these written submissions focus on the two points identified above, since they are points in relation to which Sir John is in a position to be of particular assistance. It is hoped that the gravity of the interference with fundamental rights and with the principles of Parliamentary democracy is already apparent without the point needing to be laboured here.

**Legitimate and illegitimate purposes**

5. Sir John endorses the Claimants' submission (at paragraph 62 of the Statement of Facts and Grounds) that it is unlawful to exercise the power of prorogation if the purpose of doing so is to obstruct Parliament from enacting legislation with which the Prime Minister disagrees.

6. It is not necessary that that was the decision-maker's only purpose. As is established by *R (Owen) v Broadcasting Complaints Commission* [1985] QB 1153, the question is whether the impermissible purpose was material to the decision: in other words, if the impermissible purpose were removed from the analysis, would the decision-maker have reached the same decision on the basis of the purposes that remained?

7. Because the power to prorogue Parliament, and by extension the power to advise the Monarch to do so, are not statutory creations, there is no 'legislative purpose' (in the strict sense) from which the permissibility or impermissibility of a given motive can be ascertained. However, that poses no issue in the present case, because the principles in question are so fundamental to the constitution that they can properly be considered part of the objects and limits by reference to which any power, irrespective of its source, must be exercised.

   7.1 It is well-settled that the exercise of prerogative powers is not unfettered. At the most basic level, the exercise of prerogative powers must be for the purpose of promoting the public good: see for example *Burmah Oil Company v Lord Advocate* [1965] AC 75 at 118, and Blackstone's Commentaries Book 1, pp251-252 (cited in *Laker Airway Ltd v Department of Trade* [1977] QB 643): "*For prerogative consisting […] in the discretionary power of acting for the public good, where the positive laws are silent, if the discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner.*"

7.2 The exercise of prerogative powers is also subject to review on the standard grounds of illegality, irrationality, and procedural impropriety: *CCSU v Prime Minister* [1985] AC 374. That applies even to an Order-in-Council issued by the Monarch without any relevant statutory constraint: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61.

7.3 One particular ground on which the exercise of prerogative powers may be held to be unlawful is that it would "*frustrate the will of Parliament*" or "*pre-empt the decision of Parliament*" in relation to a particular issue on which Parliament has legislated: per Lord Browne-Wilkinson in *R (Fire Brigades Union) v Secretary of State for the Home Department* [1995] 2 AC 513.

7.4 If it is unlawful to frustrate or pre-empt Parliament's will in relation to an issue on which it has legislated, it must be at least as unlawful – if not more so – to frustrate Parliament's ability to convene to debate and legislate upon such an issue at all, by proroguing it during a critical period during which any such debate and legislation would need to take place.

7.5 That is no less a frustration of the will of Parliament than the unlawful decision in *Fire Brigades Union*, because it is Parliament's will that it should have supreme legislative authority. It is a basic part of the constitutional framework of the United Kingdom that Parliament has "*the right to make or unmake any law whatever*" (see Claimant's Statement of Facts and Grounds at §57), and it follows from the existence of that "*right*" that Parliament must be permitted to convene and exercise its law-making powers if it wishes to do so, since otherwise the "*right*" would be inexercisable and would be no right at all.

7.6 Indeed, that is not merely implicit in the constitutional structure; it is the express will of Parliament, as enacted in Article 13 of the Bill of Rights ("*For the redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently*"). Although that does not define in precise terms the regularity with which Parliament must be permitted to convene, it does state in very clear terms the purpose by reference to which that requirement is to be interpreted: Parliament must be permitted to convene sufficiently frequently as to ensure that it may redress grievances and amend, strengthen, and preserve the laws as it considers appropriate. It follows that, if Parliament were prevented from convening at a time of major

political and constitutional importance, and/or prevented from convening on the grounds that the Prime Minister fears there is a real prospect that it will exercise its power to redress grievances or amend/strengthen/preserve laws in a manner with which he disagrees, the legislative purpose of Article 13 (not to mention the constructional structure as a whole) would be frustrated.

8. In almost every case, the prorogation of Parliament will make little difference to Parliament's ability to exercise its legislative authority. If there is something which Parliament wishes to do, it can generally do it when it reconvenes. It may even, in an appropriate case, do so with retrospective effect, such that it is no less able to express its will than if it had not been prorogued.

9. What makes the present case different is that (i) the prorogation is due to take effect during a particular period of enormous political, legal and constitutional importance in September/October 2019 during which Parliament may well wish to legislate, and (ii) because of the operation of Article 50 of the Treaty on the Functioning of the European Union, it will not be possible for Parliament later to 'undo' the consequences of the prorogation once it has had the legislative opportunity of which it will have been deprived.

10. Further, the decision would frustrate Parliament's express will for a further reason, namely that it would make it impossible for the government to comply with the requirements of the Constitutional Reform and Governance Act 2010 in respect of any withdrawal agreement.

    10.1 Section 20 of CRAG 2010 requires that no treaty shall be ratified unless it has been laid before Parliament for 21 sitting days without a negative resolution being passed. That would include any withdrawal agreement with the European Union (see the definition of "*treaty*" in section 25, and also section 13(14) of the European Union (Withdrawal) Act 2018).

    10.2 Section 22 of CRAG 2010 ("*Section 20 not to apply in exceptional cases*") provides that the requirements may be disapplied "*if a Minister of the Crown is of the opinion that, exceptionally, the treaty should be ratified without the requirements of that section having been met*". However, it could not credibly be argued that that permits the executive to create circumstances in which it is impossible to comply with Section 20 (because Parliament has been prorogued and nothing can be laid before it) and then to rely on that impossibility as

an exceptional circumstance justifying non-compliance with the requirement to give Parliament proper time to consider the treaty.

10.3 It follows that the prorogation of Parliament until 14 October 2019 (which is less than 21 days before the Article 50 deadline) would frustrate the will of Parliament as expressed in s.20 CRAG 2010 – and is unlawful on exactly the same grounds as were upheld by the House of Lords in *Fire Brigades Union*.

***Ulterior purpose***

11. Further, leaving aside the permissibility or impermissibility of a given purpose in the abstract, it is unlawful for a decision-maker to exercise a power for a particular stated purpose while in fact having an ulterior motive.

12. That is a principle of general application, and a number of examples from the authorities are given in De Smith's Judicial Review (8th edition, 2018) at 5-097 (footnotes with citations omitted):

> "*An authority, purporting to exercise powers of compulsory acquisition for the purpose of widening streets, proposed to widen a street only to a minute extent, its true purpose being to alter the street level. A local authority empowered to acquire unfit houses purported to do so in order to provide temporary accommodation pending their demolition, but in reality intended to render them fit for habitation and add them to its permanent housing stock. An authority purporting to dismiss school teachers on educational grounds, in reality dismissed them for reasons of economy. An authority claiming to raise the salaries of its employees to reflect an increase in their duties, in reality did so in order to grant an employee a salary increase unrelated to the changes in his duties. A police authority which called its former chief constable, who was living abroad, ostensibly for medical examination (and cancelled his pension when he failed to appear) in reality called him so as to facilitate the execution of a warrant of arrest issued against him by the Bankruptcy Court. A local authority sought to acquire land for its benefit, when its true motive was to remove gypsies from the land.*"

13. It is also an important point in the present context, which concerns the giving of advice to the Monarch to take a particular course of action.

13.1 As a matter of general law, if an adviser gave advice that a particular course of action should be taken for particular reasons, while having an undisclosed ulterior motive for wanting the recipient of the advice to take that action, that would be a plain breach of fiduciary duty: see *Bowstead and Reynolds on Agency*, Article 43. By way of illustration, in *Premium Real Estate Ltd v Stevens* [2009] NZSC 15 an estate agent acting for a seller presented a particular buyer as seeking to buy the property for his own use and

occupation, when in fact the buyer wished to buy and resell it for a profit. That was held to be a breach of fiduciary duty.

13.2 It could hardly be suggested that the duties of the Prime Minister to the Monarch are less than those of an estate agent to a homeowner. Accordingly, if the Court is satisfied that the Prime Minister's decision was materially influenced by something other than the stated justification, that decision must be unlawful, irrespective of whether the unstated justification was itself legally impermissible.

13.3 There is ample precedent in other contexts in support of the proposition that an act of royal authority is void if the basis on which it was sought was misdescribed: most famously, the *Case of Monopolies* 77 ER 1260, in which it was held that a grant of a monopoly in respect of playing cards was void because "*The Queen was deceived in her grant; for the Queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee*". There is no reason why the same should not apply where the relevant act affects not just one industry but the legislature and the rights of the nation as a whole.

**The Prime Minister's purpose in this case**

14. The Defendant has not yet submitted any evidence as to the purpose of the Decision. Nor does it appear that he has submitted any such evidence in the proceedings underway in the Scottish or Northern Irish courts, both of which are due to be heard substantively this week.

15. However, his public explanation of the reason for the Decision is that he wishes to introduce an ambitious programme of domestic legislation. Indeed, the Decision was first announced in the sixth paragraph of a letter dated 28 August 2019, after various points about matters such as the length of the current Parliamentary session and its impact on the amount of legislation available. That letter explained that his purpose was "*to bring forward a new bold and ambitious domestic legislative agenda for the renewal of our country after Brexit.*"

16. That justification has since been maintained publicly, although not invariably. For example, on 29 August 2019, after the Secretary of State for Defence (Ben Wallace MP) was recorded giving a different reason – namely that the government's lack of a majority was "*not easy for our system*", and that "*Parliament has been very good at saying what it doesn't want, but it has been awful at saying what it wants […] So, you know, any leader eventually has to, you know, try*" – a spokesman

for the Prime Minister's office said that he had "*misspoken*" and reiterated the explanation that "*The Queen's speech will allow us to set out an ambitious legislative programme [...]*".

17. As explained in the witness statement accompanying these submissions, that justification makes no sense and cannot be the true explanation, or at least a true and complete explanation, of the purpose of the Decision.

    17.1 First, there is no reason why Parliament must be prorogued in order for the government to pursue a legislative programme. Proposed legislation can be introduced at any time: there is nothing which requires that a Bill can only be introduced at the beginning of a new session, or that a Bill can only be introduced if it has been mentioned in a Queen's Speech.

    17.2 Second, even if that were wrong, it would only explain why it is necessary to terminate the existing session and commence a new one. The new session could – as is the usual practice – begin a few days after the old. The need for a new session is therefore incapable of providing any explanation at all for a period of five weeks between sessions.

    17.3 Nor is there any <u>practical</u> reason why a five-week period might be needed in order to meet the stated purpose. For instance, it cannot be said that the government needs to use the five-week period to draft its proposed legislation, because:

        17.3.1 there is nothing to prevent the government from working on its legislation while Parliament is in session, or while it is adjourned;

        17.3.2 nor is there anything to require that the draft legislation must be complete by the time of the Queen's Speech (and indeed it is common for the drafting of Bills to take place afterwards: Major WS1/§22);

        17.3.3 further, as explained at Major WS1/§37, there are <u>already</u> approximately 17 Bills concerning various subjects which could be introduced now if the government wished to do so: if anything the prorogation of Parliament will delay, rather than expedite, that legislative programme.

    17.4 For similar reasons, Professor Paul Craig (Professor of English Law at the University of Oxford, and an eminent public and EU lawyer) has recently written that the justification "*makes no sense in its own terms*": "*If the Prime Minister wishes to kick start his*

*new agenda now, there is nothing legally or politically to prevent him […] The reality is not merely that the causation is lacking. It is that prorogation will almost certainly hamper prime ministerial efforts to roll out the new agenda.*" ("*Prorogation: Constitutional Principle and Law, Fact and Causation*", 31 August 2019).

17.5 It is notable that there has been no attempt whatsoever to explain why the Prime Minister's stated purpose requires a five-week gap between sessions. That failure is particularly significant in view of the fact that it is apparent that the five-week gap was a conscious part of the decision, and not a mere coincidence or byproduct: as the Observer reported on 24 August 2019, the Prime Minister had sought guidance from the Attorney General specifically on <u>the lawfulness of a five-week prorogation beginning on 9 September 2019</u>.

18. In short:

18.1 if this were an ordinary prorogation aimed only at closing one session and beginning a new one, there would be no reason to prorogue for any longer than the normal period of a few days (or to seek advice on the lawfulness of doing so);

18.2 there is a conspicuous lack of explanation why it is necessary in the case of this particular prorogation to require such an unusually long period during which Parliament may not sit even if it wishes to;

18.3 that period occupies a substantial part of the remaining time in which Parliament has an opportunity to exercise its legislative authority contrary to the Prime Minister's wishes before the Prime Minister's policy takes effect by default;

18.4 in the circumstances the inference is inescapable that the otherwise unexplained length of the prorogation, and the very obvious political interest that the Prime Minister has in there being no activity in Parliament during that time, are linked.

19. There are also a number of clear indications to that effect in the available evidence.

19.1 First, as mentioned at paragraph 16 above, the Secretary of State for Defence was recorded on camera on 28 August 2019 saying that the reason for the prorogation was that the government's lack of a majority in Parliament was "*not easy for our system*", that Parliament's approach towards Brexit was unconstructive ("*Parliament has been very good at saying what it doesn't want, but it has been awful at saying what it wants"),* and that that

unconstructiveness therefore needed to be overridden ("*any leader eventually has to, you know, try*").

19.2 Second, when the Prime Minister himself was asked about the prorogation in a BBC News interview, he replied: "*We want to do a deal […] Everybody can see the rough shape of what needs to be done. […] The best way to do that 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 other words, he (i) linked the prorogation expressly to a need to show that Parliament would not be able to interfere with Brexit, and (ii) he made no mention of the purpose of pursuing a new legislative programme.

19.3 Third, the Prime Minister's Director of Legislative Affairs (Nikki da Costa), shortly before her appointment to that role, wrote an opinion piece published in The Spectator on 29 June 2019 entitled "*Will parliament be able to stop the next PM leaving without a deal?*", in which she identified the risk that MPs "*could try to legislate*", and said: "*But, an adept government could delay the passage of future legislation to buy time […] The clock will however be on the government's side – if the next prime minister can head to the next EU Council summit on 17 October with his hands unbound, we may finally have the conditions for negotiations to shift.*" That is entirely in line with the Prime Minister's decision to advise that Parliament be prorogued until 14 October.

20. In considering whether the "*legislative programme*" explanation is the true and complete explanation for the Decision it is also relevant to consider that as recently as Saturday 24 August 2019, when the Observer reported that the Prime Minister was seeking advice from the Attorney General on the lawfulness of a 5-week prorogation, the Prime Minister's press office issued a statement saying "*the claim that the government is considering proroguing parliament in September in order to stop MPs debating Brexit is entirely false*".

21. It is now clear that that was, at best, extremely misleading, because the government was plainly considering proroguing Parliament in September. If it is said that the statement was technically accurate on the grounds that the government was considering proroguing Parliament in September for reasons other than "*in order to stop MPs debating Brexit*":

21.1 that statement is misleading as a response to a story about the seeking of advice on prorogation; and,

21.2 indeed, the statement was not understood in that way even within the Cabinet: the Secretary of State for Digital, Culture, Media and Sport said on the Today Programme on 27 August 2019 that "*Downing Street has made it very clear that claims of any sort of prorogation in September are utterly false*" (Major WS1/§26).

22. Finally, it has been suggested publicly in some quarters – although it is not clear whether the Defendant has endorsed this suggestion – that there is precedent for a politically-motivated prorogation of Parliament for a lengthy period of time in Sir John's decision to advise prorogation on 21 March 1997 in advance of the general election on 1 May 1997. As Sir John explains in his witness statement, any such suggestion is entirely incorrect: in short, (i) the simple reason was that in view of the date of Easter (30 March 1997) it made no sense to require Parliament to return for a short period after Easter but before the start of the election campaign; and (ii) in any event the allegation of a political motive (namely the prevention of the imminent publication of a report by Sir Gordon Downey) is unsustainable in circumstances where the report was not close to completion, and was not in fact completed until months later (in July 1997), so would not have been published even if Parliament had remained in session until the last legally permissible date.

**Conclusion**

23. For the above reasons, Sir John supports the Claimant's challenge to the Defendant's decision.

LORD GARNIER Q.C.

TOM CLEAVER

ANNA HOFFMANN

2 September 2019