



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 49  
P680/19

Lord President  
Lord Brodie  
Lord Drummond Young

OPINION OF LORD CARLOWAY, THE LORD PRESIDENT

in the reclaiming motion by

JOANNA CHERRY QC MP and OTHERS

Petitioners and Reclaimers

against

THE ADVOCATE GENERAL

Respondent

---

Petitioners: O'Neill QC, Welsh; Balfour + Manson LLP  
Respondent: Johnston QC, Webster QC; Office of the Advocate General  
Intervener (the Lord Advocate): Mure QC, C O'Neill (sol adv); Scottish Government Legal Directorate  
Applicants (the BBC and others): McBrearty QC; Burness Paull

11 September 2019

**Introduction**

[1] This reclaiming motion (appeal) raises an issue of when the prorogation of the United Kingdom Parliament by an Order in Council, at the instance of Her Majesty the Queen on the advice of the UK Government, can be the subject of a judicial review. There are two central questions. The first, as a matter of law, is whether the prorogation can be judicially reviewed in circumstances in which it is alleged that it has been requested for

what is said to be an improper motive *viz.* the stymying of Parliamentary debate on the issue of the UK leaving the European Union. The second, as a matter of fact, is whether that improper motive has been demonstrated. The Government contends that the purpose is legitimate and is simply to prepare for a new legislative programme, to be contained in HM the Queen's speech on 14 October, and to cover the period of the party conferences, during which time Parliament tends to be in recess.

[2] There are subsidiary questions. The first concerns access by the press to documents in the court process, including certain UK Government papers which have been produced by the respondent in obedience of the duty of candour in such matters. The second is whether the court should call for unredacted copies of these documents.

### **Background**

[3] Prorogation of Parliament is the means by which the Government, by the exercise of a prerogative power, can bring a Parliamentary session to an end. While Parliament is prorogued, members cannot "debate government policy and legislation, submit parliamentary questions for response by government departments, scrutinise government activity through parliamentary committees or introduce legislation of their own" (House of Commons Library Briefing Paper no 8589: *Prorogation of Parliament*, 11 June 2019 p 3). The typical duration of a prorogation in recent times has been "very short". Since the 1980s, it has rarely lasted longer than two weeks and, between sessions, it has been less than a week (*ibid* pp 3-4).

[4] On 29 March 2017, following upon the authorisation which was provided by section 1 of the European Union (Notification of Withdrawal) Act 2017, the former Prime Minister (The Rt Hon Theresa May MP) wrote to the President of the European Council

notifying the EU that, in terms of Article 50 of the Treaty on European Union, the UK intended to withdraw from the EU. In terms of the article, this would take effect on 29 March 2019. The European Union (Withdrawal) Act 2018 provides (s 1) that, on “exit day”, the European Communities Act 1972 ceases to have effect, but (s 2) EU law is to be preserved within the domestic regime.

[5] On 21 March 2019, following two rejections by the House of Commons of a withdrawal agreement in terms of Article 50, the Government and the European Council agreed to extend the UK’s membership until 22 May, if the withdrawal agreement was approved by Parliament. Otherwise, the UK would cease to be a member on 12 April 2019. On 29 March, the withdrawal agreement was again rejected. On 10 April, a further extension to 31 October was agreed. On 24 May, the then PM resigned. On 24 July, The Rt Hon Boris Johnson MP was appointed in her place.

[6] On the same day, the Northern Ireland (Executive Formation etc) Act 2019 received Royal Assent. This provides (s 3) for reports on progress towards forming an Executive to be published before 4 September 2019 and thereafter laid before Parliament. Specific provision is made for the situation in which Parliament would stand prorogued or adjourned at the relevant time. In that event, a proclamation under the Meeting of Parliament Act 1797 would require Parliament to meet for several days after the date on which the report was laid.

[7] The prospect of prorogation in the context of the Parliamentary procedures involving the UK’s withdrawal from the EU (commonly called “Brexit”) was first ventilated in the House of Commons as early as March 2019 as a method of circumventing the rule that the withdrawal agreement could not be the subject of a third vote during the same Parliamentary session. Prorogation, with the intention of preventing Parliament from

blocking a “no deal Brexit”, was suggested in a paper by Policy Exchange on 25 March 2019.

The idea is that, because the default position under Article 50 is that the UK will leave the EU with “no deal”, if none is reached by 31 October, Parliament will be unable to prevent a no deal Brexit if the time elapses with no further parliamentary action. This was covered in an article in the Daily Telegraph and was thereafter the subject of academic discussion.

During the Conservative Party leadership contest, following upon the former PM’s resignation, there was occasional reference to this possibility.

[8] The petition was lodged on 30 July 2019 although the first orders were only made on 31 July 2019. The first plea-in-law is for declarator that it is *ultra vires* and unconstitutional for the Government to advise the Queen to prorogue Parliament with the intention of preventing sufficient time for proper consideration of Brexit. The second plea-in-law is for interdict on the basis that the petitioners are reasonably apprehensive that the Government intend to proceed in that manner. The respondent’s fifth plea-in-law is that there is no basis for such an apprehension.

### *The Respondent’s Documents*

[9] On the eve of the hearing before the Lord Ordinary, the respondent produced a number of documents relative to what happened within the Government. The first is a Memorandum dated 15 August 2019 from Nikki Da Costa, the Director of Legislative Affairs within the PM’s Office, to the PM. This reads as follows:

“ENDING THE SESSION

#### SUMMARY

1. The current session is the longest since records began, and all bills announced as part of the last Queen’s Speech have now received Royal Assent, or are paused awaiting carry over into the next session: this makes it increasingly difficult to fill parliamentary time with anything other than general debates. As a new Prime

Minister, there is an expectation that you will set out a refreshed domestic programme and it would be natural to do so when the House returns in the autumn.

2. As the first week's business in September has already been announced, I recommend dedicating the second to wash-up on bills such as R&R [Restoration and Renewals]. We would then prorogue sometime between the end of Monday 9<sup>th</sup> September and Thursday 12<sup>th</sup> September, allowing for the long-standing conference recess, and return on Monday 14<sup>th</sup> October with the State Opening of Parliament.
3. [REDACTED]

#### RECOMMENDATION

2. (*sic*). Are you content for your PPS to approach the Palace with a request for prorogation to begin with the period Monday 9<sup>th</sup> September and Thursday 12<sup>th</sup> September, and for a Queen's Speech on Monday 14<sup>th</sup> October?"

[10] The memorandum outlines certain practical considerations. Choosing when to end the Parliamentary session was a balance between having enough time for the completion of Bills which were close to Royal Assent and not wasting time that could be used for new measures in the fresh session. The recommendation was to close the session in early September. The memorandum continues:

#### "POLITICAL CONSIDERATIONS

14. Finally, politically it is essential that parliament is sitting before and after EU Council – MPs and Peers must be in a position to consider what is negotiated, and hopefully pass the Withdrawal Agreement Bill. If there is no deal, they need to have an opportunity to hear what you have to say, and respond accordingly."

[11] The memorandum noted that, in modern times, prorogation was usually less than 10 days, although there were longer periods for up to 21 days since 1980. Although the planned prorogation would be 34 days, the expected conference recess of three weeks would mean that only one to three days would be lost in the week commencing 9 September and four in the week commencing 7 October. There was no record of the House of Commons sitting in late September or early October since the start of the 20<sup>th</sup> Century.

[12] The recommendation to prorogue was endorsed (presumably by the PM) with the word “yes” and a tick. The second document is a redacted (although later leaked to the press in unredacted form) hand-written response from the PM, dated 16 August. It reads:

*“1. The whole September session is a rigmarole introduced [REDACTED] to show the public that MPs were earning their crust*

*2. So I don't see anything especially shocking about this proposition*

*3. As Nikki notes, it is OVER THE CONFERENCE SEASON so that the sitting days lost are actually very few”.*

[13] The third document is a further memorandum, dated 23 August 2019, from Ms Da Costa to the PM. This is headed “ANNOUNCING THE QUEEN’S SPEECH”. It briefs the PM on a proposed “handling plan”. It refers to the PM’s agreement to approach HM the Queen with a request to prorogue Parliament within the period Monday, 9 to Thursday, 12 September and for a Queen’s Speech on Monday, 14 October. A telephone call between the PM and the Queen was fixed for the evening of 27 August. The Order in Council was to be signed on 28 August. On that day, the Chief Whip and the Leaders of the Houses of Commons and Lords were to go to Balmoral to form the necessary meeting of the Privy Council. After the signing, the members of the Cabinet would be informed, followed by the Parliamentary Party and the press. The planned announcement to the Cabinet was to focus on the extraordinary length of the current parliamentary session. A statement would be made that this could not continue and that the PM would bring forward a new legislative agenda which would take matters “through our exit from the EU and the months that follow”. At the heart of the agenda would be the Government’s “number one legislative priority” (Brexit). If a deal was forthcoming, a Withdrawal Agreement Bill could be introduced to “move at pace to secure its passage before 31 October”. The PM would confirm that he was committed to facilitating Parliament’s ongoing scrutiny of Brexit. He

would deliver a statement and take questions on the “first sitting back” (presumably 14 October). A draft letter to Conservative MPs was provided. This re-iterated the message to Cabinet Members. It stated that the NIEFA 2019 would be debated on Monday, 9 September and that thereafter the Government would “begin preparation to end the Parliamentary session ahead of a Queen’s Speech”.

[14] On Wednesday, 28 August 2019, the three Privy Counsellors attended at Balmoral.

HM the Queen promulgated an Order in Council in the following terms:

“It is this day ordered by Her Majesty in Council that the Parliament be prorogued on a day no earlier than Monday the 9th day of September and no later than Thursday the 12th day of September 2019 to Monday the 14th day of October 2019, to be then holden for the despatch of divers urgent and important affairs, and that the Right Honourable the Lord High Chancellor of Great Britain do cause a Commission to be prepared and issued in the usual manner for proroguing the Parliament accordingly.”

[15] The fourth document is a redacted Cabinet minute dated 28 August 2019. This records that the PM provided the Cabinet with the proposed dates for prorogation and the Queen’s Speech. He said:

“This timetable gave Parliament ample time to debate Brexit in the period before the October European Council on 17-18 October, and again in the run up to the UK’s departure date on 31 October. It was important to emphasise that this decision to prorogue Parliament for a Queen’s Speech was not driven by Brexit considerations: it was about pursuing an exciting and dynamic legislative programme to take forward the Government’s agenda.”

The minute records that the following points were made in discussion:

“b) any messaging should emphasise that the plan for a Queen’s Speech was not intended to reduce parliamentary scrutiny or minimise Parliament’s opportunity to make clear its views on Brexit. Parliament had already had a significant opportunity to debate Brexit and would still have remaining parliamentary time to do so before 31 October. Likewise, it was crucial that parliamentary colleagues understood that the Government was still seeking a deal and that this plan would allow time for the Withdrawal Agreement to be approved by Parliament if a deal was agreed at the European Council on 17/18 October. Therefore, any suggestion that Government was using this as a tactic to frustrate Parliament should be rebutted;

c) the number of sitting days had not been substantially reduced, because for the majority of the time that Parliament would be prorogued it would ordinarily be Recess for party conferences. Until relatively recently Parliament did not sit in September at all. Parliamentary colleagues should be made aware of this...;

d) the terrain between now and October would be rocky. Although there had been longer periods of prorogation in the past, they were exceptional. Parliament would not normally be prorogued for a longer period than one to two weeks. It should be explained why in this case the period was significantly longer. The Government would be attacked for this decision, but it would be manageable;...”.

[16] The PM responded:

“... it was vital to persuade and enthuse parliamentary colleagues to get behind the Government’s plan. The EU were likely to hold out for Parliament to block Brexit while they thought that was possible. The UK would only be able to negotiate a better deal by showing the EU: a united front, including in Parliament. Two messages had landed with the EU: that the UK wanted a deal and was prepared to work hard to get one; but also that the Government was prepared to leave without one if necessary. There had been absolute clarity with the EU about the aspects of the current Withdrawal Agreement that were unacceptable. The backstop was fundamentally undemocratic. It bound the UK into EU laws over which it had no say and tilted the balance of the Good Friday Agreement away from the UK by giving Dublin a greater say over matters in Northern Ireland.”

Concluding, the PM said:

“Progress with the EU should not be exaggerated, but it was substantial. Whilst there was a good chance that a deal could be secured, there was also a high chance that it could not. Success would require a united and determined approach. Everyone joining the Government had done so on the understanding that the UK might have to leave the EU without a deal. There were no plans for an early General Election. This would not be right for the British people: they had faced an awful lot of electoral events in recent years. They wanted the Government to deliver Brexit and a strong domestic agenda.”

[17] On the same day, the PM wrote to Conservative MPs along similar lines.

### **Lord Ordinary’s Decision**

[18] The Lord Ordinary refused the prayer of the petition for the principal reason that the provision of advice to the Queen on the prorogation of Parliament was not justiciable. The exercise of some prerogative powers in some circumstances was justiciable, but in others it

was not. The power to advise the Queen in relation to the decision to prorogue Parliament was a political one. Its exercise could not be measured against legal standards. The accountability for the advice was to Parliament and, ultimately, the electorate, and not to the courts. The advice did not contravene the rule of law. It followed from the separation of powers that the courts would not interfere with Parliament's decisions on when to sit. It was not for the courts to devise restraints on prorogation beyond the limits which Parliament had set. Parliament could sit before and after the prorogation. It had recently, in the NIEFA 2019, provided for periods in which to do so.

[19] If the matter was justiciable, the Lord Ordinary was not persuaded that the reasons for the advice as disclosed in the documents provided by the respondent were unlawful. There had been no breach of the provision in the Claim of Right 1689 that "Parliaments be frequently called and allowed to sit". The Claim of Right 1689 gave rise to no justiciable issue, but in any event there had been no breach. The Lord Ordinary was not persuaded by the respondent's argument that the issue raised by the petition was academic.

[20] The petition was concerned with prorogation, not with the legal requirements for Brexit. The fact that Parliament may not be sitting for five weeks did not of itself have any direct effect on individuals' EU law rights. The Lord Ordinary agreed with the respondent's analysis of *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 and the subsequent legislation. It would not be unlawful for the UK to leave the EU with no deal unless there was further legislation. Withdrawal from the EU had been approved by Parliament unconditionally (European Union (Notification of Withdrawal) Act 2017, s 1(1)).

### **Preliminary Matters**

[21] *In limine*, the petitioners moved for an order for the production of unredacted

versions of the four documents produced by the respondent (*supra*). The redactions purported to have been made on the basis of irrelevance, legal privilege and the Law Officers' advice convention. The petitioners did not know whether these redactions had been properly made. No claim of public interest immunity had been advanced. It was a breach of the right to a fair trial for the respondent to produce redacted documents. Once the documents had been produced, any privilege had been waived (*Scottish Lion Insurance Co v Goodrich Corporation* 2011 SC 534 at para [48]). The court had an inherent power to override an objection by the Government to the production of documents based on public interest grounds (*Glasgow Corporation v Central Land Board* 1956 SC (HL) 1 at 9 and 11; *Somerville v Scottish Ministers* 2008 SC (HL) 45 at para [155]).

[22] The BBC, the Times and the Sun made an application for access to the four documents produced by the respondent, the pleadings and the written arguments for the Lord Advocate and the respondent. This was on the basis of the principle of open justice (*Dring v Cape Intermediate Holdings* [2019] 3 WLR 429 and *R (Guardian News and Media v Westminster Magistrates' Court* [2013] QB 618). There required to be public scrutiny of the way in which the courts decided cases. The public had to be able to understand why decisions had been taken. It was difficult, if not impossible, to know what was going on without the written material. The court required to carry out a fact specific balancing exercise involving the principle of open justice on the one hand and the risk of harm to the judicial process or the legitimate interests of others on the other hand. The principle of open justice applied equally in Scotland (*A v Secretary of State for the Home Department* 2014 SC (UKSC) 151; *British Broadcasting Corporation, Ptnrs* 2012 SLT 476).

[23] The respondent opposed the application for production of unredacted versions of the documents. These had been produced in response to the duty of candour which rested

upon the Government. They were available *quantum valeat*; the respondent's position remaining the lack of justiciability of the issue. The reclaiming motion ought to be determined on the basis of the documents which had been produced to the Lord Ordinary. Although the petitioners had opposed the lodging of the documents, they had not asked the Lord Ordinary to order production of unredacted versions. The court could not determine whether unredacted versions should be produced without looking at these versions or appointing a commissioner to do so. Counsel had seen the unredacted versions and could state, on his professional responsibility, that the redactions had been properly made.

[24] RCS 4.11 provides that any person having an interest may inspect a writ lodged with the court. A writ includes a petition and answers (RCS 1.3). There is no difficulty in the press having access to the pleadings. At the start of the proceedings, therefore, the court provided these, including the Lord Advocate's written intervention, to the press. It is common practice for the press to have access to the pleadings at the stage of any final hearing. That is not to say that publication of their contents will thereby be privileged (*Macleod v Justices of the Peace of Lewis* (1892) 20 R 218).

[25] In relation to the written notes of argument in a reclaiming motion, these are lodged in accordance with the timetable in RCS 38.13(2)(c). In terms of the Practice Note (No 3 of 2011, para 86), they are intended to be a "concise summary of the submissions to be developed". They, or parts of them, are routinely adopted by the party at the start of the oral argument, but not always covered in that argument. They still form part of the submission to the court. They will often assist the press in understanding the core elements of a party's cause. In the absence of special circumstances, they too will be open for inspection. Parties may, in accordance with past practice, assist in facilitating access to those documents by the press. The court will continue to do so.

[26] In a reclaiming motion, it is normal for the court to proceed on the basis of the same documents as were provided to the Lord Ordinary (*Scotch Whisky Association v Lord Advocate* 2017 SC 465, LP (Carloway), delivering the opinion of the court, at para [109]), although it can look at new material if it is satisfied that it is in the interests of justice to do so. Even in a case of urgency, as the present proceedings undoubtedly are, the court would not expect to be considering an application of this nature, which could have been made to the Lord Ordinary, at the stage of the Summar Roll hearing. It would normally require a formal application for a commission and diligence and then scrutiny of the documents by the Lord Ordinary to determine whether the redactions are justified on the bases proffered (*Somerville v Scottish Ministers (supra)*, Lord Rodger at para [155]). In that context, the court can, of course, override any objections from the Government based upon public interest considerations. It could reject the assurance by counsel that the material had been properly excluded for the reasons stated. The test is whether “production of the full version of the document to the petitioners is necessary for disposing fairly of the proceedings” (*ibid* para [156]).

[27] The court is not satisfied that this test has been met. The redactions appear to be justified on the bases stated. The court sees no reason not to accept the assurance given by counsel. It is certainly borne out by the leaking, following the Summar Roll hearing, of the redacted part of the PM’s handwritten note. It is satisfied that the relevant parts of the material have been properly disclosed in terms of the obligation of candour. It will therefore refuse the application for production of unredacted versions given both the timing of the application and the absence of any need for this to be done in order to decide the issues fairly. The redacted versions will be available to the press.

## Submissions

### *Petitioners*

[28] The petitioners sought a declarator in terms of the petition, together with an order reducing the Order in Council and an interdict prohibiting the Government from proroguing Parliament. Scots and English law were not necessarily the same as regards the use of prerogative powers (*Admiralty v Blair's Trustees* 1916 SC 247 at 266). If there was any difference, the law that was more limiting of executive power should be preferred.

Parliamentary sovereignty was fundamental (*R (Jackson) v Attorney General* [2006] 1 AC 262 at paras [9] and [126]). The Government had no inherent power to legislate. The prerogative encompassed the residual powers which Parliament had left vested in the Government. It remained only where the situation was not covered by statute (*Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* 1964 SC (HL) 117 at 122). It was displaced where there was a corresponding power conferred by statute (*Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 526). It could not be used to defeat rights which had been created by Parliament (*R (Miller) v Secretary of State for Exiting the European Union* (*supra*), paras [44], [45] and [63]).

[29] The Government was politically accountable to Parliament in the exercise of its powers. The Government would be acting unlawfully if it curtailed political accountability (*Moohan v Lord Advocate* 2015 SC (UKSC) 1 at para [35]). The proper constitutional relationship between the executive and the courts was one of respect. The Government's political accountability to Parliament and its legal accountability to the courts were not mutually exclusive. They could overlap (*R (Barclay) v Lord Chancellor (No 2)* [2015] AC 276 at para [57]). The Government had to obey the law as declared by the courts (*Edwards v Cruickshank* (1840) 3 D 282 at 306-7, endorsed in *R (Bancoult) v Secretary of State for Foreign and*

*Commonwealth Affairs* [2009] 1 AC 453 at para [106]). This protected the individual from arbitrary government (*Wightman v Secretary of State for Exiting the European Union* 2019 SC 111 at para [67]). The rule of law, as enforced by the courts, was the ultimate control upon which the constitution was based (*R (Jackson) v Attorney General (supra)* at para [107]). The court had to provide an effective remedy against constitutional violations (*Teh Cheng Poh v Public Prosecutor* [1980] AC 458 at 473; Bankton: *Institutes* IV, xxiii, 18). The courts could enforce the law by interdict and contempt proceedings (*Beggs v Scottish Ministers* 2007 SLT 235 at para [9]). The Lord Ordinary had abrogated his constitutional function in determining that, in relation to prorogation, the Government was above the law. The court was the only umpire available to ensure a balance of power. Parliament had no power to stop itself being suspended. If the Lord Ordinary was right and the court had no power, the only option to prevent tyranny would be to “take to the street”.

[30] Scottish constitutional law involved the subordination of Government to the law. This could be traced back to Buchanan’s *De jure regni apud Scotos* (1567). The power of the sovereign was, by immemorial tradition, restricted by the laws and customs of the people. This was different from England. The two approaches were reflected in the reformations in each country and the approach to the appointment of the clergy. The kings of Scotland had no prerogative distinct from supremacy above the law (Rutherford: *Rex Lex* (1660) question XLIII).

[31] The Claim of Right 1689 (affirmed by the Act of the Scottish Parliament of 1703: APS xi 104, c. 3) set limitations on the sovereign’s power. That power could not be used to contravene the law. Parliaments had to be called frequently and allowed to sit in order to redress grievances and to amend, strengthen and preserve the law. Although the court could not enter into forbidden areas such as foreign policy, decisions or inaction could be

reviewed if they were irrational (cf *R (Sandiford) v Secretary of State for Foreign Affairs* [2014] 1 WLR 2697 at paras [50], [52] and [65]). Certain prerogative powers, including (at that time) the dissolution of Parliament, were not justiciable, but others may be (*Council of Civil Service Unions v Minister for the Civil Service: re GCHQ* [1985] AC 374 at 417-418; *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349 and *R v Secretary of State for foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811). The power to prorogue Parliament was accordingly justiciable and reviewable on grounds of irrationality and other judicial review principles (*R (Sandiford) v Foreign Secretary (supra)*). It was at least not unfettered. The Government could not use the prerogative to effect individuals (*Attorney General v De Keyser's Royal Hotel (supra)* at 567-8). The power was lawfully exercised only if it was consistent with constitutional principle. It had to be exercised for a proper purpose. Prorogation was subject to the ordinary principles of legality, rationality and procedural impropriety as with other Governmental action (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (supra)* at paras [35], [105], [122] and [141]).

[32] The Government was obliged to “co-operate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings” (*Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] Env LR 38 at para [86]; *McGeoch v Scottish Legal Aid Board* 2013 SLT 183 at para [64]). The PM had not done so (cf *R (I) v Secretary of State for the Home Department* [2010] EWCA Civ 727 at para [55]). A full and accurate explanation of the facts was required (*R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at para [50]). The respondent had no pleadings on the matter. At the same time, as the respondent had pled that the petitioners had no reasonable

apprehension that the Government intended to prorogue Parliament with the intention of denying sufficient time for debate, the Government was in fact doing precisely that.

Adverse inferences should be drawn concerning the veracity of the reasons for prorogation advanced in the documentation (*R (Das) v Secretary of State for the Home Department* [2014] 1 WLR 3538 at para [80]). Anxious scrutiny of these reasons was required, given that fundamental rights and the constitution were in issue (*R v Ministry of Defence ex p. Smith* [1996] QB 517 at 554; Case C-621/18 *Wightman v Secretary of State for Exiting the European Union* [2019] QB 199 at para [64]; *Wightman v Advocate General for Scotland (supra)* at para [53]). The power had been exercised “for an alien purpose or in a wholly unreasonable manner” (*Pepper v Hart* [1993] AC 593 at 639); preventing parliamentary scrutiny of a no deal Brexit. It was the “paramount duty” of the court to recognise this abuse of power (*R v Secretary of State for the Home Department ex p. Fire Brigades Union* [1995] 2 AC 513 at 571E-F).

[33] Parliament was not given to passing legislation idly. An act, when in force, will have practical consequences (*RM v Scottish Ministers* 2013 SC (UKSC) 139 at para [34]). The prorogation was unlawful because it ran contrary to Parliamentary intention in passing sections 9, 10 and 13 of the European Union (Withdrawal) Act 2018), which provide that Parliament must have the time and opportunity to give effect to any withdrawal, deal or no deal, and to respect the British-Irish Agreements of 1998 and 2007. It was only once Parliament had passed the necessary statute that the Government had the authority to effect the withdrawal. Only in this way would the constitution be maintained (*AXA v Lord Advocate* 2012 SC (UKSC) 122 at 153. The prorogation was vitiated by an error of law as it was predicated on the idea that the Government had the authority to create a no deal Brexit. The Article 50 process required a partnership between the Government and Parliament. Primary legislation was required to conclude the process (*Wightman v Advocate General for*

*Scotland (supra)* at para [54]). None of the existing provisions, whether express or by implication (*R (Morgan Grenfell & Co Ltd) v Special Commissioner for Income Tax* [2003] 1 AC 563 at para [45]; *R (Black) v Secretary of State for Justice* [2018] AC 215 at paras [36](3) and (4)), authorised a no deal Brexit. Given that prorogation was aimed at facilitating a no deal Brexit, which was unlawful in the absence of Parliamentary sanction, the prorogation itself was unlawful.

[34] The petitioners moved for *interim* interdict preventing prorogation which was scheduled for Monday 9 September 2019 on the basis that they had established a *prima facie* case and the balance of convenience favoured its grant.

#### *The Lord Advocate*

[35] The Lord Advocate maintained that the Lord Ordinary had erred in concluding that the prorogation was not justiciable. It was disproportionate to any justification advanced. This was apt for judicial review on the basis of familiar standards and involved an assessment of its impact on recognised legal interests. The question was always whether a particular exercise of prerogative power was reviewable. For example, if it had been procured by bribery, it would be. Although the Lord Ordinary had found that scrutiny of the prorogation lay with Parliament and the electorate, it was in its nature that it deprived Parliament, during the period of prorogation, from the ability to exercise accountability. That was why the courts could not reject the challenge as *per se* not justiciable. The courts had a responsibility, when circumstances required, to protect Parliament from an abuse of Government power. If the prorogation had been until a date after 31 October 2019, the court would have been entitled to scrutinise that decision closely because of the effect which it would have on the principle of responsible government. It would have to ask whether,

having regard to its duration, the prorogation was rationally connected and proportionate to the justification advanced.

[36] It was a cardinal principle of the constitution that the Government was accountable to Parliament. This was no less fundamental than that of parliamentary sovereignty (*R (Miller) v Secretary of State for Exiting the European Union (supra)* at para [249]). The courts should not overlook the constitutional importance of ministerial accountability to Parliament (*ibid* para [240]). The effect of the prorogation was to insulate the Government entirely from any accountability to Parliament. Although the power to prorogue lay with the PM, the lawfulness of the exercise of that power lay with the courts. Just as with the sole question in *R (Miller) v Secretary of State for Exiting the European Union (supra)* at para [4], the question here was whether, as a matter of constitutional law, the prorogation, in the context of the anticipated Brexit, was unlawful.

[37] Prerogative powers existed for the public benefit and not that of the executive (Sales: *Crown Powers, the Royal Prerogative and Fundamental Rights* (c 4) in Wilberg and Elliot ed: *The Scope and Intensity of Substantive Review* (2015)). The public interest was promoted by allowing Parliament to carry out its role without let or hindrance. The courts had jurisdiction to review an Order in Council made on the advice of the Government (*R (Barclay) v Lord Chancellor (No 2) (supra)* at para [58]; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (supra)*). Just as the courts could control legislative action to protect individual rights (*AXA v Lord Advocate (supra)* at paras [50]-[51], [153] and [169]), so they should review Government action which undermines a fundamental constitutional principle (Craig: *Prorogation: Constitutional Principle and Law, Fact and Causation* (Oxford University Hub)).

[38] The decision to prorogue for five weeks was an abuse of power. It was disproportionate to the declared purpose of paving the way for a Queen's Speech. That could be achieved by a prorogation of a few days. Just as there was a sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference (*Pham v Secretary of State* [2015] 1 WLR 1591 at paras [105]-[106]), so there was a similar scale concerning justification for executive action which interfered with a fundamental principle of the constitution; that of responsible government.

### ***Respondent***

[39] The respondent's primary submission was that the Lord Ordinary was correct in deeming the issue to be not justiciable. There were no judicial or manageable standards by which the courts could assess the lawfulness of ministerial advice to prorogue Parliament. The issue was one of high policy and politics and not of law. Parliament could regulate its own sittings by legislating in specific contexts. Prorogation was governed by constitutional conventions which the courts did not enforce. Parliament had decided on what controls it should impose on prorogation. There was nothing unconstitutional in the Government acting within those limits. It would be unconstitutional for the courts to impose an additional control. Only the sovereign could prorogue Parliament in exercise of the Royal prerogative (Prorogation Act 1867 s 1). Parliament had expressly preserved the prorogation prerogative except in specific contexts.

[40] The issue was not justiciable because it was political (*Shergill v Khaira* [2015] AC 359 at para [40]; *A v Secretary of State for the Home Department* [2005] 2 AC 68 at para [29]). The principle was longstanding. It was doubtful whether the tests of irrationality, impartiality or fettering of discretion could be applied to the exercise of prerogative powers (*Council of Civil*

*Service Unions v Minister for the Civil Service: re GCHQ (supra)* at 411; *Wheeler v Office of the Prime Minister* [2008] EWHC 1409 (Admin) at para [34]; *McClellan v First Secretary of State* [2017] EWHC 3174 (Admin) at paras [21] and [22]; *R (Sandiford) v Secretary of State for Foreign Affairs (supra)*). Issues of high policy and political judgment were not ones with which the courts were equipped to grapple or had the means to determine. Constitutional arrangements, which involved the exercise of political judgment, permitted a flexible response *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 at para [12]). They could not be measured against public law standards. There was no measure by which the court could determine the sufficiency of time for proper consideration of the Brexit issue.

[41] The court could not begin to rule on whether sufficient time was being afforded to Parliament to debate a particular issue. That was a matter for Parliament to determine, as it had done in setting the procedures under the NIEFA 2019. The petition was inviting the court to go beyond what Parliament had already determined and to superimpose additional requirements. That was an interference with the political and legislative processes and was constitutionally inappropriate.

[42] There were wider political considerations, including the separation of powers, which dictated that the courts would not interfere with Parliamentary proceedings, rules and privileges. The courts and Parliament had to respect each other's roles and jurisdictions (*Coulson v HM Advocate* 2015 SLT 438; cf *Adams v Guardian Newspapers* 2003 SC 425 at paras [13] and [17]). Parliament had control over its dissolution and prorogation. It had legislated for the former and had done so for prorogation in certain circumstances (Succession to the Crown Act 1707 s 5; Reserve Forces Act 1996 s 52(8); Civil Contingencies Act 2004 s 28; NIEFA 2019 s 3). The exercise of a prerogative power was not immune from review, but this depended upon the subject matter and the context of the power and the challenge (*Council of*

*Civil Service Unions v Minister for the Civil Service: re GCHQ (supra)* at 407 and 418; *R v Secretary of State for foreign and Commonwealth Affairs, ex p Everett (supra)* at 820; *R v Secretary of State for the Home Department, ex p Bentley (supra)* at 363). Matters of high policy, including prorogation were examples (see also *R v Wilde (1669) 1 Lev 296*).

[43] Prorogation was governed by constitutional convention. There required to be a new session of Parliament each year, although this was flexible. The existing session had lasted for more than two years. Political conventions were not enforceable (*R (Miller) v Secretary of State for Exiting the European Union (supra)* at [141]). They were not legal restrictions (see *Adegbenro v Akintola [1963] AC 614*).

[44] The existence of prerogative powers was recognised in the same way in Scotland and England. Their scope was the same (*Burmah Oil Co (Burma Trading) Ltd v Lord Advocate (supra)*). There was no difference in the law of parliamentary privilege (*Adams v Guardian Newspapers (supra)* at para [13]). In both jurisdictions there were settled limits on the circumstances in which it was appropriate for the court to grant an advisory declarator (*Wightman v Advocate General for Scotland (supra)* at para [24] under reference to *AXA v Lord Advocate (supra)* at para [170]). The issue of justiciability necessarily involved considerations of whether the issue was legal or political (*Gibson v Lord Advocate 1975 SC 136 at 144*; *Lord Gray's Motion 2000 SC (HL) 46 at 61*).

[45] Secondly, the issue was academic because, in terms of the NIEFA 2019, Parliament would be sitting before 31 October 2019. In addition, the Order in Council meant that Parliament would be sitting in both September and October. The petitioners' complaint was therefore restricted to the number of days available. It was not for the courts to determine this.

[46] Thirdly, the petitioner's claim was unsustainable on its merits. The complaints of unconstitutional action were not matters of law (see Dicey: *The Law of the Constitution* (8<sup>th</sup> ed) 293). The Claim of Right 1689 set no mandatory periods during which Parliament had to sit and nothing remotely sufficient to require the additional sittings beyond the NIEFA 2019. It provided no legal standard to measure the lawfulness of the decision to prorogue at any particular time or for any particular reason. It was for Parliament to decide whether the provision in the Claim of Right was to be further defined as the English Parliament had done in the Meeting of Parliament Act 1694 (applied to the UK Parliament by the Succession of the Crown Act 1707). The Claim of Right did not require Parliament to be in permanent session. There was nothing in the European Union (Withdrawal) Act 2018, the NIEFA 2019 or the Fixed-term Parliaments Act 2011 which would be frustrated by prorogation at any time for any reason.

[47] HM the Queen in Parliament was sovereign in the sense that Parliament could enact whatever it wished, subject to its own self-imposed restraints such as the European Communities Act 1972 and the Human Rights Act 1998 (*R (Jackson) v Attorney General* (*supra*) at para [159]). There was a distinction between enacted law and resolutions of either or both Houses of Parliament; the latter having no legal effect. The Government and the courts had to act in conformity with the will of Parliament as expressed in legislation. Neither the courts nor the Government could act to undermine legislation, including provisions for Brexit and the NIEFA 2019.

[48] There was no substance to the petitioners' argument that a no deal Brexit required authorisation by further primary legislation and thus parliamentary time. Withdrawal had already been authorised by the European Union (Notification of Withdrawal) Act 2017. Article 50 meant that Brexit would occur on the expiry of the relevant period with or

without a deal. If the petitioners were correct, they would cease to have a relevant complaint. The provisions in the European Union (Withdrawal) Act 2018 were, in relation to the withdrawal agreement then extant, spent. They had no application to a no deal Brexit.

[49] The considerations which the PM took into account in seeking a prorogation were not justiciable. Nonetheless, in accordance with the duty of candour, the reasons were set out in the documentation. They were lawful. The decision was taken having regard, *inter alia*, to the fact that Parliament would be sitting extensively in the period leading up to 31 October 2019, having already made extensive legislative provision on the issue. The decision was: (a) to enable the new Government to set out its legislative agenda in a Queen's Speech; (b) to end the extraordinarily long Parliamentary session in a practical way, having regard to the traditional Parliamentary recess for party conferences; (c) based upon specific political considerations referred to in the documents; and (d) to reflect the fact that the timetable would afford time both before and after the Queen's Speech to debate Brexit, having regard to the European Council meeting on 17-18 October 2019.

### **Decision**

[50] The decision under review, which seems to have been made by the Prime Minister alone, is that to request HM the Queen to exercise her prerogative to prorogue Parliament. A prerogative decision may be the subject of a judicial review (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453, Lord Rodger at para [106], endorsing *Edwards v Cruickshank* (1840) 3 D 282, LP (Hope) at 306-7). Whether the issue is ultimately justiciable will depend upon the subject matter (*Council of Civil Service Unions v Minister for the Civil Service: re GCHQ* [1985] AC 374, Lord Scarman at 411, Lord Roskill at 418). As a generality, decisions which are made on the basis of legitimate political

considerations alone are not justiciable (*Shergill v Khaira* [2015] AC 359, Lords Neuberger, Sumption and Hodge at para [40]; *Gibson v Lord Advocate* 1975 SC 136, Lord Keith at 144). It is not possible to apply to such decisions the public law tests of reasonableness (*Council of Civil Service Unions v Minister for the Civil Service: re GCHQ* (*supra*) Lord Diplock at 411), impartiality (*McClellan v First Secretary of State* [2017] EWHC 3174 (Admin), Sales LJ at paras [21] and [22]) or fettering of discretion (*R (Sandiford) v Secretary of State for Foreign Affairs* [2014] 1 WLR 2697). In this case, if the challenge was based upon these judicial review considerations or similar matters, it would not be justiciable. If the reasons for the decision were based upon legitimate political considerations, including a desire to see that Brexit occurs, they would not be challengeable. However, that is not the contention.

[51] The contention is that the reasons which have been proffered by the PM in public (to prepare for a new legislative programme and to cover the period of the party conferences) are not the true ones. The real reason, it is said, is to stymie Parliamentary scrutiny of Government action. Since such scrutiny is a central pillar of the good governance principle which is enshrined in the constitution, the decision cannot be seen as a matter of high policy or politics. It is one which attempts to undermine that pillar. As such, if demonstrated to be true, it would be unlawful. This is not because of the terms of the Claim of Right 1689 or of any speciality of Scots constitutional law, it follows from the application of the common law, informed by applying “the principles of democracy and the rule of law” (*Moohan v Lord Advocate* 2015 SC (UKSC) 1, Lord Hodge at para [35]). The terms of the Claim of Right are not breached simply because Parliament does not sit for a month or so. Parliament has, throughout the year, been allowed to sit.

[52] There is some force in the contention that the court should leave it to Parliament to decide whether to challenge the prorogation. Parliament could, if there were time to do so,

enact legislation which would have the effect of removing the prorogation before it began. It has not done that in the days which were available. In practical terms, this is not surprising given the intensity of the political debate in recent times; in particular the moves by the opposition parties and some Conservative MPs to enact a Bill designed to prevent a no deal Brexit (European Union (Withdrawal) (No 6) Bill which, on 9 September 2019, became the European Union (Withdrawal) (No 2) Act 2019). This requires the PM to seek an extension to the Article 50 exit date for a further four months to 31 January 2020 if no withdrawal agreement is secured by 19 October 2019. Because the prorogation goes to the root of Parliament's ability to sit, and thus prevents Parliament from performing its central role in scrutinising Government action, the court must have a concurrent jurisdiction (see *R (Barclay) v Lord Chancellor (No 2)* [2015] AC 276, Lady Hale at para [57]) to prevent this occurring and to enable Parliament to sit, should it choose to do so. Parliament is, of course, free to pass legislation which overrides a court's decision. It can decide not to sit.

[53] The circumstances demonstrate that the true reason for the prorogation is to reduce the time available for Parliamentary scrutiny of Brexit at a time when such scrutiny would appear to be a matter of considerable importance, given the issues at stake. This is in the context of an anticipated no deal Brexit, in which case no further consideration of matters by Parliament is required. The Article 50 period, as extended, will have expired and withdrawal will occur automatically.

[54] This conclusion on the true reason stems from a number of factors. First, the prorogation was sought in a clandestine manner during a period in which litigation concerning the prospect of prorogation occurring was extant. Although it is possible to argue about exactly what was meant by the respondent's fifth plea-in-law (see *supra* para [8]), it is not unreasonable to comment that even the respondent's legal team appear to have

been kept in the dark about what was about to happen. Secondly, the decision to prorogue in the manner sought was taken against the background of the discussions in which it was being suggested that MPs, and thus Parliament, would be unable to prevent a no deal Brexit if time was simply allowed to elapse, without further legislation, until the exit date. Put shortly, prorogation was being mooted specifically as a means to stymie any further legislation regulating Brexit.

[55] Thirdly, there is remarkably little said about the reason for the prorogation in the respondent's pleadings. Although the court would not expect an affidavit from a Government minister or official testifying to the reason (cf the procedure in England: *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] Env LR 38, Lord Walker, delivering the opinion of the minority, at para [86]) it would expect averments in the respondent's answers setting out that reason. Such averments would require to be based upon information provided to counsel and to proceed upon counsel's responsibility (*McGeoch v Scottish Legal Aid Board* 2013 SLT 183, Lord Brodie at para [64]).

[56] Fourthly, there was, and is, no practical reason for a prorogation for what is, in modern times, an extraordinary length of time (5 weeks instead of about 7 days). The Memorandum of 15 August 2019, which does not emanate from a member of the civil service, does not state that there is any such reason. It says that prorogation could occur as early as 9 to 12 September; there already being matters scheduled for the first week in September and additional time was needed for the "wash-up" of extant Bills. There would be a requirement for Parliament to sit both before and after the EU Council meeting on 17-18 October in order to approve any Brexit deal (2018 Act s 13), hence a Queen's Speech at about that time; 14 October being selected. The references in the memorandum and the PM's

handwritten note state that the number of sitting days lost, having regard to the party conferences, may be relatively small. This does not acknowledge that the party conferences are normally covered by a period of recess, which Parliament itself has set. Parliament may elect not to recess or, if in recess, to recall itself. Similarly, the sitting following the Queen's Speech is required at least in part to debate the Government's legislation programme as set out in that speech. Presumably, the sittings required by the Northern Ireland (Executive Formation etc) Act 2019 are primarily designed to deal with issues relating to that subject matter and not for scrutiny of other matters. None of this justifies losing the days, which might be available, to no apparent purpose, other than not to have time available for Parliamentary scrutiny of Government action and, in particular, the ongoing Brexit procedure.

[57] At the Cabinet meeting, the tenor of the PM's remarks, and the discussion around them, point to the various factors being used publicly to deflect from the real reason for the prorogation (see *Porter v Magill* [2002] 2 AC 357, Lord Scott at para [144]). That reason, as is reflected in the frequent references to it in the papers, centred on Brexit and not the intervention of the party conferences or the new legislative programme.

[58] The fact that there will be some days in September and October during which Parliament will be sitting, and thus potentially some time to discuss Brexit, does not detract from the general position that the prorogation is intended unlawfully to restrict that time. The court is not dictating the days on which Parliament should sit. That is a matter for Parliament to decide. It is merely holding that a particular attempt to restrict the available days is unlawful.

[59] Having regard to the substantial effect of the prorogation on the ability of Parliament to scrutinise Government action, the matter cannot be considered academic. However, the

proroguing of Parliament does not have a direct consequence on individual legal rights. The issue is not justiciable on that basis and the petitioner's argument to the opposite effect on this point is rejected.

[60] The court should for these reasons allow the reclaiming motion and grant a declarator that the advice to prorogue Parliament on a day between 9 and 12 September until 14 October, and hence any prorogation which followed thereon, is unlawful and thus null and of no effect.



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 49  
P680/19

Lord President  
Lord Brodie  
Lord Drummond Young

OPINION OF LORD BRODIE

in the reclaiming motion by

JOANNA CHERRY QC MP and OTHERS

Petitioners and Reclaimers

against

THE ADVOCATE GENERAL

Respondent

---

**Petitioners:** O'Neill QC, Welsh; Balfour + Manson LLP  
**Respondent:** Johnston QC, Webster QC; Office of the Advocate General  
**Intervener (the Lord Advocate):** Mure QC, C O'Neill (sol adv); Scottish Government Legal Directorate  
**Applicants (the BBC and others):** McBrearty QC; Burness Paull

11 September 2019

**The proceedings**

[61] This is a reclaiming motion against an interlocutor of the Lord Ordinary dated 4 September 2019 refusing a petition for judicial review by means of which the petitioners sought:

(1) a declarator that it is *ultra vires et separatim* unconstitutional for any Minister of the Crown, including the Prime Minister, with the intention and aim of denying before Exit Day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union, to purport to advise the Queen to prorogue the Union Parliament.

(2) interdict against Ministers of the Crown from advising the Queen, with the view or intention of denying before Exit Day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union, to prorogue the Union Parliament and for interdict *ad interim*.

(3) such further orders (including an order for expenses) as may seem to the court to be just and reasonable in all the circumstances of the case.

[62] An order for intimation and service of the petition was made on 31 July 2019, the Advocate General for Scotland being named as respondent in the schedule for service and the Prime Minister as an interested party. Answers were lodged by the respondent. Permission to proceed was granted on 8 August. On 13 August parties were allowed to adjust their respective pleadings until 23 August and to adjust their pleadings in response until 27 August. Parties were appointed to intimate and lodge in process no later than 4pm on 30 August all affidavits and other documents to be relied on. On 3 September the Lord Advocate was granted leave to intervene by way of written submission (at the summar roll hearing before the Inner House a written submission in the reclaiming motion was supplemented by a short oral submission by Mr Mure QC on behalf of the Lord Advocate).

[63] Short as that timetable may be thought to be, it was to an extent overtaken by events. Statement 51 of the petition, which can be seen as encapsulating the petitioners' complaint is in the following terms:

“That in light of the public statements made by among others the current Prime Minister and, separately, in light of the refusal by the current Leader of the House of Commons to rule out the possibility of the UK Government seeking to advise the Queen to prorogue the Union Parliament the petitioners are reasonably apprehensive that the UK Government intends to advise the Queen – whether as part of a process either ending a session of Parliament in preparation for the State Opening of Parliament, or dissolving Parliament and summoning a new Parliament following a General Election – to prorogue the Union Parliament in advance of Exit Day so as to deny the Union Parliament an adequate opportunity to scrutinise the terms of any exit of the United Kingdom from the European Union and hold to account the Government as is its role on behalf of the people of the United Kingdom. ...”

These averments were denied by the respondent. However, on 28 August 2019 the Queen, on the advice of the Privy Council, pronounced the following order:

“It is this day ordered by Her Majesty in Council that the Parliament be prorogued on a day no earlier than Monday the 9<sup>th</sup> day of September and no later than Thursday the 12<sup>th</sup> day of September 2019 to Monday the 14<sup>th</sup> day of October 2019, to be then holden for the despatch of divers urgent and important affairs, and that the Right Honourable the Lord High Chancellor of Great Britain do cause a Commission to be prepared and issued in the usual manner for proroguing the Parliament accordingly.”

[64] Accordingly, when the petition came before the Lord Ordinary for a substantive hearing on 3 September 2019, reflecting the fact that, on the petitioners’ interpretation of events, their apprehension had become a reality with the making of the Order in Council, their motion to the Lord Ordinary was:

- (1) to pronounce a declarator that it is *ultra vires et separatim* unconstitutional for any Minister of the Crown, including the Prime Minister, with the intention and aim of denying before Exit Day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union, to purport to advise the Queen to prorogue the Union Parliament;
- (2) to order reduction of the Order in Council of 28 August 2019;

(3) to interdict Ministers of the Crown in right of the United Kingdom from acting upon the Order in Council of 28 August 2019 proroguing the Union Parliament.

### **The grounds of challenge**

[65] In their petition the petitioners present two grounds of challenge to the lawfulness of the Order in Council of 28 August 2019 proroguing Parliament (the “Order”).

[66] The first ground is summarised at statements 37 to 42 of the petition. Put short, it might be stated in two propositions which are to be found in that part of the petition: (i) the UK Government, as the executive, is on all matters politically accountable and answerable to the Union Parliament; and (ii) in advising the Queen to prorogue the Union Parliament prior to Exit Day [by making the Order] with a view to denying the Union Parliament sufficient time properly to consider issues around the withdrawal of the United Kingdom from the European Union would undermine the United Kingdom’s system of constitutional and democratic government in respect of the principle of the political accountability of the executive to the legislature and its legal accountability to the courts.

[67] The second ground of challenge is that prorogation of Parliament for a period of some five weeks consequent on the Order would frustrate the will of Parliament as expressed in at least two statutes: the European Union (Withdrawal) Act 2018 (the “EUWA 2018”) and the Northern Ireland (Executive Formation etc) Act 2019 (“NIEFA”). It is to this, the second ground, that I will first turn.

### **The second ground of challenge**

[68] In my opinion, the second ground of challenge can be dealt with briefly; and rejected.

[69] The argument based on EUWA 2018 is as follows. Article 50 of the Treaty on European Union (2007/C 326/01) ('TEU') provides *inter alia*:

- “1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
  
2. A Member State which decides to withdraw shall notify the European Council of its intention. ... [T]he Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal ...
  
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”

[70] What article 50 terms “an agreement with [the withdrawing] State, setting out the arrangements for its withdrawal” has come to be generally referred to as “a deal” and, conversely, the absence of any such agreement as “no deal”. A withdrawal agreement reached by the government requires ratification by Parliament in terms of section 13 of EUWA 2018. It is the petitioners’ contention that the effect of section 13 of the Act, as read with section 1(1) of the European Union (Notification of Withdrawal) Act 2017 and the European Union (Withdrawal) Act 2019 is that:

“... in the absence of express Parliamentary discussion and specific Parliamentary approval for such a course, it is unlawful for the Government (relying on the automatic effect of EU law and its own failure) to allow the United Kingdom to leave the European Union by default, without a deal. Ministers accordingly require the authority of Parliament in the form of new primary legislation expressly allowing for it, before they can lawfully take the course of allowing for such a ‘no deal Brexit’. The Government is therefore obliged to ensure that Parliament is sitting for such no deal authorising legislation to be considered by Parliament and, if so advised, passed before Exit Day.”

[71] The respondent disputed that interpretation of section 13. It is directed at parliamentary approval of a withdrawal agreement; it has no application to an exit from the

EU without a deal because in these circumstances there would be no deal to be approved. The Lord Ordinary agreed with that interpretation. I express no concluded opinion on the matter. On the face of it section 13 is about approval of a deal. To come to a concluded view on the proper interpretation of the legislation would require a much more detailed examination than has been or is possible in the time available. More critically, as Mr Johnston QC submitted on behalf of the respondent, section 13 of EUWA 2018 is irrelevant to the issues in the petition. If, contrary to the respondent's interpretation, it requires parliamentary approval for a no deal exit then the petitioners' principal concern, a no deal exit by default, cannot occur. I would add that, again, the petition would appear to have been overtaken by events in that the European Union (Withdrawal) (No 6) Bill received Royal Assent, on 9 September 2019, and became the European Union (Withdrawal) (No 2) Act 2019. That Act provides that unless Ministers have sought and obtained parliamentary approval either of a withdrawal agreement or of leaving the European Union without an agreement by 19 October 2019 then the Prime Minister must seek a further extension of the article 50 notice period until 31 January 2020.

[72] The NIEFA argument is based on the requirement of section 3 of that Act for a Minister to report periodically to the House of Commons until December 2019 on the progress of talks on restoring the Northern Ireland Assembly. The petitioners aver that this indicated the clear intention and purpose of Parliament to ensure that it continued to sit throughout September to December 2019 to ensure, among other things, Parliament's continued scrutiny of the process of the UK's withdrawal from the European Union and to maintain the accountability of the Government on this issue. I do not accept that. NIEFA illustrates that Parliament can and does regulate when it will sit. The provisions of NIEFA are very specific as to the days when Parliament must sit in the period until December 2019,

assuming no dissolution but irrespective of prorogation. It can be taken to have been Parliament's intention to sit on these days but it cannot be taken that it was Parliament's intention to sit on other days. Just what business Parliament considers in addition to the progress of talks on restoring the Northern Ireland Assembly will be for Parliament to determine but there is nothing in NIEFA to prevent Parliament standing prorogued for other than the specified days. However, I do not go the distance of accepting that by passing the bill that became NIEFA, Parliament must be taken to have "occupied the ground", as it was put by Mr Johnston for the respondent, if by that he meant having comprehensively determined all the days when it must sit before December 2019, but as to the petitioners' suggestion that a more extensive parliamentary intention can be implied from NIEFA than what is specifically stated I agree with the respondent and the Lord Ordinary.

### **The first ground of challenge**

[73] The first ground of challenge gives rise to two broad questions: first, whether this court in exercise of its supervisory jurisdiction can reduce the Order; second, whether it should.

[74] In order to answer these two questions in the affirmative, as the petitioners would wish, the court must be satisfied that the advice given to the Sovereign by the relevant members of the Privy Council in respect of the making of the Order was in some way unlawful, however that unlawfulness is characterised; "abuse of power", "*ultra vires*", "unconstitutional", "improper purpose" and "irrational" were among the expressions used in the course of submissions.

### **The petitioners' submission in support of the first ground of challenge**

[75] There are three pillars to the State: Parliament, the Executive, and the courts. While its sovereignty may not be absolute, Parliament is sovereign. The Executive must act within the powers permitted it by Parliament, and for the purposes for which those powers were left with it by Parliament. The Executive is politically accountable to Parliament for exercise of its powers. Through its exercise of prerogative power the Executive may prorogue Parliament but if and so far as the Executive were to use this power in order to avoid being held accountable to Parliament or to impede Parliament from exercising control over the Executive that would be unlawful. The proper constitutional relationship of the Executive and the courts is one of mutual respect; the courts will respect all acts of the Executive within its lawful province, and the Executive will respect all decisions of the courts as to what its lawful province is. As the Executive is politically accountable to Parliament, the Executive is legally accountable to the courts. The government of the United Kingdom is subject to the rule of law and it is the function of the courts to ensure the rule of law by providing an effective remedy against any constitutional violation. It is the law (and accordingly a matter for courts in enforcing the rule of law) that parliaments be called and allowed to sit: the Claim of Right Act 1689, as subsequently confirmed. It is therefore clear that the Executive's power to prorogue Parliament is a matter which is justiciable before the courts and is reviewable on grounds of irrationality or breach of other judicial review principles (cf *Attorney General v De Keyser's Royal Hotel* [1920] AC 508 at 567-8, *R (Sandiford) v Foreign Secretary* [2014] 1 WLR 2697 at paras 50 and 65). The Executive's exercise of the power of prorogation of Parliament is accordingly not unlimited or unfettered. Exercise of the power is lawful only if it is consistent with constitutional principle. The power can only be exercised for a proper purpose. Even if it is exercised for a proper purpose, it is subject to

review on the ordinary principles of legality, rationality and procedural propriety. In the present case the Prime Minister has declined to give a proper and complete account of the Executive's true reasons for exercising the prerogative to prorogue Parliament for the period specified in the Order. This refusal by the Prime Minister to explain the decision-making and reasoning underlying the exercise of the power at the present time mean that the court should draw inferences of fact against the respondent. In particular it is proper in these circumstances for the court critically to examine and sceptically to question the reasoning and justification given for the exercise of the power to prorogue Parliament in his letter of 28 August 2019 to MPs (that the decision was not driven by Brexit, and that the Prime Minister wished to press ahead with a new agenda and to prepare for its presentation in a Queen's Speech) (*R (Das) v Home Secretary* [2014] 1 WLR 3538 Beatson LJ at para 80 approving the approach taken by Sales J, as he then was, at first instance). Such an approach of anxious scrutiny was appropriate as requiring the Executive to demonstrate that the most compelling of justifications existed for an exercise of the power to prorogue where it will have profoundly intrusive and distortive effects on the constitution. It is in any event clear that the Executive's exercise of the power in the present case has been vitiated by its use for an improper purpose and in an unreasonable manner namely: to prevent or impede Parliament holding the Executive politically to account in the run up to Exit Day; to prevent or impede Parliament from legislating on the United Kingdom's exit from the European Union; and to allow the Executive, notwithstanding that it has no Parliamentary mandate to do so, to pursue a policy of No Deal Brexit without further Parliamentary interference. The Executive has purported to use the power intending to silence and disempower Parliament for the crucial period in the immediate run up to Exit Day. Prorogation used in this way seeks to curtail Parliament's capacity to exercise the totality of legislative authority. Where,

as in the present case, the Executive so abuses its power of prorogation of Parliament, it is the paramount duty of the court to say so.

### **The Lord Advocate's submission in support of the first ground of challenge**

[76] The question was whether, having regard to its effects in all the circumstances, this particular decision to prorogue was one that calls for the intervention of the court. In the particular context the decision to advise and procure the prorogation of Parliament for five weeks at this time may properly be characterised as an abuse of executive power which calls for intervention. It is an existential question: whether Parliament is to sit. The Executive is accountable to Parliament but once the Executive has suspended Parliament that mechanism for democratic accountability is removed and yet it is said that a closing down of the possibility of scrutiny of the Executive is non-justiciable. The abuse of power lies in the timing and duration of the prorogation, its effect on a fundamental constitutional principle – namely, accountable or responsible government – and a marked absence of any compelling justification offered in that regard by the Prime Minister for that timing and length. While the UK Government has publically stated that the purpose of prorogation at this time is to bring the current session of Parliament to an end, a period of five weeks is disproportionate for that purpose. It was the role of the courts to protect Parliament. It would be odd if the court disqualified itself just because political judgement is involved. Merely because a question is in the political sphere does not mean that it is not justiciable. The real issue was how the courts should carry out their review, in other words what is the appropriate standard and intensity of review. The structure of analysis that the intervener invites the court to apply is a familiar one. It involves the court assessing the impact of the decision under review on a recognised legal interest, here the constitutional principle of responsible

government; in applying scrutiny to the justification advanced by the UK Government; and in addressing whether the interference is rationally connected to the justification; and whether that impact is proportionate to the justification advanced. These are all questions which are apt for judicial determination. The constitutional right of Parliament to sit is so important that it requires enforcement in the court. In these circumstances the intervener invites the court to reduce the Order.

### **The Lord Ordinary's opinion**

[77] In refusing the petition, the Lord Ordinary essentially accepted the submissions made to him on behalf of the respondent. Review of the exercise of some prerogative powers was justiciable in some cases but not in others. Whether the exercise of prerogative power is reviewable depends on the subject matter of the power or its exercise and the context of the power and of the challenge. Some functions exercised or decisions taken are non-justiciable. Among them are matters of high policy and political judgement. The courts do not have the tools or standards to assess the legality of such matters. That is political territory and decision-making which cannot be measured against legal standards but rather only by political judgements. It could not be said that the prorogation contravened the rule of law, thus making the claim justiciable. The Prime Minister had the *vires* to advise the Sovereign as to the exercise of the royal prerogative. Parliament is master of its own proceedings. It is not for the courts to devise restraints on prorogation beyond those which Parliament has chosen to provide. The Lord Ordinary saw force in the submission by counsel for the respondent that the petitioners' claim that the Claim of Right Act 1689 had been contravened was non-justiciable but he preferred to decide that issue on the more

straightforward ground that there was nothing to support any breach of the provisions of the Act.

### **Discussion**

[78] The petitioners seek to challenge the exercise of the royal prerogative in order to prorogue Parliament.

[79] A session of a Parliament can only be brought to an end by an exercise of the royal prerogative (hence the Order); formerly this was done at the end of the session by the monarch in person but now it is prorogued by a commission for the purpose under the Great Seal; the effect of prorogation is to put an end with certain exceptions to all proceedings then current and to suspend any sitting of Parliament or its committees for the period of prorogation (see Erskine May's Parliamentary Practice (24<sup>th</sup> edit, 2011, pp144-145).

[80] The Order was made by the Queen but, as appears on its face, in making the Order she was acting in council, in other words with the advice of ministers. In reality the Sovereign never acts by himself, but only through the medium of ministers or executive servants and accordingly a challenge to an order in council is properly directed against the responsible ministers or their law officer (*Edwards v Cruickshank* (1840) 3 D 282, Lord President Hope at pp 306-307, quoted with approval by Lord Rodger in *R (Bancoult) v Foreign Secretary* [2009] 1 AC 453 at para 106; cf *Teh Cheng Poh v Public Prosecutor* [1980] AC 458 at 473). As a matter of procedure an order in council may be quashed by decree of the Court of Session in an action or petition directed against the Advocate General for Scotland (Crown Suits (Scotland) Act 1857, *R (Bancoult)* at para 106).

[81] While the respondent submits that this is all a matter of high politics and therefore not a matter for the courts, a certain amount is conceded or otherwise not a matter for

argument. The petitioners have been granted permission to proceed. Their standing to bring the petition has accordingly been acknowledged by the court and indeed was expressly accepted by the respondent. Also accepted was that, as a matter of generality, this court has jurisdiction to review an exercise of power derived from the royal prerogative. There is no procedural difficulty in this court granting a decree the effect of which is to nullify the Order. While the court was reminded of the separation of powers, I did not understand the proposition that review of the Order would in some way constitute contempt of Parliament to be pressed. Thus, while we heard much from Mr O'Neill on behalf of the petitioners which was both interesting and stirring about a particularly Scottish tradition of holding the Crown, in its various manifestations, to account, for present purposes (and not having actually identified any material differences between the applicable Scots law and the corresponding English law) Mr O'Neill was, to an extent, pushing at an open door; however only to an extent. The Lord Ordinary has held that the petitioner's first ground of challenge is not justiciable; that prorogation of Parliament in terms of the Order is not contrary to the rule of law; that as Parliament is master of its own proceedings, the courts will not interfere; and that there has been no contravention of the Claim of Right Act 1689. He has refused the petition. Counsel for the respondent submits that he was right to do so.

[82] I shall address these points in turn, although there is a degree of inter-dependence among them.

### *Not justiciable*

[83] Without pretending to define the concept, I would see a question to be justiciable if it is capable of practical determination by reference to legal principles in a court of law. If it is not capable of determination in that manner it is not justiciable. I have suggested that the

first ground of challenge gives rise to two issues: whether this court can reduce the Order; and second, whether it should. Both involve a question of justiciability in that in order for this or any other court to find those whom the respondent represents to have acted unlawfully the court must be satisfied that there are sufficiently precise and applicable legal principles by reference to which the lawfulness of making the Order can be judged; and the court must further be satisfied that on the material available to it by applying the relevant principles it should conclude that advising the Queen to make the Order was an unlawful act. The Lord Ordinary captured the notion of justiciability, or at least non-justiciability rather more succinctly than I have been able to do when he indicated that where the court does not have the tools or standards to assess the legality of a matter then it is not justiciable. In doing so the Lord Ordinary was echoing the “lack of judicial or manageable standards” referred to in the joint judgment of Lords Neuberger, Sumption and Hodge in *Shergill v Khaira* [2015] AC 359 at para [40] (and see also the other authorities cited by the respondent: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 411D-F, *A v Home Secretary* [2005] 2 AC 68 at para [29], *Wheeler v Office of the Prime Minister* [2008] EWHC 1409, *McClean v First Secretary of State* [2017] EWHC 3174 (Admin) (DC) at paras 21 and 22, *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 at paras 12 ).

[84] The Lord Ordinary correctly recognised that review of the exercise of some prerogative powers was justiciable in some instances but not so in respect of other powers or other instances; it will depend on the nature of the power, the circumstances and context of its exercise, any established practice or undertaking giving rise to an expectation, and the precise way in which a particular challenge is formulated (*R (Sandiford) v Foreign Secretary* at paras 50-52 and authorities cited there). However, while questions of justiciability in judicial review are not confined to applications to review exercises of the royal prerogative they are

more likely to arise in such cases because of the relatively amorphous nature of common law prerogative powers in comparison to the more closely defined powers conferred by statute.

[85] An illustration of circumstances in which a court may conclude that a question or issue is not justiciable is provided by the line of argument in the present case that the making of the Order contravenes the provisions of the Claim of Right Act 1689. It is a statute but also a document of its time. It lacks the precision to be expected of modern legislation. The passage founded on by the petitioners reads as follows:

“That for redress of all grievances and for the amending strengthning and preserving of the lawes Parliaments ought to be frequently called and allowed to sit and the freedom of speech and debate secured to the members”

As I understand it, the Lord Ordinary rejected the petitioners’ contention that making the Order contravened the 1689 Act on the basis that a particular prorogation of Parliament, taken in isolation, does not amount to breach of a requirement that Parliament be “allowed to sit”. However counsel for the respondent had also argued that, given the terms of the relevant text, the question of whether the requirement that Parliament be “allowed to sit” was not justiciable. Like the Lord Ordinary, I see the force of that argument. Where in practice the sitting of Parliament is commonly adjourned and prorogued, by reference to what criteria and what materials can a court determine that in a particular instance Parliament has not been “allowed to sit”? Moreover, if this is brought into contention, how can a court decide that the “redress of all grievances and for the amending strengthning and preserving of the lawes” or “freedom of speech and debate” have been subverted or prevented?

[86] As matters stood when the petition was first presented (31 July 2019) I am inclined to the view that the petitioners were not in a position to frame a justiciable question or at least had not done so. The events up to that date which are recorded by your Lordship in the

chair provided context, but I do not consider that a court asked to consider the petition on 31 July 2019 would have had the materials or the “judicial or manageable standards” available to it to conclude that the petitioners had a reasonable apprehension that Parliament was to be prorogued in such a way as to be unlawful. It was then the apprehension of the petitioners that Parliament was to be denied “sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union”. It does not appear to me that a court has the capability to determine what time is sufficient for Parliament or what consideration is proper for Parliament when the matter for consideration is the withdrawal of the United Kingdom from the European Union.

[87] The landscape changed, however, with the making of the Order, the issue of the Prime Minister’s letter to MPs on 28 August 2019 and the disclosure to the court of copies of the three redacted documents referred to by your Lordship in the chair which were apparently exhibited to the witness statement of Jonathan Guy Jones dated 2 September 2019 in the proceedings *R (Miller) v The Prime Minister* before the Queen’s Bench Division of the High Court in England (Exhibit JGJ/1, Exhibit JGJ/2, and Exhibit JGJ/3). The making of the Order meant that prorogation was no longer a matter of apprehension; it would happen. Moreover, the dates and the period of prorogation were known. The Prime Minister’s letter set out his explanation for the prorogation. The redacted documents provided material bearing on the thinking of the Prime Minister and his advisers, which, taken with the whole circumstances, including the Prime Minister’s public statements, might allow a court to draw inferences as to whether the Prime Minister’s explanation disclosed his whole or indeed his principal reasons for proroguing Parliament at this time.

[88] As to the use to be made of the redacted documents, I respectfully associate myself with the position of your Lordship in the chair. It was submitted by Mr O’Neill on behalf of

the petitioners that it was simply not open to a party to put in documents to support his case in redacted form where the redaction was at his hand; any claim of privilege or confidentiality had to be taken as having been waived. Mr O'Neill was also critical of the absence of any affidavit, whether to explain the documents or otherwise to support the reasons for advising the Queen to make the Order. It was for the Prime Minister, submitted Mr O'Neill, to commit to a position on oath and render himself liable to cross-examination. I do not agree with Mr O'Neill on any of these points. In my opinion it is open to a court to look at any documentary production which is tendered to it and give it such weight as the court considers that it is worth. If a party has redacted certain portions in the way that these documents have been redacted (portions blacked out) then it is clear that the court is not being provided with the full text of the original. The court can take that into account. Redaction may mean that certain inferences should be drawn. However, I do not consider that a party should not be allowed to produce a document in redacted form or to rely on it, for what it is worth. Similarly I do not consider that a document cannot be produced and relied on where it is evident that it is part of or originally intended to be read with another document, such as an affidavit. Counsel for the respondent explained that the three documents had been produced on the advice of the Treasury Solicitor in discharge of what he saw to be a duty of candour to the court. The redactions had been made on the basis of legal professional privilege, the convention as to Law Officers' advice and relevancy. I see no reason why not to accept the good faith and professional diligence of the Treasury Solicitor and of counsel when he advised that he had satisfied himself that redactions had been properly made. Indeed, while there may be cases when the court will have to probe more deeply, I would see every reason for the court to be prepared to rely on what is said by professional civil servants and counsel who understand what is meant by accurate

information and their duty to present it to the court. In an age of special or political advisers who may not share that understanding and the diffusion of “messaging”, to use an expression in the cabinet minute, responsible conduct and adherence to the highest standards is to be encouraged.

[89] When regard is had to all the material now before the court, it is my opinion that the petitioners are entitled to be sceptical of the proposition that the reason for making the Order was simply in order to prepare a new legislative agenda for announcement in a Queen’s Speech at the beginning of the next session of the Parliament. Further, I consider that they are entitled to ask the court to infer, as I would infer, as submitted on behalf of the petitioners, that the principal reason for the advice to the Queen to make the Order for the prorogation of Parliament was to prevent or impede Parliament holding the Executive politically to account in the run up to Exit Day; to prevent or impede Parliament from legislating on the United Kingdom’s exit from the European Union; and to allow the Executive to pursue a policy of no deal Brexit without further Parliamentary interference. My reasons for inferring that are as follows. The Prime Minister has made it very clear that his principal policy objective is to achieve a withdrawal of the United Kingdom from the European Union on 31 October 2019 irrespective of the consequences of such a withdrawal and therefore irrespective of the making of a withdrawal agreement with the European Union with a view to ameliorating some of the adverse effects of withdrawal (that there will be adverse effects would seem to be accepted by the Prime Minister, given his expressed wish to negotiate an agreement). If withdrawal by 31 October 2019 means a no deal Brexit then the Prime Minister is prepared to accept that. He would prefer to be “dead in a ditch” to not achieving that objective. However, the Prime Minister does not command a majority in Parliament for this policy objective if it comes at the price of no deal. A sitting Parliament,

carrying out its constitutional functions including the passing of legislation, therefore presents the potential to interfere with the Prime Minister's policy objective. As it happens, this was to be demonstrated during the two days of the hearing of the reclaiming motion, but it had been anticipated for some time before that. What was also anticipated, not just by the petitioners but in public statements by at least one member of the present cabinet, that a means of preventing such interference would be to prorogue Parliament (and the speaker said he was willing to procure that). It is now known that a prorogation of some five weeks between 9 September and 14 October was being planned at least as early as 15 August. That planning would seem to have been conducted in conditions of some secrecy. That Parliament was to be prorogued was only announced after the Order was made, on 28 August. That was so, as your Lordship in the chair observes, despite the fact that the petitioners' application with its averments of apprehension of a prorogation had been initiated on 31 July without any subsequent acknowledgement in the respondent's pleadings that the apprehension was well founded. As your Lordship observes, it would appear to have been thought appropriate to keep the respondent's legal advisers in the dark about what was planned. Of significance is the length of the prorogation. The note from Nikki Da Costa to the Prime Minister (Exhibit JGJ/1) states that the usual length of prorogation is usually under 10 days, although occasions of longer periods are there identified. For the reasons given by Professor Paul Craig in *Prorogation: Constitutional Principle and Law, Fact and Causation*, Oxford Human Rights Hub, 31 August 2019, presenting and initiating a new legislative agenda would not appear to require a five week prorogation of Parliament. That the Prime Minister was conscious that an inference might be drawn that the true purpose of the prorogation was other than it was claimed to be appears from the cabinet minute (Exhibit JGJ/3). He is there recorded as saying that it was "important to emphasise that this

decision to prorogue Parliament for a Queen's speech was not driven by Brexit considerations ...". The point was picked up in discussion during which it was observed that:

"any messaging should emphasise that the plan for a Queen's Speech was not intended to reduce parliamentary scrutiny or minimise Parliament's opportunity to make clear its views on Brexit. ... Therefore, any suggestion that Government was using this as a tactic to frustrate Parliament should be rebutted;"

One can protest too much, but even if Parliament is to be given an opportunity "to make clear its views" that does not mean that it is intended that it should have the opportunity to do anything about them.

[90] In my opinion the justiciability question should be approached on the basis that what is challenged by the petitioners is "a tactic to frustrate Parliament", to use the shorthand of the cabinet minute. Can and should this court declare this tactic unlawful?

[91] I can see that just because a government has resorted to a procedural manoeuvre in order to achieve its purpose does not mean that there is necessarily scope for judicial review. Procedural manoeuvres are the stuff of politics, whether conducted in Parliament or in lesser bodies. However, when the manoeuvre is quite so blatantly designed "to frustrate Parliament" at such a critical juncture in the history of the United Kingdom I consider that the court may legitimately find it to be unlawful. There are undoubted difficulties in the courts applying its supervisory jurisdiction to an exercise of the royal prerogative within the political sphere, but Mr Johnston for the respondent did not go the distance of saying that there could never be a case which would justify intervention. He accepted that a two year prorogation of Parliament might be amenable to review. Here, the prorogation is only five weeks (and it is to be borne in mind that in practice the reduction of sitting days will be less because of the traditional adjournment of Parliament during the political party conference

season). However, it is a lengthy prorogation at a particularly sensitive moment when time would seem to be of the essence. In my opinion Mr Mure QC for the Lord Advocate (whose analysis I accept) was right to point to the *dictum* of Lord Sumption in *Pham v Secretary of State* [2015] UKSC 19 at paras 105-106:

“in reality [there is] a sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference”.

Here there has been interference with Parliament’s right to sit, should it wish to. The petitioners want to protect that right. If Parliament does not wish to be so protected it can decide accordingly but the petitioners want to give it the opportunity to determine whether and when it is to sit between now and 31 October. The petitioners submit that as yet Parliament has not had that opportunity, notwithstanding the legislative activity that was going on during the hearing of the reclaiming motion. What has led me to conclude that the court is entitled to find the making of the Order unlawful is the extreme nature of the case. A formulation to which I have been attracted is found in chapter 14, *Crown Powers, the Royal Prerogative and Fundamental Rights*, in Wilberg & Elliott, *The Scope and Intensity of Substantive Review* (Hart, 2015) at p 374 where the author of the chapter, Sales LJ, as he then was, refers to a group of authorities where the courts had been prepared to review exercises of the Crown’s common law and prerogative powers. The formulation is: “these are egregious cases where there is a clear failure to comply with generally accepted standards of behaviour of public authorities”. I see this as an egregious case. Mr O’Neill came to submit that the essence of the illegality here was irrationality (as had been the cases with the cases referred to by Sales LJ). Mr O’Neill may be right about that, although I would see it as having to do with improper purpose. At all events, I consider the Order to be unlawful and that making it was contrary to the rule of law.

*Parliament the master of its own proceedings*

[92] Clearly Parliament is the master of its own proceedings but, as I would see it, what the petitioners seek to achieve is to allow it to act as such.

*No breach of the Claim of Right Act 1689*

[93] As previously touched on, I would agree with the Lord Ordinary on this point.

**Conclusion**

[94] I respectfully agree with your Lordship in the chair. The Order was unlawful and thus null and of no effect. The court should grant an order to that effect.



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 49  
P680/19

Lord President  
Lord Brodie  
Lord Drummond Young

OPINION OF LORD DRUMMOND YOUNG

in the reclaiming motion by

JOANNA CHERRY QC MP and OTHERS

Petitioners and Reclaimers

against

THE ADVOCATE GENERAL

Respondent

---

**Petitioners:** O'Neill QC, Welsh; Balfour + Manson LLP  
**Respondent:** Johnston QC, Webster QC; Office of the Advocate General  
**Intervener (the Lord Advocate):** Mure QC, C O'Neill (sol adv); Scottish Government Legal Directorate  
**Applicants (the BBC and others):** McBrearty QC; Burness Paull

11 September 2019

**Introduction**

[95] I am grateful to your Lordship in the chair for setting out the factual background to this case. I agree with your Lordship that the reclaiming motion should be allowed and that this court should pronounce a declarator that it was *ultra vires et separatim* unconstitutional for any Minister of the Crown to purport to advise the Queen to prorogue the United

Kingdom Parliament in the manner of the Order in Council reportedly pronounced on 28 August 2019.

[96] The critical question is whether the Government's decision to prorogue Parliament embodied in the Order in Council of 28 August was a proper exercise of the executive's power. It is a matter of agreement that the power to prorogue Parliament falls within the royal prerogative. The prerogative extends to other matters, notably foreign policy, the defence of the realm and the prerogative of mercy. Nevertheless, the power to prorogue Parliament differs from other prerogative powers in important respects. Principal among these is the fact that prorogation raises in an acute form the relationship between the executive and the legislature. That is obviously a matter of fundamental constitutional importance. Parliament is the democratically elected organ of government, and the government, the executive, is answerable to Parliament and will normally attempt to obtain majority support there. Prorogation has the effect of suspending the operation of the democratically elected body, leaving the executive for the time being free of political (as against legal) control. In this connection there is an important distinction between prorogation and Parliament's going into recess. During a recess, Parliament may reconvene itself at any time. Prorogation, by contrast, is an act of the executive, not of Parliament, and Parliament can do nothing during the period of prorogation to bring it to an end.

[97] In considering whether the exercise of the power to prorogue Parliament has been properly exercised, three features of the constitutional system of the United Kingdom are in my opinion of central importance: the sovereignty of Parliament, the accountability of the executive to Parliament, and the rule of law. I will begin with a brief consideration of those principles. Thereafter I will consider whether the exercise by the executive of the power to prorogue Parliament is subject to control by the courts, and if so in what circumstances and

in what manner the courts may control the exercise of the power. Finally, on the basis that the courts do have such a power, I will consider the particular decision to prorogue Parliament that is in issue in the present case: the circumstances in which the decision to prorogue has arisen, the reasons given for the decision, and whether in all the circumstances the exercise of the power is *intra vires* of the government.

### ***Parliamentary sovereignty***

[98] Under the constitutional system of the United Kingdom Parliament is the sovereign institution. Its sovereignty is exercised through the enactment of Acts of Parliament, which represent law binding on all persons, including the executive and other official institutions.

The principle has been described as

“the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law... as having a right to override or set aside the legislation of Parliament”: Dicey’s *Introduction to the Study of the Law of the Constitution*, 8<sup>th</sup> ed (1915), at page 38.

In the recent decision of the UK Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union*, [2018] AC 61, the majority of the court described Parliamentary sovereignty as “a fundamental principle of the UK constitution”, and affirmed that the legislative power of the Crown is today exercised only through Parliament: see paragraphs [40]-[46]. Thus it is Parliament, and Parliament alone, that is empowered to effect changes in the law of the United Kingdom, either directly in an Act of Parliament or indirectly by authorizing subordinate legislation through an Act of Parliament.

### ***The executive and Parliament***

[99] Thus the enactment of statute law is a vital function of Parliament. Parliament has a second equally important function, namely that of holding the executive to account. The policies and actions of the government are subject to scrutiny in Parliament by Members of

Parliament. The United Kingdom operates by a system of representative democracy, and it is Members of Parliament, representing the interests of their constituents and the wider interests of the country, who are responsible for ensuring that the executive operates in the national interest. In particular, Parliament is responsible for ensuring that the policies of the executive are properly considered in a democratic body, and that the actions of the executive are subject to critical scrutiny, with representatives of the government reporting on and explaining those actions. In this way Parliament performs the fundamental role of protecting the country from the arbitrary exercise or abuse of executive power. The importance of the latter function is obvious, both in the abstract and in the light of the events during the 17<sup>th</sup> century that gave rise to the principle of Parliamentary sovereignty.

### *The rule of law*

[100] The importance of the rule of law should be self-evident: a system of democratic government that pays proper respect to the rights of citizens must be based on a system of rules, and those rules must be properly interpreted and consistently applied. Otherwise government is liable to descend into tyranny or anarchy. The doctrine of the sovereignty of Parliament emerged from the constitutional conflicts of the 17<sup>th</sup> century, and in particular from the settlement effected by the Revolution of 1688-90. The principle was recognized in various statutes that followed the Revolution, notably the Claim of Right Act 1689 (c 28) in Scotland, the Bill of Rights 1688 (1 Will & Mar Sess 2 c 2) and the Act of Settlement 1700 (12 & 13 Will 3 c 2) in England and Wales, and the Acts of Union of 1706 (6 Ann c 11) and 1707 (c 7) in England and Wales and in Scotland respectively. Central to the Revolution settlement, however, was the principle of the rule of law. Thus the introductory clause of the Claim of Right Act refers to King James VII's invading the fundamental constitution of the kingdom, altering it from "a legall limited monarchy to ane Arbitrary Despotick power",

and asserting an absolute power to annul and disable laws. The Bill of Rights likewise refers to the King's assuming and exercising a power of dispensing with and suspending laws without the consent of Parliament. Those two statutes reflect the fact that the rule of law is fundamental to the constitutional system of the United Kingdom.

[101] The maintenance of the rule of law – determining what the law is and ensuring that it is consistently applied and if necessary enforced – is a primary function of the judiciary. That is a task that must obviously be carried out with scrupulous impartiality and objectivity. Judicial independence is central to that function. The executive cannot be judge of its own powers; independent courts must be able to consider the exercise of those powers in order to determine whether such exercise is or is not *intra vires*.

### **Judicial control of the power to prorogue**

[102] The primary submission for the respondent was that the petitioners' challenge to the exercise of the power to prorogue Parliament was non-justiciable. In my opinion this contention must be rejected. The rule of law requires that any act of the executive, or any other public institution, must be liable to judicial scrutiny to ensure that it is within the scope of the legal power under which it is exercised. The boundaries of any legal power are necessarily a matter for the courts, and the courts must have jurisdiction to determine what those boundaries are and whether they have been exceeded. That jurisdiction is constitutionally important, and in my opinion the courts should not shrink from exercising it. Consequently, if the expression "non-justiciable" means that the courts have no jurisdiction to consider whether a power has been lawfully exercised, it is a concept that is incompatible with the rule of law and contrary to fundamental features of the constitution of the United Kingdom.

[103] When pressed on the meaning of the expression “non-justiciable”, counsel for the respondent conceded that in some circumstances the court might hold that the power to prorogue Parliament had not been validly exercised: for example, if Parliament were prorogued for two years, or if the governing party lost its majority at a general election and immediately thereafter attempted to prorogue Parliament. In my opinion that concession was properly made. What the concession acknowledges, however, is that the power to prorogue Parliament is subject to judicial review by the courts. For the reasons stated in the last paragraph I am of opinion that this is inevitable: the courts must have jurisdiction to determine whether any power, under the prerogative or otherwise, has been legally exercised.

*The grounds for judicial control*

[104] The grounds for judicial control of the exercise of prerogative powers are in my opinion broadly the same as those used in other cases of judicial review of executive action, subject to one important qualification, that the court should not interfere with the substantive political grounds for the exercise of prerogative power provided that the power is used for a proper purpose. The grounds for judicial review are well known and do not require to be restated; they include *ultra vires* in the narrow sense and the use of a power for an improper purpose: something that does not fall within the purposes that the power, construed objectively, is intended to achieve. Those grounds are legal in nature, however, and do not normally go to policy questions, including political matters. In judicial review, the primary decision maker is a body or person other than the court, and the court only has jurisdiction to review the legality of a decision, not its merits. In relation to the prorogation of Parliament, this feature is particularly important, as a decision to prorogue Parliament is likely to be based on political considerations. This may make it difficult to apply standards

such as proportionality, which does involve consideration of the merits of a decision.

Nevertheless, standards of review are flexible, and in appropriate circumstances it would be possible for a court to hold that a decision by the executive to exercise a prerogative power is one that no reasonable person in that position could exercise: see, for example, *Pham v Home Secretary*, [2015] 1 WLR 1591, in particular at paragraphs [105]-[107]. For present purposes, it is not necessary to go so far; it is sufficient to hold that the court has jurisdiction to consider whether the exercise of a power, including a prerogative power, is *ultra vires*, or whether such a power is used for a purpose that is objectively outwith its intended scope.

[105] Counsel for the respondent submitted that the court should not interfere with the present decision to prorogue Parliament on the ground that it amounted to “high policy”. The expression “high policy” has not, so far as I am aware, been judicially defined; it has been used in a number of cases, but generally as a convenient label in a case where the court considers that the executive decision in question is too political for the court to interfere with. The court must not stray into the political aspects of any executive decision, especially one in exercise of the prerogative, but in my opinion it must still apply legal standards in the manner described in the last paragraph.

### ***Parliamentary control***

[106] It does not follow, that the actions of the executive, and in particular its use of prerogative powers, are subject to no political control. Political control over such actions is exercised by Parliament through its scrutiny of the actions of government. This includes such matters as Parliament’s power to call for debates on controversial matters or to question ministers about their decisions. As I have indicated, parliamentary scrutiny of executive decisions is one of the essential features of the constitutional arrangements of the United Kingdom. Thus the government is held to account in two distinct ways: legally by

the courts and politically, or on policy grounds, by Parliament. With the prorogation of Parliament, however, this leads to a paradox. The proroguing of Parliament suspends the operation of the body that is responsible for subjecting the executive to critical scrutiny. Consequently during the period of prorogation formal political scrutiny of the executive cannot take place. This in my opinion makes it particularly important that the courts should ensure that the power to prorogue Parliament is only used in a proper manner and for proper purposes. The courts cannot subject the actings of the executive to political scrutiny, but they can and should ensure that the body charged with performing that task, Parliament, is able to do so.

[107] On the subject of prorogation, I should note one further matter. Prorogation is an act of the executive acting through the Crown. Parliament has no power to revoke it. This should be contrasted with Parliament's going into recess. That is a decision of Parliament itself, and a recess can be revoked by Parliament at any time. Recesses take place regularly, for example, during the summer and over the party conference season in the autumn. The power to reconvene Parliament at any time provides important flexibility. This is absent from prorogation. This explains in part why prorogation is in practice normally only used for very short periods, generally to begin a new Parliamentary session.

#### *Previous cases of prorogation*

[108] So far as I am aware the prorogation of Parliament has never been the subject of judicial challenge. Prorogation is used regularly to bring sittings of Parliament to an end and begin a new session. When that occurs, however, the suspension of Parliament usually only lasts for a few days. Furthermore, we were not referred to any case where prorogation was used at a time of acute political controversy in such a way that Parliamentary debate was suspended for several weeks during a critical period. In my opinion the standard use of

prorogation to begin a new Parliamentary session is not in any way a precedent for the prorogation that is now proposed. Occasionally prorogation has been used for other purposes, to achieve political objectives rather than merely the routine change in sessions of Parliament. We were referred to one particular example of this, the two prorogations that occurred in 1948 to enable the Bill that ultimately became the Parliament Act 1949 to pass through Parliament notwithstanding opposition by the House of Lords. The Bill had been rejected by the House of Lords, and was likely to be rejected by them on subsequent votes. At that time, under the Parliament Act 1911, it was only a rejection of a bill by the House of Lords in three consecutive sessions that permitted use of the Parliament Act procedure to pass the bill notwithstanding its rejection by the Lords. Prorogation was therefore used to provide for three sessions of Parliament in quick succession, to enable the Bill to proceed to Royal assent. The use of prorogation in that way was not challenged in the courts, perhaps for obvious reasons. What this case illustrates is that the examples where prorogation has been used for more than formal purposes are highly unusual, and cannot serve as a precedent for later use of the power.

**The government's decision to prorogue Parliament effected by the Order in Council of 28 August 2019**

[109] As already noted, the primary question in the present case is whether the government's decision to prorogue Parliament, as effected by the Order in Council of 28 August 2019, was *intra vires* of the Crown's prerogative powers, and in particular whether it was a proper exercise of the power of prorogation. It is a matter of agreement that the decision to prorogue, although effected by the Crown through an Order in Council, results from a decision of the government. In considering whether that decision was a proper

exercise of the power to prorogue, it is essential in my opinion to have regard to the legal and political context in which it was made.

[110] Central to that context is the notice that has been given by the United Kingdom in terms of article 50 of the Treaty on the Functioning of the European Union to leave that body. After extensions, it is now due to take effect on 31 October 2019. The effect of the decision in *R (Miller) v Secretary of State for Exiting the European Union, supra*, was that legislation was required to effect the United Kingdom's withdrawal from the European Union, and that was in due course enacted by Parliament, in the form of the European Union (Withdrawal) Act 2018 (2018 c 16). Section 13 of that act provides that the terms of any withdrawal agreement between the United Kingdom and the European Union require Parliamentary approval in order to become law within the United Kingdom. If, however, no such approval is obtained, the result will be that the United Kingdom's withdrawal still takes effect, but without any formal arrangements to govern the future relationship between the United Kingdom and European Union – on a so-called “no deal” basis. If a withdrawal agreement is not approved by Parliament, that is the default position.

[111] This is potentially a matter of great importance. The law of the European Union covers large areas of legal practice. The European Union (Withdrawal) Act provides that EU legislation will continue in force in the United Kingdom, but of itself that has no effect on the international relationships of the United Kingdom with the remaining member states of the EU, and to a considerable extent with third countries, where trading and other relationships are at present governed by EU treaties. Those international problems cover a number of important areas of law. These include international trade, financial services, transport, customs, trading standards (which at present apply internationally), nuclear energy,

immigration, asylum, criminal justice, particularly in the area of extradition, and the recognition of foreign judgments and other legal acts.

[112] The United Kingdom government has engaged in negotiations with the European Union over the terms of a withdrawal agreement, and ultimately concluded such an agreement in the early part of 2019. For the agreement to take effect, however, it required to be approved by Parliament. On three occasions Parliament refused to give its approval by substantial majorities. Notwithstanding those defeats in Parliament the government, with a new Prime Minister and government, has continued to negotiate with the European Union over the terms of a proposed withdrawal agreement to take effect after 31 October 2019. The change of government has been significant, however, because the present Prime Minister has declared that he would be willing to withdraw from the EU without a withdrawal agreement, a view that appears to be supported by a majority of his government. His predecessor, by contrast, had negotiated a withdrawal agreement and focussed on trying to have that approved by Parliament, although in that she was unsuccessful. Extensive preparations are currently being made for withdrawal from the EU on 31 October, including legislation and administrative arrangements to deal with the possibility that the United Kingdom might leave the EU without any withdrawal agreement. So far those arrangements, together with the legislation, have been the subject of Parliamentary scrutiny.

*The decision to prorogue and parliamentary scrutiny*

[113] In these circumstances, it is obvious that the United Kingdom's withdrawal from the European Union, and the terms on which that withdrawal is effected, if any, are a matter of immense national importance. It is therefore not surprising that within Parliament the matter has been the subject of extensive debate and a great deal of controversy. It has become apparent that a majority of Members are opposed to the United Kingdom's leaving

the EU without a withdrawal agreement. This has resulted in the passing of legislation that will compel the Prime Minister to seek an extension to the withdrawal process if no agreement is reached with the EU before 19 October 2019, in the form of the European Union (Withdrawal) (No 2) Act 2019, which received Royal assent on 9 September 2019.

[114] Apart from legislation, however, it is apparent that the United Kingdom's withdrawal from the EU and its future relationship with the EU are the subject of vigorous debate and controversy. The controversy goes beyond the terms of any withdrawal agreement or the lack of it. It extends to the arrangements that will be put in place in the United Kingdom either to implement a future withdrawal agreement or to address the consequences of withdrawal on a "no-deal" basis. These are themselves complex matters, and preparations for a "no-deal" withdrawal are widely reported as involving a great deal of work by the civil service. At such a time Parliament's second essential constitutional function, the scrutiny of the executive, is of paramount importance.

[115] The decision to prorogue Parliament was given effect by the Order in Council of 28 August 2019. Its effect is that Parliament will be prorogued from Monday 9 September. A Queen's Speech will take place on Monday 14 October. During the intervening period of five weeks, Parliament will sit on certain days by virtue of provisions of the Northern Ireland (Executive Formation etc) Act 2019 (c 22), but these are limited in number and are in any event related to the formation of an executive in Northern Ireland. The effect of prorogation will accordingly be to prevent Parliament from sitting, except to a very limited extent, during the five-week period between 9 September and 14 October. The United Kingdom is due to leave the European Union on 31 October. Consequently the effect of prorogation is to reduce the sitting time of Parliament by five weeks during the period of approximately seven weeks between the date when prorogation takes effect and Britain's

leaving the EU. That is clearly a material reduction in the time available for Parliamentary debate. That is so even if the sittings mandated by the Northern Ireland (Executive Formation etc) Act 2019 are taken into account; these are clearly of limited utility.

[116] The effect of proroguing Parliament is to prevent, or at least to limit severely, the ability of Parliament to perform its essential function of holding the executive to account. During a vital period of five weeks Parliament will be prevented from performing that function. Seven weeks after Parliament is prorogued the United Kingdom is scheduled to leave the European Union, with or without a withdrawal agreement. Such lack of scrutiny may be convenient for the government. Nevertheless, it is taking place at a time when matters of great national importance fall to be decided. It extends over most of the period during which Parliamentary debate or the questioning of ministers in Parliament might have a practical effect in relation to the basis of which the United Kingdom might leave the EU. When regard is had both to the circumstances at the time of prorogation and its duration, I am of opinion that it is incumbent on the government to show that it has a valid reason for proroguing Parliament in that manner. In reaching that conclusion, I have particular regard to the fundamental constitutional importance of Parliamentary scrutiny of executive action.

[117] Prorogation has the effect of bringing Parliamentary scrutiny to an end, and thus in the event of challenge any reason for proroguing must be supplied to the court. If no reason is given, in the present circumstances I am of opinion that the decision to prorogue Parliament for five weeks out of the seven remaining before the United Kingdom is scheduled to leave the European Union leads inevitably to the conclusion that the reason for prorogation was to prevent Parliamentary scrutiny of the government. I find it impossible to see that it could serve any other rational purpose. The respondent's pleadings say almost

nothing about the reason for the prorogation, and the court was not provided with any other formal statement of the reasons. It was provided, however, with the documentation behind the decision to prorogue, and I will now consider the reasons disclosed by that documentation.

*The reasons given for prorogation*

[118] Three documents were made available. The first is a memorandum from Nikki Da Costa, the Prime Minister's Director of Legislative Affairs, dated 15 August 2019. This is set out in the opinion of your Lordship in the chair. I would draw attention to the following passage:

“RECOMMENDATION

2. Are you content for your PPS to approach the Palace with a request for prorogation to begin within the period Monday 9<sup>th</sup> September to Thursday 12<sup>th</sup> September, and for a Queen's Speech on Monday 14<sup>th</sup> October?

DEADLINE

3. 16 August – with only two months until 14<sup>th</sup> October it would be wise to open discussions this week, with the aim of securing confirmation next week. ...”.

The memorandum goes on to discuss a number of other factors, including political considerations and precedents for prorogation. Next to the recommendation quoted above there is a tick and the word “yes”; we were informed that these were written by the Prime Minister.

[119] The memorandum of 15 August was accompanied by the Prime Minister's comments, made on 16 August:

“(1) The whole September session is a rigmarole introduced [redaction] to show the public that MPs were earning their crust.

(2) So I don't see anything especially shocking about this prorogation.

(3) As Nikki notes, it is OVER THE CONFERENCE SEASON so that the sitting days lost are actually very few”.

The tenor of these comments suggests a desire to excuse the length of the prorogation. It is perhaps worth observing that the September session is an established feature of modern Parliamentary procedure. During the period of the party conferences in the early autumn Parliament goes into recess; it is not prorogued. This means that if necessary it can resume sitting at any time.

[120] In neither the memorandum nor the Prime Minister’s comments is any actual reason for the prorogation given other than a desire to begin a new session of Parliament with, as is customary, a Queen’s Speech in which the government’s legislative programme is set out. Reference is made to the fact that the legislative programme for the present session of Parliament is nearly at an end, which would provide a valid reason for starting a new session. No attempt is made, however, to explain why a prorogation of five weeks is necessary at a time of acute national controversy. The critical complaint about the prorogation is not the fact that it occurred; short prorogation is regularly used to start new Parliamentary sessions. The complaint rather relates to the length of the period during which Parliament is to be prorogued, without any power to resume sitting during that period.

[121] The second document made available, also emanating from Nikki Da Costa, is a memorandum to the Prime Minister dated 23 August 2019 headed “ANNOUNCING THE QUEEN’S SPEECH”. This document is concerned primarily with the timing of announcements made in connection with the prorogation and the intention to announce a new session of Parliament with a Queen’s Speech on 14 October. Attached to it is an annex, Annex B, which appears to contain text for an announcement by the Prime Minister. In

Annex B it is stated that Parliament has been in session for an especially long time, 340 sitting days; but that had involved “too much drift for too long”; and that the Prime Minister intended to bring forward a new legislative agenda for the period before and after leaving the European Union. The main part of the legislative programme is said to be a Withdrawal Agreement Bill, and it was intended to have that bill passed before 31 October. Once again, the tenor of the document suggests that the need for a new legislative programme is being put forward as the reason for prorogation, but no attempt is made to explain why a prorogation of five weeks is required for this purpose.

[122] The third document that was made available was the minutes of a Cabinet meeting held on 28 August. Your Lordship in the chair has set out the terms of this document at some length. Once again, no reason is given for the length of the period during which Parliament is to be prorogued. It is noted that the timetable gave Parliament “ample time to debate Brexit in the period before the October European Council on 17-18 October, and again in the run up to the UK’s departure date on 31 October”. In relation to those timings, the available periods are between 14 October, when the Queen’s Speech was to be delivered, and 17 October. That ignores the fact that discussion of the Queen’s Speech is likely to take a substantial part of that period. In any event it does not provide any justification as to why the prorogation requires to start five weeks before that, especially if anything said in Parliament is to have an effect on the United Kingdom’s negotiating position at the European Council meeting. Similarly, in relation to the period between the Council meeting and the date, 31 October, when the United Kingdom is scheduled to leave the European Union, the time involved is not great, and it is difficult to understand how any debate at that late stage would have a significant effect on the terms of departure from the EU.

*Conclusion as to the purpose of proroguing Parliament*

[123] In my opinion nothing in these documents can be said to provide any rational explanation as to why Parliament must be prorogued as early as 9 September for a period of five weeks. Nor has any other explanation been provided for the length of the prorogation, beyond references to the need to begin a new session of Parliament to promote a new legislative programme. That, of course, does not explain the length of the prorogation; merely the fact that prorogation is required. In these circumstances I have come to the conclusion that the only inference that can properly be drawn on an objective basis is that the government, and the Prime Minister in particular, wished to restrict debate in Parliament for as long as possible during the period leading up to the European Council meeting on 17-18 October and the scheduled date of Britain's departure from the European Union.

[124] It would be wrong to speculate as to whether this is because the government wishes to persuade the European Union to accept a withdrawal agreement that differs from the agreement previously concluded or whether the government is truly intent on achieving departure from the European Union without a withdrawal agreement. In either event, the matter clearly calls for Parliamentary scrutiny. The effect of the prorogation under consideration, in particular its length, is that proper Parliamentary scrutiny is rendered all but impossible. As I have noted, I consider that the inference must inevitably be drawn, on a strictly objective basis, that that was the purpose of the prorogation. In my opinion that is not a proper purpose for proroguing Parliament. I accordingly conclude that the decision to prorogue contained in the Order in Council of 28 August 2019 was not a proper exercise of the prerogative power. It follows that the prorogation was *ultra vires*. In my opinion the court should pronounce a declarator to that effect.

[125] Finally, I should express concurrence with the views of your Lordship in the chair on the question of redaction of documents supplied and the proposition that proroguing Parliament does not have a direct effect on individual legal rights.