Passports, the prerogative, and process rights: XH & AI v Secretary of State for the Home Department [2017] EWCA Civ 41

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Summary: The appellants' British passports were cancelled on the grounds that they were suspected of intending to travel abroad in order to get involved with terrorism-related activity. The Court of Appeal dismissed the appellants' argument that the Secretary of State's exercise of purported power under the Royal Prerogative to cancel their passports was unlawful as the power had, in their submission, been excluded or limited by the Terrorism Prevention and Investigation Measures Act 2011. Instead, the Court held that such a prerogative power continues to exist. The Court of Appeal also dismissed arguments made on behalf of XH that the exercise of such power was, in any event, unlawful on the basis of EU law norms of procedural fairness. This case note discusses the first ground of appeal relating to the Royal Prerogative.

XH & AI v Secretary of State for the Home Department [2017] EWCA Civ 41 (*"XH & AI"*) is the first judgment concerning the Royal Prerogative since the Supreme Court's extensive analysis of such executive powers in *R (Miller & others) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (*"Miller"*). A comparison of the approaches each Court takes is therefore of particular interest.

As I have explained elsewhere (here and here), challenges to the use of purported prerogative powers can be analysed in four stages ("the four e's"): first, whether a relevant prerogative power **exists**; second, assuming one does exist, whether it **extends** to the circumstances and intended usage envisaged; third, whether such a prerogative of that nature and scope has, in any event, been **excluded** by a statutory power (whether expressly or by necessary implication); and fourth, assuming such a relevant prerogative has not been excluded by statute, whether the **exercise** of that prerogative is nonetheless unlawful on grounds of, e.g., irrationality, procedural impropriety or disproportionality. A particular case may revolve around any multiple of these analytical stages.

On this occasion, there was no dispute between the parties that historically a prerogative power to issue or withdraw a passport existed (see, for example, O'Connor LJ in *ex p Everett* [1989] QB 811 at p.817C-D cited with approval by the Court of Appeal at para. 31). This was not, then, a case of the Secretary of State doing the impermissible by attempting to create or extend the list of prerogative powers which are historically available – as stated by Diplock LJ in *British Broadcasting Corporation v Johns* [1965] Ch 32 at p. 79, it is over 350

years and a civil war too late to attempt to extend such powers.

Instead, what the appellants primarily alleged was that such a prerogative power had been excluded by necessarily implication by the Terrorism Prevention and Investigation Measures Act 2011 ("TPIM" or "the Act") with the effect that the Secretary of State had unlawfully circumvented the more stringent procedures and safeguards contained within that Act. The appellants submitted that TPIM implicitly ousted the passport prerogative insofar as the Act related to the same subject matter, namely imposing foreign travel restrictions on an individual in order to prevent or restrict an individual's involvement in terrorism related activities. Specifically, under section 2 and paragraph 2 of schedule 1 of the Act, the Secretary of State could impose restrictions on an individual leaving or travelling outside the United Kingdom by imposing requirements that such an individual could not possess any travel document (defined so as to include a passport) and that the individual should surrender such travel document. It was submitted by the appellants that, whilst these travel measures do not expressly deal with the refusal and cancellation of a passport, they achieve the same practical result and have the same aim.

Further, the continued existence of such a prerogative power to cancel a passport would, on the appellants' case, sit uncomfortably with the existence of the statutory scheme in TPIM and Parliament's intention in enacting such scheme. The Act imposed more demanding procedural protections which must be complied with before a passport could be withdrawn. For example, the Act: specifies a maximum two year time limit for TPIM notices; requires the prior permission of the court save where that is precluded by urgency; has built in procedures for review with the individual present; imposes a requirement of continuous review; requires the Secretary of State to report to Parliament; requires personal service of the TPIM notice on the individual before it becomes binding; and provides for an independent reviewer of the TPIM Act's operation. Thus, as counsel for AI submitted, Parliament had purposely legislated to prevent travel for terrorist purposes in a legislative scheme which balanced the public interest with greater safeguards for the individual liberty of suspects than was ensured under usage of the Royal Prerogative.

The Court rejected such submissions (see paras. 89 – 101). Instead, upholding the Divisional Court's analysis, the Court of Appeal held that Parliament did not intend to exclude or override the prerogative power to cancel a passport: TPIM's provisions were such that it could co-exist with a prerogative power as each had a different scope, with the Act having a narrower application only creating personal obligations on individuals rather than affecting the general power to affect the existence or validity of a passport. Specifically, the Court was concerned that the removal of the prerogative power to cancel passports would create *"an obvious area of public risk and lack of security"* (para. 94). As such, the Court stated, *"[i]t seems highly unlikely that Parliament would have intended to increase the risk to public security by abolishing the power to cancel*

powers in such circumstances without any express provision to that effect; and particularly unlikely in a statute which creates a new and wide-ranging suite of anti-terrorism powers" (para. 98). Further, the Court held that *"there can be no case that exercise of [prerogative] power would always be abusive"* when deployed to secure a similar result which could be achieved under a statutory power (para. 106, emphasis added).

Accordingly, unlike in *Miller* – where the third analytical step (exclusion by statute) and the fourth step (control of the exercise of such prerogative power) became unnecessary once the Supreme Court found that the foreign relations treaty prerogative did not in the first place extend to affecting domestic law or domestic rights – *XH &AI* squarely confronted such issues. In doing so, there are arguably two controversial aspects of the Court of Appeal's approach.

First, the Court of Appeal appears to have elided the different stages of analysis of the prerogative powers by conflating extent control with that of exclusion control. The Court of Appeal does this by treating the matter purely under one stage – the latter stage of whether a statute has excluded a prerogative power whether expressly or by abrogation. This treats all questions in relation to the prerogative as an *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 type of case, interpreting a relevant statute and deciding upon the effects of that statute on any pre-existing prerogative power. This approach, however, was expressly rejected by the Supreme Court in Miller, despite that being exactly the approach contended for by the Government there too. Here, the Court of Appeal has taken the bait. Instead, as we see from the Supreme Court's judgment in Miller, there are prior questions relating to what prerogative power can ever extend to in the first place: (1) prerogative power cannot be used to change domestic law; (2) prerogative power cannot be used to affect domestic rights; (3) prerogative power cannot be used to frustrate Acts of Parliament; and (4) prerogative power cannot be used to suspend or dispense with Acts of Parliament. The Court of Appeal has arguably glided over this extent stage, specifically that third facet.

This 'frustration principle' is entirely separate from the exclusion-by-statutes line of cases (e.g. *de Keyser's*). The former is demonstrated particularly well by the cases of *Laker Airways Ltd v Department of Trade* [1977] QB 643 and *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513. However, in my view, the Court of Appeal summarises the ratio of these cases inaccurately at paragraphs 37 and 38 respectively as purely exclusion cases, and does likewise with the *Miller* case itself at paragraph 35. This all sits at odds with how the Supreme Court in *Miller* decided the case and utilised *Laker* and *ex p Fire Brigades Union* in doing so:

> *"…ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation. Thus, ministers could not exercise prerogative powers at the*

international level to revoke the designation of Laker Airways under an aviation treaty as that would have rendered a licence granted under a statute useless: Laker Airways Ltd v Department of Trade [1977] QB 643 - see especially at pp 718-719 and 728 per Roskill LJ and Lawton LJ respectively. And in Fire Brigades Union cited above, at pp 551-552, Lord Browne-Wilkinson concluded that ministers could not exercise the prerogative power to set up a scheme of compensation for criminal injuries in such a way as to make a statutory scheme redundant, even though the statute in question was not yet in force." - para. 51.

"…rather than the Secretary of State being able to rely on the absence in the 1972 Act of any exclusion of the prerogative power to withdraw from the EU Treaties, the proper analysis is that, unless that Act positively created such a power in relation to those Treaties, it does not exist" - para. 86.

"[De Keyser's] thus established that, to the extent that a matter has been regulated by Parliament, the Crown cannot regulate it differently under the prerogative. The cases of Laker Airways Ltd v Department of Trade [1977] QB 643 and R v Secretary of State for the Home Department, Ex p Fire Brigades Union [1995] 2 AC 513 are cited by the Miller claimants as more recent examples of the application of the same principle, although in the former case only Roskill LJ relied on it (contrast Lord Denning MR at pp 705G-706A and Lawton LJ at p 728A), while the decision in the latter case was based on a different principle (see per Lord Browne-Wilkinson at p 553G and Lord Lloyd of Berwick at p 573 C-D)." - para. 168 per Lord Reed (a minority judgment but entirely consistent with what the majority decided on this issue).

As such, the Court of Appeal may have undervalued the fact that the exercise of any prerogative power to withdraw a passport could, in effect, amount to an attempt to circumvent the statutory scheme under TPIM or frustrate that Act's purpose.

Second, when applying the exclusion stage, the Court of Appeal has, in one respect, arguably set an unnecessarily high burden for satisfying the "by necessary implication" test which the Court of Appeal states *"is a strict one"* (para. 89). This arguably misapplies the very quote from *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2002] UKHL 22 which the Court of Appeal itself quotes at para. 89. In particular, statutes must be *"construed in their context"* (para 45 of Morgan Grenfell). As we learn from *R v Secretary of State for the Home Department ex p Northumbria Police Authority* [1989] QB 26, in determining the effect of a statute on a prerogative, the Courts should have particular regard to the nature of the powers in question and the impact that the co-existence of the prerogative would have on individual rights. In finding that there was no incompatibility between the statute and prerogative

(so that they could both co-exist) in *ex p Northumbria Police Authority*, the Court was influenced by the fact that the prerogative was being used for the good of the individual (as they saw it) rather than (as in *De Keyser's*) to attempt to undercut statutory safeguards. Lord Justice Purchas distinguished *De Keyser's Royal Hotel*, where, he said, the courts had intervened "*to prevent executive action under prerogative powers in violation of property or other rights of the individual where this is inconsistent with statutory provisions"* from the case he was considering, *"where the executive action is directly towards the benefit or protection of the individual"* (at p. 571). Thus, the Court of Appeal in *XH & AI* may have undervalued the safeguards which TPIM enshrined for individuals, and should have been more ready to find that it excluded use of the prerogative for a similar effect, restriction of travel.

Nevertheless, in another respect, the Court of Appeal's expression of the "by necessary implication" test is certainly welcome from a claimants' perspective. The Court rejected the Secretary of State's submission that there has to be a *"precise overlap"* for a statute to exclude the Royal Prerogative by necessary implication (para. 102). Instead, as the Court held, while the extent of overlap is *"always relevant and important"* the question at the end of the day *"is always one of statutory interpretation"* (para. 102). This is a helpful clarification of the conflicting *dicta* in *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (which the Government has attempted to utilise in both *Miller* and *XH & AI* to limit the opportunities for statutes to override the prerogative by implication), and accords with the Supreme Court's formulation in *Miller* at paragraph 48 that *"a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute."*

Daniel Beard QC, Nikolaus Grubeck and Julianne Kerr Morrison were instructed by Hickman and Rose and acted on behalf of AI.

The comments 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.

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