



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 68

P680/19

OPINION OF LORD DOHERTY

In the petition

(FIRST) JOANNA CHERRY QC MP, (SECOND) JOLYON MAUGHAM QC, (THIRD) JOANNE SWINSON MP, (FOURTH) IAN MURRAY MP, (FIFTH) GERAINT DAVIES MP, (SIXTH) HYWEL WILLIAMS MP, (SEVENTH) HEIDI ALLEN MP, (EIGHTH) ANGELA SMITH MP, (NINTH) THE RT HON PETER HAIN, THE LORD HAIN OF NEATH, (TENTH) JENNIFER JONES, THE BARONESS JONES OF MOULESCOOMB, (ELEVENTH) THE RT HON JANET ROYALL, THE BARONESS ROYALL OF BLAISDON, (TWELFTH) ROBERT WINSTON, THE LORD WINSTON OF HAMMERSMITH, (THIRTEENTH) STEWART WOOD, THE LORD WOOD OF ANFIELD, (FOURTEENTH) DEBBIE ABRAHAMS MP, (FIFTEENTH) RUSHANARA ALI MP, (SIXTEENTH) TONIA ANTONIAZZI MP, (SEVENTEENTH) HANNAH BARDELL MP, (EIGHTEENTH) DR ROBERTA BLACKMAN-WOODS MP, (NINETEENTH) BEN BRADSHAW MP, (TWENTIETH) THE RT HON TOM BRAKE MP, (TWENTY-FIRST) KAREN BUCK MP, (TWENTY-SECOND) RUTH CADBURY MP, (TWENTY-THIRD) MARSHA DE CORDOVA MP, (TWENTY-FOURTH) RONNIE COWAN MP, (TWENTY-FIFTH) NEIL COYLE MP, (TWENTY-SIXTH) STELLA CREASY MP, (TWENTY-SEVENTH) WAYNE DAVID MP, (TWENTY-EIGHTH) EMMA DENT COAD MP, (TWENTY-NINTH) STEPHEN DOUGHTY MP, (THIRTIETH) ROSIE DUFFIELD MP, (THIRTY-FIRST) JONATHAN EDWARDS MP, (THIRTY-SECOND) PAUL FARRELLY MP, (THIRTY-THIRD) JAMES FRITH MP, (THIRTY-FOURTH) RUTH GEORGE MP, (THIRTY-FIFTH) STEPHEN GETHINS MP, (THIRTY-SIXTH) PREET KAUR GILL MP, (THIRTY-SEVENTH) PATRICK GRADY MP, (THIRTY-EIGHTH) KATE GREEN MP, (THIRTY-NINTH) LILIAN GREENWOOD MP, (FORTIETH) JOHN GROGAN MP, (FORTY-FIRST) HELEN HAYES MP, (FORTY-SECOND) WERA HOBHOUSE MP, (FORTY-THIRD) THE RT HON DAME MARGARET HODGE MP, (FORTY-FOURTH) DR RUPA HUQ MP, (FORTY-FIFTH) RUTH JONES MP, (FORTY-SIXTH) GED KILLEN MP, (FORTY-SEVENTH) PETER KYLE MP, (FORTY-EIGHTH) BEN LAKE MP, (FORTY-NINTH) THE RT HON DAVID LAMMY MP, (FIFTIETH) CLIVE LEWIS MP, (FIFTY-FIRST) KERRY MCCARTHY MP, (FIFTY-SECOND)

STUART C. MCDONALD MP, (FIFTY-THIRD) ANNA MCMORRIN MP, (FIFTY-FOURTH)
CAROL MONAGHAN MP, (FIFTY-FIFTH) MADELEINE MOON MP, (FIFTY-SIXTH)
LAYLA MORAN MP, (FIFTY-SEVENTH) JESS PHILLIPS MP, (FIFTY-EIGHTH) LLOYD
RUSSELL-MOYLE MP, (FIFTY-NINTH) THE RT HON LIZ SAVILLE ROBERTS MP,
(SIXTIETH) TOMMY SHEPPARD MP, (SIXTY-FIRST) ANDY SLAUGHTER MP, (SIXTY-
SECOND) OWEN SMITH MP, (SIXTY-THIRD) CHRIS STEPHENS MP, (SIXTY-FOURTH)
JO STEVENS MP, (SIXTY-FIFTH) WES STREETING MP, (SIXTY-SIXTH) PAUL SWEENEY
MP, (SIXTY-SEVENTH) GARETH THOMAS MP, (SIXTY-EIGHTH) ALISON THEWLISS
MP, (SIXTY-NINTH) THE RT HON STEPHEN TIMMS MP, (SEVENTIETH) ANNA
TURLEY MP, (SEVENTY-FIRST) CATHERINE WEST MP, (SEVENTY-SECOND) MATT
WESTERN MP, (SEVENTY-THIRD) MARTIN WHITFIELD MP, (SEVENTY-FOURTH) DR
PHILIPPA WHITFORD MP, (SEVENTY-FIFTH) DR PAUL WILLIAMS MP, (SEVENTY-
SIXTH) DANIEL ZEICHNER MP,

Petitioners

for

JUDICIAL REVIEW

Petitioners: O'Neill QC, Welsh; Balfour and Manson LLP

Respondent: Dunlop QC; N Taylor, Solicitor to HM Advocate General for Scotland

30 August 2019

Introduction

[1] In these judicial review proceedings the remedies which the petitioners sought in the petition were (stat 18):

- “(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.”

[2] The history of the proceedings is that the petition was lodged on 30 July 2019. Permission to proceed was granted on 8 August 2019. At a by order hearing on 13 August 2019 an accelerated timetable was fixed. That provided for an early substantive hearing to take place on Friday 6 September 2019 and for a variety of steps preparatory to that to take place before then (including dates by which the pleadings should be adjusted and notes of argument, documents, affidavits and lists of authorities lodged).

[3] Since the petition was lodged, and since its terms were last adjusted, it has been overtaken by events, at least to some extent. By an Order in Council made on 28 August 2019 at the Court at Balmoral Her Majesty the Queen ordered that Parliament be prorogued on a day no earlier than Monday 9 September 2019 and no later than 12 September 2019, until Monday 14 October 2019. It is common ground that in making the order Her Majesty accepted the advice of the Prime Minister and the Government.

The motion and the hearing

[4] On the same day as the Order in Council the petitioners enrolled a motion seeking interim interdict and interim suspension in terms of stat 18(2) of the petition or to make any such other order as the court considers appropriate in terms of stat 18(3).

[5] I heard the motion on 29 August 2019. The motion which Mr O'Neill moved did not wholly reflect the terms of the motion enrolled but, sensibly, no issue was taken on that point. As moved, the motion was for interim suspension of the Order in Council and interim interdict of the Prime Minister, any other Minister, or any other person from acting further upon the Order in Council and from seeking by any means to advise Her Majesty to

prorogue Parliament prior to 31 October 2019 or such other date to which Exit Day may be moved.

[6] The essence of the petitioners' argument at the hearing was that the advice which Ministers gave Her Majesty was unlawful and unconstitutional (first) because it was motivated by a desire to restrict Parliament's ability to hold the Government to account; and that that matter was justiciable; and (second) because the advice frustrated the will of Parliament as expressed in a number of statutes, including the European Union (Withdrawal) Act 2018, the Northern Ireland (Executive Formation) Act 2019, and the Fixed-term Parliaments Act 2011. Mr O'Neill maintained that the petitioners had a *prima facie* case and that the balance of convenience favoured the grant of interim orders. I continued the motion until this morning in order to consider my decision overnight.

Decision and reasons

[7] The grant of interim interdict and interim suspension is a matter in relation to which the court possesses a broad discretion. Normally a party seeking such interim orders requires to show that there is a cogent need for the orders to be made.

[8] I am not satisfied that it has been demonstrated that there is a cogent need for interim suspension or interim interdict to be granted at this stage. At the moment, a substantive hearing is set down to take place on Friday 6 September, before the first possible date on which Parliament could be prorogued. The petitioners have also enrolled a motion to move that hearing to an earlier date next week. The motion was not formally moved yesterday, but I suspect that it may be moved this morning. In light of the making of the Order in Council my provisional view (but I shall have to hear parties on this) is that the substantive hearing ought to be moved forward to Tuesday or at latest Wednesday of next

week. That would facilitate an earlier decision and it would provide greater opportunity for a reclaiming motion (appeal) to be heard before 9 September. At the substantive hearing the court will hear full argument on the issues raised in the petition and answers, and the question will be whether or not the petition is well founded, rather than whether a case for interim orders has been made out. If the petitioners are in the right they will be able to ask the court to grant appropriate remedies at that hearing. It seems to me that even if the petitioners are correct that they have a *prima facie* case (it was not submitted that it was a strong *prima facie* case), the balance of convenience does not favour granting interim orders.

[9] Since I am not satisfied that there is a cogent need for interim orders, and the balance of convenience does not favour the petitioners, I do not propose to decide whether the petitioners have a *prima facie* case. I appreciate that that is an unusual course to take, but in the whole circumstances, and bearing in mind the imminent substantive hearing where fuller argument will be possible, I think it is preferable that I do not say more at this stage than is strictly necessary.

[10] The motion for interim suspension and interim interdict is refused at this stage.

Postscript

[11] After I had delivered my decision Mr O'Neill moved for the substantive hearing to be brought forward to Monday 2 September 2019, failing which Tuesday 3 September 2019. Mr Dunlop recognised that there was a case for bringing the hearing forward, but he asked that it be fixed for Wednesday 4 September 2019. I was not persuaded that it need wait that long. I varied the timetable to direct (i) that the substantive hearing take place on Tuesday 3 September; and (ii) that notes of argument and lists of authorities be exchanged and lodged by noon on Monday 2 September 2019.

[12] I am grateful to counsel and those instructing them for all that they have done to facilitate the presentation of arguments at the hearing of the motions yesterday and today.