Brexit Essentials: Government will "Keep Calm and Carry On" despite Pannick

The UK Government intends to appeal the High Court's decision that it lacks prerogative powers to invoke Article 50.

In this latest of our series of briefings covering the essential aspects of the UK's vote to leave the EU, we consider the High Court's judgment on 3 November in the case of Miller and others v. The Secretary of State for Exiting the European Union.

The High Court has ruled that the Government's prerogative powers cannot lawfully be used to give notice under Article 50 of the Treaty on European Union (the "**Article 50 Notice**") that the United Kingdom intends to leave the European Union: any decision to give such notice can only be taken by Parliament.

The Government has already announced its intention to appeal the decision and arrangements have been made for the case to be heard directly by the Supreme Court (by-passing the Court of Appeal) in early December.

The Government will, no doubt, seek to expedite any Parliamentary process to keep to its intended timetable of serving the Article 50 Notice by March 2017 but delays may lie ahead. While Parliament is unlikely to stop the process of leaving the EU altogether, any bill to authorise the Government to give the Article 50 Notice will be subject to debate and, potentially, to amendment. This is likely to force the Government to be more specific about its plans and subject those plans to a degree of Parliamentary control.

The legal arguments

The sole question in this case was whether, as a matter of the constitutional law of the United Kingdom, the Crown, acting through the Government, is entitled to use its prerogative powers to give the Article 50 Notice.

It was common ground between the parties that:

- an Article 50 Notice is irrevocable and cannot be given conditionally, so the inevitable result of issuing the notice would be that the UK will leave the EU;
- legislation made by Parliament is supreme and is subject to no higher authority, save where Parliament allows, as it did when enacting the European Communities Act 1972 ("**ECA**"), which gave EU law precedence over domestic law;
- as a general rule, the Crown can make and revoke international treaties under its prerogative powers without the need for Parliamentary approval;
- only Parliament has the power to create the necessary changes to national law to allow EU law to have effect at the domestic level.

Lord Pannick QC (leading for the claimants) argued that the ECA had given rise to rights which are directly enforceable under UK domestic law. As those rights have been embedded in UK law by Parliament, the Crown lacks the prerogative power to nullify those rights. Nullification of those rights would be the inevitable consequence of giving the Article 50 Notice. Subsequent Parliamentary scrutiny, and the possibility that the Government might decide to replicate some of those rights by subsequent legislation, is irrelevant.

The Attorney General (for the Government) argued that the rights conferred by the ECA are defined by reference to EU treaties, so it is a continuing condition for the existence of those rights that the UK remains a party to those treaties. They are therefore capable of being removed by executive action. He contended that, as the Crown has prerogative power to make and unmake international treaties, the ECA could not have supplanted that prerogative power without stating an express intention to do so. He argued that certain of the rights which would be lost as a result of giving the Article 50 Notice might be replicated by the Government in domestic law if it so chose and that others effectively arise under the laws of other Member States. However, he conceded that there is a third category of genuinely domestic rights which would be nullified at the point of exit.

The judgment

The Court described the Attorney General's key submission as flawed at a basic level. It glossed over an important constitutional principle: unless Parliament legislates to the contrary, the Crown has no power to vary the law of the land by exercising prerogative powers. If Parliament had intended the Crown to be able to remove the rights conferred by the ECA, then the Act would have provided for this. Neither the language nor the context of the ECA supports the Attorney General's contention that the rights which it confers are conditional on the Crown refraining from exercising prerogative powers to remove them. Indeed, Parliament's clear intention in enacting the ECA was to embed EU law in domestic UK law and render it directly enforceable in the UK. It presupposes the continuing applicability of EU law and EU treaties in the UK unless and until Parliament decides otherwise.

The ability of the Government to replicate rights (if it chooses to do so) is not relevant to the question of whether it has the power to extinguish them by executive action.

The ECA has a special status in UK constitutional law. It is the only statute by which Parliament subordinates its own powers to a higher authority – namely, the authority of EU law.

> *"Parliament having taken the major step of switching on the direct effect of EU law in the national legal system by passing the ECA 1972 as primary legislation, it is not plausible that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again".*

The 2015 Referendum Act does not confer any power on the Government to give notice under Article 50. A referendum is merely advisory to the lawmakers in Parliament unless very clear language to the contrary is used in the referendum legislation. No such language was used in the 2015 Referendum Act and the supporting Parliamentary briefing papers confirm that the referendum was intended only to have advisory effect.

Commentary

Despite the political reaction, this was (rightly) a decision on a question of constitutional law, not on the result of the referendum or on Government policy – a point which was emphasised in the judgment.

The Government conceded that an Article 50 Notice, once issued, is irrevocable. This has been the subject of academic debate since 23 June and is (ironically, perhaps) a question of EU law which, had it been argued, might ultimately have been referred to the Court of Justice of the European Union (**"CJEU"**).

Article 50 entitles an EU Member State to decide to withdraw from the Union "in accordance with its own constitutional requirements". If the Supreme Court upholds the decision that the Government lacks the prerogative power to issue the Article 50 Notice, or the Government abandons its appeal, any such notice would not be given by the UK "in accordance with its own constitutional requirements" unless Parliament passes legislation to approve it.

The case really turned on the special constitutional status of the ECA. Exercising its sovereign powers, Parliament decided to qualify its own sovereignty by conferring legislative competencies on the EU. This gave rise to rights which are directly enforceable in the UK. Parliament's intention to give direct and continuing effect to those rights in domestic law constrains the Crown's powers to nullify them by using the royal prerogative to terminate the treaties, and the EU legislation made under them, which the ECA enacts. The EU Treaties are therefore an exception to the general rule that international treaties only confer rights and obligations on the signatory states and not directly on their citizens.

What now?

Although some commentators have suggested that the nature of the required Parliamentary approval is uncertain, the judgment makes this clear. The High Court used the term "Parliament" expressly to refer to the Crown acting "with the consent of both Houses of Parliament". It follows that if the UK constitution requires Parliamentary approval to give the Article 50 Notice, this will require primary legislation approved by both houses. This may force the Government to spell out its intentions and subject them to detailed scrutiny and amendment as the bill passes through the legislative process.

Lord Pannick argued that the case was not about giving Parliament the right to prevent a decision to leave the EU being made. Parliament might impose conditions as to the timing of the notice, the UK's negotiating position, reporting back to Parliament and other matters. However, unless the decision is overturned on appeal, it follows from the judgment that Parliament will have the right to decide whether the Article 50 Notice should be given at all. Although a majority of Members of the House of Commons were in favour of remaining in the European Union, it is unlikely that there would be a majority in favour of rejecting a bill outright. The Commons may be swayed by the perceived will of the electorate to support the giving of the Article 50 Notice and may feel pressure not to divert the Government from its current trajectory.

The Government may encounter greater difficulty in the House of Lords, although the latter's power is ultimately only to delay legislation. Nonetheless, it may amplify calls for the Government to involve Parliament in the process of defining the approach to negotiations. How that can be done in a way that allows the negotiating team to obtain the best possible outcome remains to be seen. What is clear is that the decision threatens the Government's proposed timetable for serving the Article 50 Notice and therefore the timing of exit.

November 2016

OSM0009312_V03