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Supreme Court on Brexit*

In our article of 19 November 2016 we discussed the dramatic judgment the English High Court handed down on 3 November 2016, in the case of R (Miller) v Secretary of State for Exiting the European Union. In its judgment the High Court held that the UK Government did not have the requisite constitutional power to initiate the UK's withdrawal from the European Union; instead, it must first secure permission from Parliament. That judgment has since been upheld by the UK's most senior domestic court, the Supreme Court. This article explains the Supreme Court's reasoning, and sets out the broader implications from a legal and political perspective.

The key provision regulating a Member State's withdrawal from the EU is the now-infamous Article 50 of the Treaty of the European Union, which stipulates that a Member State "*may decide to withdraw from the Union in accordance with its own constitutional requirements and that a Member State which decides to withdraw shall notify the European Council of its intention*". The UK Government asserted that the requisite "constitutional requirements" were simple: it had authority to trigger Article 50 by virtue of its so-called "Royal Prerogative powers" – powers originating from the delegated authority of the monarchy.

The lead claimants in the subsequent legal challenge, Gina Miller and Deir Dos Santos, argued that the UK's constitution actually required that the Government first secure permission through an Act of Parliament. After the Claimants resoundingly won their case before the High Court, there was some speculation as to whether the Government would admit defeat and resolve to secure the requisite Act of Parliament as soon as possible, in order to improve its chances of meeting a self-imposed deadline of triggering Article 50 by the end of March. Instead, the Government elected to appeal.

Normally an appeal from the English High Court would proceed to the Court of Appeal. However, given the profound constitutional significance of this case, and the perceived urgency to reach a final resolution, the claim was "leapfrogged" directly up to the UK's most senior domestic court, the Supreme Court. An accelerated timetable that meant it was heard just a few weeks after the High Court's judgment, in a hearing that lasted three days in December. At the close of the hearing, the Supreme Court announced that it would endeavour to produce its judgment in January, and ultimately did so on 24 January 2017. The speed of resolution is a credit to all of the parties involved, and the 11 justices of the court; as an appeal of such complexity would ordinarily take up to a year to be heard and the judgment handed down.

As noted above, the Supreme Court found in favour of the Claimants, by a majority of 8-3. However, there are two additional features of the Supreme Court's judgment that also deserve attention. Firstly, the role of the devolved governments in Wales, Scotland, and Northern Ireland; and secondly the crucial question of whether Article 50 is revocable.

To the first point: the hearing actually joined several additional appeals considering a different aspect of the Government's authority to trigger Article 50 – in essence, was the Government under any legal obligation to secure permission from the UK's devolved governments? This was politically important because the people of Scotland and Northern Ireland did *not* support leaving the EU in the 2016 referendum, and so their government representatives argue strongly that they should not be pulled out of the EU by the English-dominated Government in London. On this point, however, the Supreme Court was unanimous: the devolution of power to the national governments was a political arrangement, held together by non-legally binding convention. Whilst the UK Government would be very wise to consider the positions of the devolved governments, therefore, they were not strictly under any legal obligation to secure their agreement.

The second feature of note is the outstanding debate over the revocability of Article 50. There was a lot of discussion during the High Court proceedings, and thereafter, as to whether either court would engage with this issue. Plainly the revocability of Article 50 will have profound implications for the exit negotiations between the UK and the EU. Unfortunately, however, both the Claimants and the Government took the same position on this issue, stating that in their view Article 50 was

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not revocable. For both sides this position was a matter of expediency. For the Claimants, it was fundamental to their case. For the Government, it simply could not afford to let revocability become a live issue, because if it did so, the court would have been required to decide the question by making a reference to the European Court of Justice. That would have been politically inconceivable for the UK Government, but would also have been practically untenable since it would completely destroyed the Government's proposed timetable for withdrawal. Arguably the political implications of a reference also weighed heavily on the Supreme Court. Their decision to let the issues in dispute remain narrow, and not to focus on the broader, critical question of revocability, looks like a pragmatic concession to the political context in which the claim is brought.

Whilst the UK Government is undoubtedly disappointed (albeit hardly surprised) to have lost the main issue on appeal, it is also somewhat relieved: firstly that it is not legally required to seek permission from the devolved Governments of the UK, and also that it has sidestepped the question of revocability of Article 50. In the short term, then, this is a reasonable outcome for the Government. It responded quickly by putting a short Bill before Parliament, and set an expedited timetable for its passage into law. Whilst there will be considerable discussion and debate over the Bill, it seems likely that the Government will successfully usher it through Parliament in time to meet its March deadline.

In the longer term, the UK Government still faces substantial difficulties as a result of this litigation. There are profound political implications for the Supreme Court's finding that the conventions bestowing power to Northern Ireland, Scotland and Wales are of no legal weight whatsoever. For Scotland in particular, which has long had a fractious relationship with the UK Government, it only heightens existing frustrations and resentment; and this judgment has undoubtedly rekindled the political case for Scotland to break its union with the rest of the UK.

The revocability of Article 50 is also not going away. A separate legal action in the Republic of Ireland is in motion, and framed specifically in order to force a reference to the ECJ on this issue, as well as asking another profoundly important question: does the Article 50 trigger also terminate membership of the European Economic Area? Whilst this action lies outside the UK, and therefore will not forestall the Government's progress in triggering Article 50, it is likely to receive significant attention in due course. Many UK citizens find it remarkable, and somewhat alarming, to know that the UK Government will trigger Article 50 without having any certainty as to whether it can change its mind once the EU divorce is underway, or indeed what it means for EEA Membership. It seems likely that a definitive answer will be provided before the two year negotiation is complete; and the timing and outcome of that reference will completely reshape the dynamic of the Brexit negotiations.

For constitutional lawyers in the UK, this litigation has been the gift that keeps on giving. It has also been a hugely impressive endorsement of the English legal system that the legal issues were addressed so quickly, and without the judiciary's professionalism, thoroughness, and neutrality being strained by the heightened political atmosphere. Would the German Federal Constitutional Court have acted in the same pace?

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