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LEGAL INSIGHTS

Brexit – The Supreme Court Decision: Only Parliament can pull the Brexit trigger

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In one of the most significant legal rulings of modern times, the UK Supreme Court has handed down its judgment on the legal aspects of Brexit, upholding an earlier decision of the English High Court. Amongst the tsunami of legal and political commentary it has generated, we attempt to distil the practical ramifications of the decision, and we take a look at the issues from a Northern Ireland perspective.

What was the case about?

Gina Miller, the leading campaigner who brought the case against the Government, said it was "not about politics, but process." At the heart of the claim by Ms Miller and her fellow challengers, including those from Northern Ireland, was that the Prime Minister could not use the Royal prerogative power to trigger Article 50 – the formal notice required by EU law to start Brexit – but rather primary legislation by Parliament was required in advance.

In light of the backlash from some elements of the public and the media against the English High Court judgment in November 2016, the Supreme Court was at pains to point out that the question before the justices was not about whether or not the UK should leave the EU – that decision having been made already by the people in the June referendum – but rather the legal process of leaving.

The court said that the case involved very important constitutional issues which arose not because of the UK's membership of the EU, but because they concerned:

> (a) the extent of the Government's power to effect changes in domestic law through exercise of the Royal prerogative at the international level, and
>
> (b) the relationship between the UK Government and Parliament on the one hand, and the devolved legislatures and administrations of Scotland, Wales and Northern Ireland on the other.

Law officers and various interested parties from Northern Ireland, Scotland, and Wales, made submissions during the hearing. These mostly related to devolution aspects, but also on the principle issue of whether Article 50 could be triggered without consulting Parliament. The Attorney General for Northern Ireland sided with the Government's case that legislation by Parliament was not needed, whilst his devolution counterparts, the Counsel General for Wales and the Lord Advocate for the Scottish Government, argued the opposite.

The devolution issues which the court considered, which primarily arose out of the Northern Ireland High Court case and the decision of Mr Justice Maguire in November 2016, were predicated on a claim that the Government and Parliament had enforceable obligations to consult with and obtain the consent of Northern Ireland, Scotland, and Wales in respect of Article 50 and, in effect, the exit plan.

Who won?

On the principle issue of Article 50, the Brexit challengers won by a majority of 8 justices to 3, and the UK Government lost. The court said that the Government cannot give notice under Article 50 without an Act of Parliament, properly passed by both the Commons and the Lords, and given assent by the Queen.

On the devolution issues there were no dissenting opinions. The court unanimously concluded in effect that there is no legally enforceable obligation on the UK Government to consult with or seek the consent of the people or the Governments in Northern Ireland, Wales or Scotland, before triggering Article 50.

Why?

After a lengthy exposition of the UK's constitutional and legal relationship with the EU since 1971, and

the history of the use of the prerogative, the court concluded that the triggering of Article 50 will have a direct and immediate impact on domestic law, and since the prerogative could not be used to change the law of the land, it could not be used to trigger Article 50.

The court said that the European Communities Act 1972, which took the UK into the then EEC, created a process by which EU law becomes a source of UK law. It was a special and unique piece of constitutional law, which was "unprecedented." The court said (at para 65) that:

> *In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is, as was said on behalf of the Secretary of State echoing the illuminating analysis of Professor Finnis, the "conduit pipe" by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law.*

The court referred to numerous subsequent pieces of UK legislation which implemented EU law by virtue of the 1972 Act, which generally included provisions making it clear in effect that only Parliament had the competency to change the UK's relationship with the EU, and not the prime minister of the time, or any other government minister.

With regard to the prerogative power, in the circumstances this was exercisable only to make and unmake international treaties, which are not part of UK law and give rise to no legal rights or obligations in domestic law, unlike the EU treaties which have effect at domestic level.

What is the effect of notice?

Interestingly, it was common ground between the parties that notice under Article 50 "cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn" and that "once the UK gives notice, it will inevitably cease at a later date to be a member of the EU and a party to the EU Treaties." This understanding between the parties appears to have been contrived to avoid any chance of the European Court of Justice becoming involved, since the revocability or otherwise of an Article 50 notice would be a matter for that court to determine, such notice deriving from EU law.

Lord Pannick QC, Counsel for Ms Miller, put it succinctly when he said that giving notice is equivalent to "pulling the trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply". This matter was not however common ground in the preceding cases. In the Northern Ireland High Court case it was argued that, in effect, triggering Article 50 would have no direct or immediate effect per se.

In short, the very giving of notice under Article 50 will change domestic law because it will start an irreversible process which will stop EU law having effect in the UK. That requires an Act of Parliament, and cannot be done by the Prime Minister or a member of her Cabinet.

Did the court spell out to Parliament what to do?

No, the justices did not prescribe exactly what the Act of Parliament must say.

However, that the court explicitly stated that primary legislation was required clarified some confusion which arose out of the English High Court decision. Referring to the resolution of the House of Commons on 7 December 2016, in which 448 MPs backed the triggering of Article 50, the court said:

> *[That resolution] cannot affect the legal issues before this court. A resolution of the House of Commons is an important political act. No doubt, it makes it politically more likely that any necessary legislation enabling ministers to give notice will be enacted. But if, as we have concluded, ministers cannot give notice by the exercise of prerogative powers, only legislation which is embodied in a statute will do. A resolution of the House of Commons is not legislation.*

What about Northern Ireland?

On the devolution issues, the justices all decided not to deal with three of the five items because they felt these had been "superseded" by the majority decision on the triggering of Article 50. They said that because they had ruled that primary legislation was required, there was no need to consider specifically whether such legislation was necessary under the Northern Ireland Act 1998.

In respect of the other two items – in effect whether the consent of the people of Northern Ireland or the consent of the Northern Ireland Assembly is required before triggering Article 50 – the court rejected these propositions, and any suggestion that Northern Ireland had special status within the UK, at least in respect of the legal and constitutional aspects of Brexit.

Whilst acknowledging the constitutional guarantee in the Good Friday Agreement, as enshrined in

section 1 of the Northern Ireland Act 1998, the court said:

> *In our view, this important provision…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. It neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union. Contrary to the submission of Mr Lavery QC for Mr McCord, this section cannot support any legitimate expectation to that effect.*

With regard to consent from the NI Assembly, the court ruled that this was not a legal requirement because the Sewel Convention, like any other constitutional convention, was not legally enforceable. That convention provides that Parliament should not normally legislate in respect of matters that will impact on Northern Ireland, Scotland or Wales, except with the agreement of the devolved legislature in question. The court did say that it thought the "Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures", but that the judiciary had no business in policing it.

In short, the UK Government and Parliament remains in charge of UK-EU relations. Issues arising out of Brexit do not fall within the competency of the NI Assembly, or any other devolved administration, because it is essentially a foreign affairs matter, and foreign affairs are and always have been controlled by Westminster. This is the position regardless of the local referendum result or existing constitutional arrangements.

Whilst the Government was defeated on the principle issue of Article 50, the Prime Minister will be very relieved that the Supreme Court found in her favour on the devolution issues. Having to pass an Act of Parliament, and having to consult with and seek the consent of the devolved administrations, would have put at serious risk the proposed Brexit plan.

What happens now?

It appears to be the end of the road for the courts in respect of this particular case. Matters now shift back to the political arena, as power moves from the Government to MPs.

At the time of writing, government lawyers are drafting legislation to trigger Article 50 on foot of the Supreme Court decision. It is expected to be a very short Bill, which the Government will seek to push through Parliament quickly in order to keep its plans on track to start the formal exit process by March 2017.

The present consensus amongst political commentators is that the Government will be able to get its draft legislation enacted with relative ease, and that it should not prejudice its timetable. Most MPs, including remainers, have publicly declared their support that the referendum result should be honoured and given effect to as quickly as possible. In such circumstances, Northern Ireland MPs are unlikely to have any sway.

However, it may not be that easy. If the House of Commons were to block the legislation completely, then, as a consequence of the Supreme Court decision, Brexit cannot happen. A second referendum or general election would likely ensue.

Whilst that scenario is unlikely, it is probable that MPs, especially remainers and Labour MPs, will seek to amend the legislation to restrain and control the Government in respect of its Brexit plan. At the time of writing it appears that the Government will bow to pressure to issue a White Paper in this regard. That may not derail the process, but it is highly likely to cause the kind of delay that the Government would desperately like to avoid.

The House of Lords will also need to pass the legislation. It too has the ability to block the process, but that's even less likely because of its status as an unelected chamber. In any event, the Commons can eventually override the Lords, but only after a delay of at least 12 months.

In terms of consulting the NI Assembly or Executive on the legislation (and also the administrations in Scotland and Wales), it remains to be seen if and how the Government will honour its obligations under the Sewel Convention, and how it will react if the Assembly refuses its consent.

However, with the latest political crisis and the collapse of the power-sharing here, the timing is extremely unfortunate. If the Government does consult the devolved administrations before March, there may be no Assembly or Executive to consider and to consent to or otherwise comment on the Article 50 legislation.

In the circumstances, sufficient delay to the legislative process may suit Northern Ireland in order to allow the political parties to re-establish the institutions and get the Assembly up and running again.

Are there any other legal challenges in the pipeline?

Yes, there at least two other existing legal actions currently pending or proposed, one before the English courts and one in the High Court in Dublin.

The English case relates to UK's membership of the European Economic Area (the internal market between EU Member States and Iceland, Liechtenstein, and Norway), and whether the Government needs legislation to withdraw from that treaty too. In light of the Supreme Court decision, the Government may now short-circuit that challenge by including in its Brexit bill provision for withdrawal from the EEA, in addition to triggering Article 50.

With regard to the Irish case, in the words of the English barrister leading the challenge, they are seeking "to establish whether the UK Government can unilaterally, and without the consent of the other 27 member states, withdraw the UK's Article 50 notification" if it chose to do so at a later point. This is an issue which only the European Court of Justice can decide. As discussed above, it was common ground in the Supreme Court that an Article 50 notice was irrevocable, no dispute on this point of EU law arose, and no referral could be made to the European court. So the Irish case is being taken with the intention of getting the issue in front of the Court of Justice. That it is being taking in Ireland is of no major significance. Only a member state national court can refer a question to the Court of Justice, so it had to be issued somewhere, and Ireland was deemed more suitable than anywhere else. Proceedings are expected to be issued before the end of this month.

Whether these cases, or indeed any other future challenges, will have anywhere near the same impact as the Supreme Court decision is unclear, but the Government and interested observers will no doubt be following events closely.

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