

November 3, 2016

Brexit

High Court Rules that the UK Government Cannot Notify the UK's Withdrawal From the EU Without the Prior Approval of Parliament

SUMMARY

Following the referendum vote on June 23, 2016, the UK government proposed to notify the European Council by March 31, 2017 under article 50(2) of the Treaty on European Union of the UK's decision to leave the EU.

The UK government's proposal to give this notification without the prior approval of Parliament was challenged in the High Court in London. Judgment was given by the Court today, November 3.

The Court held that the UK government does not have the ability to use its residual powers under UK constitutional law (known as "prerogative powers") to notify the UK's withdrawal from the EU without the prior approval of Parliament.

BACKGROUND

The process under which an EU member state may withdraw from the EU is set out in article 50 of the Treaty on European Union (the "TEU"). The relevant member state must "decide" to leave the EU "in accordance with its own constitutional requirements" (article 50(1)) and then "notify" the European Council of its decision (article 50(2)). The notification given pursuant to article 50(2) is referred to as an "article 50 notice". Following the giving of an article 50 notice, the EU and the withdrawing member state negotiate the terms of a withdrawal agreement, and the EU treaties (including the TEU) cease to have effect with regard to the withdrawing member state from the date of entry into force of such withdrawal agreement or, if no withdrawal agreement has been reached and no extension unanimously agreed by all EU member states, two years after the date of the article 50 notice (article 50(3)).

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The sole question in the case was whether, as a matter of UK constitutional law, the UK government may use prerogative powers to give an article 50 notice.

The UK has no written constitution. Instead, the dominant legal principle of UK constitutional law (known as “Parliamentary sovereignty”) is that Parliament is sovereign and that legislation enacted with the consent of both houses of Parliament (the House of Commons and the House of Lords, referred to together as “Parliament”) is supreme. Parliament can therefore make and unmake any law through the enactment of primary legislation.

In addition to the principle of Parliamentary sovereignty, UK constitutional law also recognises (through common law) a series of residual legal powers that can be exercised by the Crown without the approval of Parliament. These are known as the “prerogative powers”. The UK government is seeking to use one of these prerogative powers (namely the power to conduct international relations and to make and unmake treaties) as the legal basis for giving the article 50 notice.

It was also agreed between the parties in the case that:

- prior to the UK becoming a member of the EU, Parliament had provided, consistent with the principle of Parliamentary sovereignty, through the enactment of a UK statute (the European Communities Act 1972 (the “ECA 1972”)) for the supremacy of EU law over UK domestic law;
- only Parliament, through primary legislation, could have created the necessary changes to UK domestic law to provide for the supremacy of EU law;
- an article 50 notice may not be withdrawn once given; and
- article 50(2) does not allow for a conditional notice to be given (for example, by including a condition that the effectiveness of the notice was subject to Parliament approving the withdrawal agreement between the UK and the EU).

PRINCIPAL FINDINGS

The Court’s decision¹ was based primarily on its specific interpretation of the intentions of Parliament when it passed the ECA 1972, and a rejection out of hand of the arguments made by the UK government as to how the ECA 1972 should be interpreted.

The Court interpreted the ECA 1972 on the basis that:

- the effect of the ECA 1972 was to confer rights on UK citizens and companies rights under EU law,² and the effect of the submission of an article 50 notice would be to deprive UK citizens and companies of those rights; and

¹ The case is *The Queen (on the application of Miller and Dos Santos) v The Secretary of State for Exiting the European Union* ([2016] EWHC 2768 (Admin)). The full judgment of the Court can be found at <https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/>.

² In the judgment, the Court sub-divided these rights into three categories as follows: (i) rights capable of replication in UK domestic law (“category (i) rights”); (ii) rights enjoyed in other

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- the appropriate inferences to be drawn as to the intention of Parliament when legislating in the terms set out in the ECA 1972 were based on general common law principles established by the UK courts in prior decisions relating to “constitutional statutes” – i.e., statutes which are of such importance that they can only be repealed or amended by express language in a subsequent statute.

On this basis, the Court rejected the UK government’s arguments that:

- the effectiveness of the rights conferred by the ECA 1972 was subject to a continuing condition that the UK was a member of the EU, and that whether that condition was satisfied was intended by Parliament to be a function of how the UK government decided to act under prerogative powers; and
- it was necessary for the ECA 1972 to contain express language removing the prerogative powers in order for them to cease to apply.

The Court’s conclusion, and the reasons for it, were comprehensively summarised in the following section³ of the judgment:

“Interpreting the ECA 1972 in the light of the constitutional background referred to above, we consider that it is clear that Parliament intended to legislate by that Act so as to introduce EU law into domestic law (and to create the category (ii) rights) in such a way that this could not be undone by exercise of Crown prerogative power. With the enactment of the ECA 1972, the Crown has no prerogative power to effect a withdrawal from the Community Treaties on whose continued existence the EU law rights introduced into domestic law depend (rights in categories (i) and iii)) and on whose continued existence the wider rights of British citizens in category (ii) also depend. The Crown therefore has no prerogative power to effect a withdrawal from the relevant Treaties by giving notice under Article 50 of the TEU.”

The claimants’ principal argument in the case had been that it was a general principle of UK constitutional law that prerogative powers could not be used to diminish or abrogate rights arising under UK law unless authority to do so had been obtained from Parliament. While the Court agreed that it followed from its analysis of the ECA 1972 that no such authority had been given by Parliament, it did not need to discuss this argument in detail in light of the conclusion it had already reached on the interpretation of the ECA 1972.

IMPLICATIONS

The UK government has announced that it intends to appeal the judgment to the UK Supreme Court. That appeal will be heard from December 5–8, with a ruling currently expected in January 2017.

member states of the EU (“category (ii) rights”); and (iii) rights that could not be replicated in UK domestic law (“category (iii) rights”). These categories or rights are referred to subsequently in the judgment (including the quote referred to in note 3).

³ At paragraph 92.

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If today's judgment is upheld by the Supreme Court, it would mean that the UK government is unable to submit an article 50 notice without first obtaining Parliament's approval.

The Court confirmed the generally held view that, as a matter of law, the result of the referendum is only advisory – although it expressly stated that its judgment did not “question the importance of the referendum as a political event, the significance of which will have to be assessed and taken into account elsewhere”.

While the relevant legislation required for Parliament to approve the submission of an article 50 notice is likely to be relatively straightforward, the time required for it to be debated and voted on by both houses of Parliament is likely to be significant. If the judgment is upheld on appeal, it is therefore likely that, at the very least, there will be a delay in the submission of any article 50 notice. The UK government had previously stated that it intended to submit the article 50 notice by March 31, 2017.

In addition, it is likely that members of Parliament who are in favour of the UK remaining in the EU would seek, as part of the Parliamentary debates, to introduce amendments to the relevant legislation that would have the effect of further delaying, or even frustrating, the proposed withdrawal of the UK from the EU.

It is also probable that, in connection with the Parliamentary debates, the UK government would be required to reveal more details of its proposed negotiating strategy with the EU for the withdrawal negotiations. The UK government had previously stated that it did not intend to reveal details of its negotiating strategy at this stage.

Until the result of the appeal is known, we expect that there will be little, if any, progress in relation to the many questions which have arisen in relation to the legal implementation of the UK's withdrawal from the EU (in particular as to the model to be adopted for withdrawal), and the implications of how those questions are resolved on particular areas of UK law (in particular financial services regulation).

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