R (on the application of Miller and others) v Secretary of State for Exiting the European Union

Reference by the AG for NI – In the matter of an application by Agnew and ors for Judicial Review

Reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review

Fiona Banks, Barrister, Monckton Chambers

In its landmark ruling, going to the heart of the United Kingdom's unwritten constitution, the Supreme Court has upheld the decision of the Divisional Court and held, by a majority of 8:3, that a formal notice of withdrawal pursuant to Article 50(2) of the TEU can only lawfully be given with Parliament's prior authorisation: ministers do not have the power to give such a notice unilaterally through the exercise of prerogative power without primary legislation. The Court also ruled that the consent of the Northern Ireland Assembly is not a legal requirement before the relevant Act of the UK Parliament is passed.

This case started out as a narrow legal challenge relating to the circumstances in which statutory rights can be removed or taken away; it rapidly developed into a re-calibration of the balance of power between the Executive and the Legislator, the independence of the judiciary and the extent of devolved powers within the United Kingdom's constitutional order.

Central to the case was the Government's reliance on its historical foreign affairs prerogative to make and unmake treaties on the international plane – pitted against the demands of Parliamentary sovereignty established in case law dating back to the Magna Carta and the Glorious Revolution. As Lord Hughes pithily summarised in his dissenting speech, the main question in the appeal centred on the tension between two well established constitutional rules: (1) that the executive cannot change domestic law made by Act of Parliament, nor the common law ("Rule 1"), relied upon by Ms Miller; and (2) the making and unmaking of treaties is a matter of foreign relations lying within the competence of the Government exercising its prerogative powers ("Rule 2"), relied upon by the Government.

Lord Neuberger, delivering the speech of the majority, having reviewed the constitutional background, emphasised that the prerogative power to make

treaties depends on two related propositions: (1) that treaties between sovereign states take effect in international law and are not governed by the domestic law of any state; and (2) that treaties are not part of UK domestic law and give rise to no legal rights or obligations, other than being binding on the United Kingdom in international law. Lord Neuberger held that it was only on the basis of those two propositions that Rule 2 is compatible with Rule 1.

The effect of the 1972 Act

Lord Neuberger emphasised the constitutionally unprecedented effect of the European Communities Act 1972 ("the 1972 Act") whereby, without further primary legislation, EU law becomes not only a direct source of UK law but takes precedence over all domestic sources of UK law, for so long as the 1972 Act remains in force. Thus the 1972 Act provides that rights, duties and rules derived from EU law should apply in the UK as part of domestic law and provided for a new constitutional process for making law in the UK (namely the direct effect of EU Treaties and EU Regulations (s.2(1)) and the authorisation of the implementation of EU Directives by delegated legislation (s.2(2)). Lord Neuberger adopted the description of the 1972 Act as the "conduit pipe" by which EU law is introduced into UK domestic law.

Given the overriding primacy of EU law as a matter of domestic law, Lord Neuberger noted the constitutional character of the 1972 Act, having an exceptional and entirely different status in domestic law to delegated legislation. That constitutional character means that it is immune from the doctrine of implied repeal and means that, in line with the principle of legality, EU law cannot be overridden by general words in a statute or by executive action.

It was common ground before the Supreme Court that UK domestic law will change as a result of the UK ceasing to be a party to the EU Treaties and that certain rights would inevitably be lost.

Whilst accepting that (i) the ambit of the rights and remedies which are incorporated into domestic law through section 2 of the 1972 Act varies with the UK's obligations from time to time under the EU Treaties; and (ii) Parliament cannot have intended that section 2 should continue to import the variable content of EU law into domestic law after the UK had ceased to be bound by the EU Treaties; the majority considered that it did not follow that the 1972 Act contemplates or accommodates the abrogation of EU law upon the UK's withdrawal from the EU Treaties by prerogative act without Parliamentary authorisation.

To the contrary, the majority were of the view that by the 1972 Act Parliament endorsed and gave effect to the UK's membership of the EU under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties.

Lord Neuberger stated that there was a "*vital difference*" between (i) changes in domestic law resulting from variations to the content of EU law from time to time and (ii) changes in domestic law resulting from withdrawal by the UK from the EU, representing a fundamental change in the constitutional arrangements of the UK, from which point EU law will cease to be a source of domestic law for the future. A complete withdrawal was characterised by Lord Neuberger as a change which is different not just in degree but in kind from the abrogation of particular rights and obligations derived from EU law. Lord Neuberger held that it would be "*inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone*".

Lord Neuberger also upheld the Divisional Court's analysis that changes in domestic rights acquired through EU law represents a further ground for justifying the conclusion that Parliamentary legislation is necessary: whilst section 2 of the 1972 Act envisages domestic law changing as EU law varies, it does not envisage those rights changing as a result of ministers unilaterally deciding that the UK should withdraw from the EU Treaties.

The majority rejected the Secretary of State's reliance on the absence in the 1972 Act of any exclusion of the prerogative power to withdraw from the EU Treaties on the basis that because the EU Treaties are a source of domestic law, the Royal prerogative to make and unmake treaties, operating wholly on the international plane, cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form.

Lord Neuberger considered that the provisions of the 1972 Act, particularly when considered in light of the unusual nature of the EU Treaties and the 1972 Act's unusual legislative history, supported the view that ministers did not have the power to withdraw from the EU Treaties using a prerogative power. It was implausible that ministers could have withdrawn from the EU Treaties at any time on or after 2 January 1973 without authorisation by Parliament or, even if any referendum had resulted in a vote to remain. Those criticisms were not met, in the view of the majority, by the suggestion that their decision may have been judicially reviewable given that it has always been considered that because prerogative treaty-making powers only operate on the international plane, they are not subject to judicial review. Nor were those criticisms met by reliance on the basis that ministers would be accountable to Parliament. The majority considered that to be a "*potentially controversial argument constitutionally. It would justify all sorts of powers being accorded to the executive, on the basis that ministers could always be called to account for their exercise of any power*".

The majority therefore held that the continued existence of the new source of law created by the 1972 Act and the continued existence of the rights and obligations flowing from that source, cannot have depended on the fact that to date ministers have refrained from eliminating that source and those rights

through recourse to the Royal prerogative.

The contention advanced by the Secretary of State that Parliament would be involved in the process of withdrawal from the EU, missed the point that if ministers give notice without Parliamentary authorisation, the die will be cast before Parliament has become formally involved. If the point was legitimate to take into account, it would in any event militate in favour of the pragmatic view that Parliament should have to sanction giving notice.

Analogies drawn by the Secretary of State with the UK's withdrawal in 1972 from EFTA were misplaced given that no directly effective rights had thereby been created. Similarly, comparisons with bilateral double taxation treaties failed because of the existence of specific parliamentary approval.

The effect of legislation and events after 1972: from 1973 to 2014

The Secretary of State's submission that the European Union (Amendment) Act 2008 ("the 2008 Act") and the European Union Act 2011 ("the 2011 Act") implicitly recognised the existence of the prerogative power to withdraw from the EU Treaties, unconstrained by Parliamentary control, by omitting any reference to article 50(2), was rejected by Lord Neuberger. Lord Neuberger noted that an omission in a statute can rarely, if ever, justify inferring a fundamental change in the law and that in any event, neither statue was attempting to codify the legislative restrictions on the use of the prerogative in relation to the EU Treaties.

Moreover, given the conclusion that there never was a prerogative power to withdraw from the EU Treaties without statutory authority, the prerogative power claimed by the Secretary of State could only be created by a subsequent statute if the express language of that statute unequivocally showed that the power was intended to be created. Further, it was not possible to construe the effect of the present state of the legislation as a whole given that the 2008 Act and the 2011 Act concerned a different issue from the 1972 Act but in any event, even if that were possible, they would not give rise to a prerogative power to withdraw from the EU Treaties.

Legislation and events after 1972: the 2015 Act and the referendum

Lord Neuberger confirmed that the effect of any particular referendum must depend on the terms of the statute which authorises it. Neither the 1975 Act nor the 2015 Act, which authorised referendums about membership of the European Community or European Union, made provision for any consequences of either possible outcome. Public statements by ministers as to the nature of the referendum differed but were in any event not law but rather statements of political intention.

Lord Neuberger held that where, as here, implementation of a referendum result requires a change in the law of the land and statute has not provided for that change, the only permissible way of implementing that change in the UK constitution is through Parliamentary legislation. Therefore, unless and until acted on by Parliament, the force of the referendum of 2016 is political rather than legal.

The references from NI and the devolution questions

Given the conclusion that primary legislation is required to authorise the giving of notice, the focus of Lord Neuberger's speech on the devolution questions was on whether the consent of the NI Assembly was required before the relevant legislation is enacted. That question raised in substance the application of the Sewel Convention which was adopted as a means of establishing cooperative relationships between the UK Parliament and the devolved institutions where there were overlapping legislative competences.

Lord Neuberger reiterated the well-established principle that the courts of law cannot enforce a political convention, being merely observers. Thus the policing of the scope of the Sewel Convention and the manner of its operation does not lie within the constitutional remit of the judiciary which is to protect the rule of law. As such, the majority held that the consent of the NI Assembly is not a legal requirement before the relevant Act of the UK Parliament is passed.

As to the question of whether the giving of notice without the consent of the people of NI impedes the operation of section 1 of the NI Act, Lord Neuberger answered that question in the negative, holding that section 1 of the Act gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland but did not regulate any other change in the constitutional status of NI nor required the consent of a majority of the people of NI to the withdrawal of the UK from the EU.

The dissenting speeches

Dissenting speeches in the Miller appeal were given by Lord Reed, Lord Carnwath and Lord Hughes who differed from the majority in their construction of the 1972 Act, emphasising that the terms of the Act give effect to the obligations and rules which arise under the treaties and therefore it was only ever designed to have effect whilst the UK was a member of the EU. Lord Reed (with whom Lord Carnwath and Lord Hughes agreed) expressed the view that the 1972 Act imposes no requirement and manifests no intention in respect of the UK's membership of the EU and thus does not impact on the Crown's exercise of prerogative powers in respect of UK membership. In Lord Reed's view there was no basis in the language of the 1972 Act for the majority drawing the "vital" distinction between changes in domestic law resulting from variations

in the content of EU law arising from new EU legislation and changes resulting from withdrawal by the UK from the EU. Lord Reed characterised the 1972 Act as merely creating a scheme under which the effect given to EU law in domestic law reflects the UK's international obligations under the Treaties, whatever they may be.

The fundamental principle of the UK constitution that the conduct of foreign relations falls within the prerogative powers of the Crown could only be overridden by express provision or necessary implication. The 1972 Act is silent: Lord Reed considered that neither expressly nor by implication does section 2(1) require action by the Crown to withdraw from the EU Treaties to be authorised by an Act of Parliament.

Lord Carnwath emphasised that the extent to which existing laws are changed or rights taken away following the triggering of Article 50 will be determined by legislation and will therefore be dependent on the will of Parliament. There was no basis, in Lord Carnwath's view, for reformulating the classic rule to the effect that "*the prerogative does not extend to any act which will necessarily lead to the alteration of the domestic law or of rights under it, whether or not that alteration is sanctioned by Parliament*".

Both Lord Reed and Lord Carnwath emphasised that controls over the exercise of ministerial powers under the British constitution are not solely or even primarily of a legal character and that the constitutional importance of ministerial accountability to Parliament should not be overlooked.

Analysis

The Supreme Court has upheld the Divisional Court's reasoning that the prerogative power cannot extend to either changing domestic law or affecting domestic rights. This may have significant consequences for the use of prerogative powers in the international sphere where domestic or acquired rights stand to be affected. The Court has also taken the opportunity to clarify the scope of the Court's role in respect of constitutional conventions.

The judgment lays to rest the heated academic debate as to whether a preliminary reference is required on the reversibility of Article 50 for the purposes of this litigation. The Supreme Court was content to proceed on the basis that the Secretary of State was correct in his submission that the reversibility or otherwise of an Article 50 notification would have made no difference to the outcome of the appeal.

The Government has immediately responded to indicate that a bill to approve triggering Article 50 will be tabled within days with a second

reading taking place next week, with a view to it being placed before the House of Lords by the beginning of March. However, as highlighted by Lord Carnwath in his speech, the nature of the bill is unlikely to be anything more than a bare statutory authorisation for the service of the notice. That statutory authorisation of itself will do nothing to resolve the myriad practical and complex issues which will need to be addressed as Brexit proceeds nor to protect the rights of those directly affected. Those problems remain the same with or without the statutory authorisation for the article 50 notice and remain to be resolved.

Meanwhile, the legal challenges facing the Government continue with a permission hearing in the judicial review case of Yalland and Wilding and others v Secretary of State for Exiting the EU due to be heard next Friday, 3 February 2017. In that case, Mr Yalland and Mr Wilding contend that the UK can only leave the single market through the process of Article 127 of the EEA Agreement which can itself only be triggered following Parliamentary approval. They also seek clarification of the Government's stated position that the UK's membership of the EEA will automatically cease on the UK leaving the EU.

Anneli Howard was instructed by Mischcon de Reya to represent Mrs Gina Miller, the First Respondent.

Gerry Facenna QC, David Gregory, and Jack Williams were instructed by Bindmans LLP on behalf of the Pigney Respondents/Interested Parties (known as "The People's Challenge").

The Comment made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

Monckton Chambers
1 & 2 Raymond
Buildings
Gray's Inn
London, WC1R 5NR

Tel: +44 (0)20 7405 7211
Fax: +44 (0)20 7405 2084
Email: chambers@monckton.com
www.monckton.com