

ARTICLE 50 JUDGMENT: KEY POINTS

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The High Court's ruling in *R(Miller and others) v Secretary of State for Exiting the EU* ([full judgment](#)) is, without doubt, the most important constitutional law judgment for many years. The following are the key points.

- The High Court started with the analysis (agreed by both sides) that withdrawal from the EU by Article 50 would affect: (i) UK citizens' rights capable of being restored in UK law (e.g. rights under EU Regulations); (ii) UK citizens' rights in other EU States, and (iii) UK citizens' rights that could not be replicated in UK law (such as rights to complain to the Commission or to seek a decision from an EU institution). It was agreed that category (iii) rights would be lost. But the Court also noted that category (i) rights would be lost unless Parliament chose to restore them, and unless it did so, triggering Art.50 would deprive those rights of effect. It also thought it was "formalistic" to regard loss of rights in other Member States (category (ii)) as no more than a product of the interaction of EU law with the law of those States: the reality was that Parliament knew and intended that UK citizens would have those rights as a result of enactment of the European Communities Act 1972 ("the ECA"): it would be surprising if they could be removed by use of the prerogative powers.
- The High Court then started its analysis by considering the correct approach to the ECA. First, it said that the ECA had to be interpreted against the background of the strong constitutional presumption that Parliament does not, unless it provides to the contrary, intend the Crown to have power to vary the law of the land by use of the prerogative. That presumption was particularly strong in the case of the ECA because of the scale and importance of the rights at issue. Having chosen to "switch on" the direct effect of EU law by means of the ECA, it was not plausible that Parliament intended to allow the royal prerogative to be used to "switch it off again". It may be noted that this argument deals with an argument made not so much by the Government but in a paper [here](#) which noted that Parliament frequently, in the area of double tax treaties, does leave domestic rights (eg the right to deduct tax already paid in a foreign country) in the hands of the royal prerogative (those rights can be removed merely by an act of the royal prerogative withdrawing from the tax treaty). But the High Court here emphasises the importance of the ECA as a constitutional statute and the importance of the rights conferred as an argument against construing the relationship between the ECA and the royal prerogative in the same way as is appropriate for double tax treaties.

- On a correct reading of the ECA, therefore, Parliament intended EU law rights (in all three categories) to be incorporated in UK law in a way that could not be undone by an act of the royal prerogative. Because triggering Article 50 would effect a withdrawal from the Treaties on which all three categories of rights depended, that could not be done under the royal prerogative. Moreover, it was implausible to suggest that the ECA's incorporation of rights "provided for under the Treaties" included an implied condition to the effect that that was so only if the Crown had not decided to withdraw from the Treaties: on the contrary, that wording suggested Parliament intended that the Treaties should continue to have effect in UK law as long as the Treaties existed. Further, the provision (in section 3) providing for the relationship between UK Courts and the Court of Justice would have no meaning if the Crown could withdraw the UK from the Treaties without further legislation: it could not be right that Parliament intended to allow the royal prerogative to be used to strip those provisions of meaning.
- The High Court thus dealt head-on with the Government's principal argument based on statutory construction: in its view, an exercise of statutory construction, informed by constitutional principle, led to the view that the royal prerogative had been excluded.
- That also meant that the Claimant's main argument – based on the principle that the Crown had no power to change domestic law by use of the prerogative – must also succeed: the ECA did not confer any power on the Crown to do so.
- The High Court did not deal with arguments based on the Act of Union 1707. As for Northern Ireland, it dealt briefly with the judgment of Maguire J, noting that his judgment was limited to deciding the effect of the Northern Ireland Act 1998 and the Good Friday Agreement on the royal prerogative. However, it also noted that the analysis of Article 50 presented to Maguire J seemed to assume that invocation of that Article would only "probably" lead to changes in Northern Ireland law and that any change in domestic law would necessarily be controlled by Parliament. But in the High Court case the Secretary of State accepted that the effect of withdrawal under Article 50 would be the removal of EU law rights without any further legislation.
- The High Court noted that it was agreed on all sides that the referendum was advisory only and had no effect on the powers of the Crown vis-à-vis Parliament. The referendum was important as a political event, but had no effect in law.

At the time of writing, it appears that the Government is likely to appeal to the Supreme Court.

One interesting question in the Supreme Court will be whether it is right to proceed on the basis that Article 50 notification is irrevocable (as both sides before the High Court agreed). The question is interesting because, if the answer to the question before the Court turns on that issue, the Supreme Court would have to make a reference to the Court of Justice of the EU on the correct interpretation of Article 50 (a course which would be politically contentious). For what it is worth, the present writer believes that the Supreme Court is likely to be able to avoid that course: in particular, the logic of the argument of the claimants and the approach of the High Court appears to survive even if the Crown could, by a further act of the prerogative, "pull" an Article 50 notification at the last minute: the point would remain that (if the Government were right) EU law rights would, without any involvement of Parliament and subject only to second thoughts by the Crown (acting on its own under the royal prerogative), be brought to an end at the end of the two-year process.

*Gerry Facenna QC and Jack Williams acted for Grahame Pigney & Others.
Anneli Howard acted for Gina Miller.*

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