

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT)

BETWEEN:

GINA MILLER

Appellant

and

THE PRIME MINISTER

Respondent

and

THE RT HON SIR JOHN MAJOR KG CH

Proposed Intervener

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

1. Further to the written submissions and evidence filed in the Divisional Court, The Rt Hon Sir John Major KG CH wishes to file short additional submissions addressing matters which have arisen since those documents were prepared.
2. These submissions address:
 - 2.1 the Divisional Court's decision and reasons; and,
 - 2.2 further developments relating to the reasons for the Prime Minister's decision.

The Divisional Court's decision

3. The Divisional Court concluded that the exercise of the power of prorogation is "*not a matter for the courts*" (§1), such that it was unnecessary to "*explore the facts*" (§41).

4. If that conclusion were correct, the consequence would be that there is nothing in law to prevent a Prime Minister from proroguing Parliament in any circumstances or for any reason.
5. In the context of constitutional settlement in which Parliament is acknowledged to be sovereign, that would be a remarkable position for the courts to endorse. It would follow that the courts would not intervene even if, for example:
 - 5.1 Parliament wished to abolish the power of prorogation, and a Bill to that effect passed both Houses, but before it could receive Royal Assent the Prime Minister prorogued Parliament so as to prevent it from becoming law;
 - 5.2 a Prime Minister philosophically opposed to the idea of a standing army prorogued Parliament during the period leading up to the statutory expiry of the relevant Armed Forces Act, with the result that the Act expired and the armed forces were required to disband; or,
 - 5.3 a Prime Minister prorogued Parliament before the outcome of a confidence vote which his whips had calculated he would lose, for no reason other than to prevent it from being recorded that he had lost the confidence of the House such that he would need to resign.
6. In reaching its conclusions the Divisional Court expressed the view that it was unhelpful to “*consider the arguments by reference to extreme hypothetical examples*” (§66).
 - 6.1 First, as Leggatt LJ noted in *R (The Good Law Project) v Electoral Commission* [2018] EWHC 2414 (Admin) at §87, “*the use of hypothetical examples is a standard method for testing the logic of a legal argument*”. If a particular legal analysis would in certain situations produce absurd or intolerable consequences, that is a strong indication that the analysis is wrong, or at least that it requires qualification.
 - 6.2 Second, the use of hypotheticals is particularly important where, as here, the legal argument being tested is an absolutist one. The Divisional Court’s conclusion is that there are no circumstances whatsoever in which the Court would interfere with the exercise of the power of prorogation, such that it is unnecessary even to examine the facts of the case. It is perfectly appropriate, and necessary, to consider the implications

of such a conclusion by testing it against situations in which it would have indisputably alarming consequences.

- 6.3 Third, the dismissal of factual scenarios simply on the grounds that they are “*extreme*” is not a safe basis on which to lay down legal principles of general application. That is particularly so in the present context, where many developments which until recently might have been thought to be “*extreme hypothetical examples*” have actually eventuated. Indeed, as the Divisional Court itself mentioned at §9, the idea of proroguing Parliament in order to override Parliamentary opposition to Brexit originated as a matter of academic interest rather than as a genuine political proposition – and even in that context it was described as “*astonishing*”: see Professor Mark Elliott, “*Brexit, the Executive and Parliament: A response to John Finnis*”, 2 April 2019. In circumstances where, for example, Parliament has passed an Act requiring the Prime Minister to seek an extension of the Article 50 deadline if certain conditions are met, and the Prime Minister is on record saying that he will never in any circumstances seek such an extension, it is all the more necessary that any legal analysis must have regard to the possibility of “*extreme*” scenarios as well as ordinary and uncontroversial ones.
7. It is no answer to say, as the Prime Minister submitted in the Divisional Court, that there are practical constraints on the use of the power of prorogation such as the fact that a government would be unable to raise money without Parliamentary authority. Those practical constraints are actually very limited: there would be nothing, for example, to prevent the Prime Minister from proroguing Parliament the day after the approval of the Budget. But in any event, and more fundamentally, practical constraints of that kind can only constrain a Prime Minister whose overriding purpose is to maintain an orderly and well-functioning state; they would have no effect on a Prime Minister who was prepared, for example, to allow the funding of public services to lapse if that were the price of achieving his political goals. The fact that there are constitutional safeguards which operate on the well-intentioned is no reason for the Courts to reject any possibility of intervening even in other cases.
8. It is also no answer to say, as the Divisional Court did at §42, that the appropriateness of prorogation is a matter of “*high policy*” which is best regulated by political rather than legal means.

- 8.1 In modern times the power of prorogation is not in any sense a matter of “*high policy*”. As pointed out by Professor Paul Craig in “*Prorogation: Three Assumptions*” (UK Constitutional Law Association, 10 September 2019), it serves an essentially administrative function: “*There has to be some way in a political system to signal the end of a particular legislative session. [...] In the UK, this is, for historical reasons, done through prorogation.*” It does not involve, for example, any decisions as to the most appropriate way of allocating finite resources among competing needs.
- 8.2 Indeed, in the vast majority of cases the decision to prorogue Parliament has no political content at all. The routine and regular prorogations of the last few decades are plainly not so politically sensitive that it would be wrong for the Court even to begin to examine them. If anything, those decisions are far less political than many of the types of decision that are routinely subjected to judicial review.
- 8.3 In any event, one of the central points of the present case – and the reason why these proceedings are necessary at all – is that the power of prorogation subverts the possibility of control by political means. Its effect is to deprive Parliament of a voice throughout the period of the prorogation. There is no possibility of political control except in the limited sense that a Prime Minister who exercises the power in a damaging way might face political consequences at some later date, when Parliament is permitted to reconvene – but where the effect of the prorogation is to prevent Parliament from discharging its role during a time-critical period there is no possibility of meaningful political control of that decision until after the damage has been done.
9. In support of its conclusion that prorogation is a matter of “*high policy*”, the Divisional Court relied at §55 on what it considered to be a previous example of the power being exercised for political reasons, namely the prorogation which in 1948 produced the ‘short session’ that allowed Parliament to pass the Parliament Act 1949 consistently with the terms of the Parliament Act 1911 (which required that the bill be passed by the House of Commons in three sessions over a period of not less than two years).
- 9.1 First, the fact that a decision to prorogue Parliament was not legally challenged in 1948 – at a time when, decades before the decision in CCSU, the exercise of prerogative powers was widely believed to be unsusceptible to judicial review in any circumstances – is not a reliable indicator that it was lawful, or that it would be considered lawful under the law as it now stands.

- 9.2 Second, in any event, there is a world of difference between a prorogation which facilitates Parliament's ability to pass legislation and a prorogation which impedes it. The latter interferes with Parliamentary sovereignty, and the former does not. The prorogation in 1949 facilitated the enactment of legislation which had overwhelming support in the House of Commons (it passed its third reading in the final session by 340 votes to 187) in a manner which was consistent with the requirements that previously had been approved by both Houses. It provides no support for the use of the power to prevent Parliament from acting.
10. Finally, on the question of the extent of the interference with Parliament's ability to discharge its functions, the Divisional Court suggested at §57 that the rapid passage of the European Union (Withdrawal) (No 2) Act 2019 "*graphically highlighted*" the absence of any measurable legal standard by which to find that Parliamentary sovereignty had been infringed. That is wrong for several reasons.
- 10.1 First, although the passage of the Act was quick, it was not instantaneous. As the Divisional Court noted, the Bill completed its parliamentary stages on 6 September 2019 and received Royal Assent on 9 September 2019. Importantly, the logic of the Divisional Court's decision is that a decision to prorogue Parliament in between those two dates, thereby preventing the Bill from becoming law, would have been immune from review.
- 10.2 Second, notwithstanding the passage of that legislation, there remain other time-critical matters in respect of which Parliament might have wished (and might still wish) to act. For example:
- 10.2.1 The effect of the prorogation is that Parliament's work in relation to scrutiny has ceased. To take one example, the Prime Minister was due to give evidence to the Commons Liaison Committee on 11 September 2019, but that session did not take place.
- 10.2.2 In order for there to be a general election before 31 October 2019, the House of Commons would have had to vote for it by a two-thirds majority prior to 26 September 2019, because of the provisions of s.14 of the Electoral Registration and Administration Act 2013 requiring that a general election must be held on the 25th working day after Parliament is dissolved.

Prorogation until 14 October 2019 extinguishes the possibility of that happening.

10.2.3 More generally, in view of the apparently high risk of open constitutional conflict arising from the Prime Minister's position that he will in no circumstances ask for an extension of the Article 50 deadline notwithstanding the existence of primary legislation explicitly requiring him to do so, Parliament might well have wished to take other legislative action, such as passing legislation authorising somebody other than the Prime Minister to communicate the United Kingdom's intentions to the European Union instead. There is now no prospect of any such legislation being passed before Parliament is permitted to reconvene, and therefore a greatly reduced prospect of such legislation before 31 October 2019 – assuming Parliament is not simply prorogued again when it returns.

The Prime Minister's purpose in this case

11. In his written submissions before the Divisional Court, Sir John made submissions about the reasons for the Prime Minister's decision. In summary, he submitted that, looking at the material then available, the inference was inescapable that the Prime Minister's decision was motivated, or in any event substantially motivated, by his political interest in ensuring that there was no activity in Parliament during the period leading up to the EU Council summit on 17/18 October 2019.
12. Somewhat strikingly, it remains genuinely unclear whether the Defendant disputes that proposition. No witness statements or affidavits have been filed to that effect. The Defendant's written and oral submissions to the Divisional Court studiously avoided committing to any clear position on the issue. The Divisional Court did not consider it necessary to decide it.
13. In the event that the question of the Prime Minister's purpose is disputed, Sir John wishes to draw the Court's attention to the matters set out below, which have arisen since his original submissions were filed.
14. The handful of documents exhibited to the very short statement of the Treasury Solicitor must be treated with caution, for two main reasons.

- 14.1 First, they have simply been put before the Court as documents. Unusually in judicial review proceedings, there has been no confirmation that they constitute an accurate or complete record of the reasons for the decision.
- 14.2 Second, the document which contains the clearest articulation of the “*legislative programme*” justification – the briefing paper dated 15 August 2019 – was prepared by Nikki da Costa, who (as pointed out in Sir John’s previous written submissions at §19.3) had only a few weeks previously written an opinion piece in *The Spectator* entitled “*Will parliament be able to stop the next PM leaving without a deal?*” in which she explored the possibility of an “*adept government*” seeking to “*delay the passage of future legislation to buy time*” prior to the EU Council summit. That clearly calls for an explanation, but none was provided.
15. Since then, the absence of proper witness evidence in these proceedings, and the issue of compliance with the duty of candour more generally, has been raised with the Prime Minister and other members of the Cabinet on several occasions. Taking only those examples which are in Hansard and therefore a matter of public record:
- 15.1 On 3 September 2019 the Prime Minister was asked in the House of Commons: “*Is it true that senior civil servants have refused to sign witness statements for ongoing legal proceedings relating to the prorogation? Were the director of legislative affairs and the Cabinet Secretary asked to do so, and did they agree?*” He did not answer. {HC Deb Vol 664 col 41-42}
- 15.2 Also on 3 September 2019, the Leader of the House (who, as Lord President of the Privy Council, also chaired the meeting at which the Order in Council proroguing Parliament was made) was asked: “*have any officials from his office, 10 Downing Street or elsewhere, whether political advisers or civil servants, been conducting communications away from the normal channels, in such a way that would not comply with the terms of candour and disclosure necessary for the court proceedings that are currently taking place?*” He answered: “*If people were carrying out discussions without candour, I would not know about them so would not be able to tell the hon. Gentleman whether they had happened.*” {HC Deb Vol 664 col 91-92}
- 15.3 On 4 September 2019, the Prime Minister was asked the following questions and answered as follows:

“Mr David Gauke (South West Hertfordshire) (Ind): The Prime Minister has said that the Prorogation of Parliament is nothing to do with Brexit. Is that still his position?

The Prime Minister: *As my right hon. Friend knows full well, there have been demands for a Queen’s Speech from the hon. Member for Walsall South (Valerie Vaz) and from across the House. This Session has lasted longer than any in the last 400 years, and there will be ample opportunity to debate the Brexit deal in this House after 17 October if this Government are allowed to get on and deliver a deal.”* {HC Deb vol 664 col 170}

“Mr Dominic Grieve (Beaconsfield) (Ind): *In the light of the Prime Minister’s answer to my right hon. Friend the Member for South West Hertfordshire (Mr Gauke), could the Prime Minister please explain why it has proved impossible to find any official or Minister prepared to state that the reasons for Prorogation were to pave the way for a Queen’s Speech, in the course of the current legal proceedings in which the Government are involved? Would the Prime Minister like to reconsider the answer he has just given to the House?*

The Prime Minister: *I hesitate to advise my right hon. and learned Friend about legal proceedings but, if he looks at what happened in Scotland this morning, he will discover that that case was thrown out.”* {HC Deb vol 664 col 172}

15.4 On 9 September 2019 the failure to adduce evidence in these proceedings was debated extensively in the House of Commons: see for example {HC Deb vol 664 col 524-525}. That debate concluded with the House passing a Humble Address calling for the supply of all correspondence and other communications concerning prorogation sent or received by certain specified individuals since 23 July 2019 {HC Deb vol 664 col 559}.

15.5 In the course of that debate:

15.5.1 the Chancellor of the Duchy of Lancaster was invited to “*explain at the Dispatch Box why no affidavit was filed by any official relating to the circumstances in which Prorogation was decided upon*”, but did not {HC Deb vol 664 col 553}; and,

15.5.2 the Prime Minister’s position was reported (even while the debate was continuing) to be that “*under no circumstances*” would the documents be provided “*regardless of any votes in Parliament*” {HC Deb vol 664 col 529}.

16. In any normal case, it would be all but inconceivable that a court in these circumstances would reach any conclusion other than that (i) the “*legislative programme*” explanation must be, at best, materially incomplete, and (ii) the decision was in fact substantially motivated by a desire to obstruct Parliament from interfering with the Prime Minister’s plans. The well-known principles in *Wiszniewski v Central Manchester Health Authority* [1998] PIQR P324 plainly support such an inference. In particular, it would be very straightforward for the Prime Minister or a senior official to sign a witness statement confirming (for example) that the decision had nothing to do with Brexit if that were indeed the case, and despite repeated requests nobody has been prepared to do so.
17. The scope for such an inference in the present case is if anything greater in view of the requirements of the duty of candour. The Prime Minister is under a duty “*to explain the full facts and reasoning underlying the decision challenged*”: *AHK v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) at §22. His failure or refusal to do so is conspicuous, and there has been no proper explanation for it. The only conceivable explanation is that the true reasons if disclosed would be adverse to his case. If the Court proceeded on any basis other than by drawing an adverse inference to that effect, the result would be to incentivise the non-provision of proper explanations of decisions in future cases.
18. The only real argument against drawing such an inference is that a finding of this kind in respect of a Prime Minister would be unusual. If that is of any legal relevance, it can only be in the sense that an inherently improbable allegation may require more cogent evidence in support of it. On that issue:
 - 18.1 it is by no means inherently improbable, particularly having regard to the matters set out in Sir John’s previous submissions at §§20-21, that the Defendant had a purpose other than that which is recorded in the handful of documents disclosed; and,
 - 18.2 even if it were, the evidence as to the true reasons (such as that set out in Sir John’s previous submissions at §§16-19), and the absence of evidence to the contrary which it would be readily possible for the Defendant to provide if it were true, are more than sufficient to override any such improbability.
19. The current factual picture, on the material which is available and with regard to the absence of evidence which ought to be available but has not been provided, is deeply concerning. The Court is under no obligation to approach this case on the artificially naïve basis that the

handful of disclosed documents, the contents of which nobody has been prepared to verify with a statement of truth, should nevertheless be assumed to be entirely accurate and complete when even members of the Cabinet do not appear to believe them (see previous submissions at §17). It would also be wrong to proceed on that basis, because it would mean that the real issue that has arisen on the facts would not be resolved.

Conclusion

20. For the above reasons, Sir John reiterates his support for the challenge to the Defendant's decision.

LORD GARNIER Q.C.



TOM CLEAVER

ANNA HOFFMANN

13 September 2019