Cooley

Brexit: UK Government Loses Article 50 Argument in the High Court – Reaction & Comment

November 3, 2016

The Divisional Court of the High Court of Justice of England & Wales has handed down its decision in *Gina Miller & Deir Tozetti Dos* Santos *-v- the Secretary of State for Exiting the European Union*, together with a brief summary of its reasons.

The Court firmly rejected the UK government's arguments, describing them as "*contrary both to the language used in the 1972 [European Communities] Act and to the fundamental constitutional principles of the sovereignty of Parliament and the absence of any entitlement on the part of the Crown to change domestic law by the exercise of its prerogative powers*". The UK government simply "*does not have the power … to give notice [under] Article 50 for the UK to withdraw from the European Union*".

The UK government has been given permission to appeal. If the appeal proceeds, we anticipate that it will be allowed to "leap-frog" the Court of Appeal, and be heard by a full panel of Supreme Court Justices in December. We also anticipate the devolved administrations in Scotland, Wales and Northern Ireland will apply for permission to intervene, so that their arguments can be heard at the same time. The Court expressly refers to and comments on the recent Northern Ireland #Brexit related judgment (*Re McCord's Application*). The parties to that litigation may also seek to intervene for the same reason.

The UK Supreme Court might hand down its decision before the end of the year – although with so many parties, and so much at stake, this cannot be guaranteed.

This has the makings of a constitutional crisis, with the UK government facing (at least) three potential "stand-offs": with (1) the Courts; (2) Parliament; and (3) the devolved administrations. This is *not* about whether the UK can or should leave the EU. (Unless Parliament takes a different view, that issue was been settled by June's referendum.) The question now is: does the UK government have the power to start the withdrawal process without the prior approval of Parliament? The Court's answer is an emphatic "*no*". So: will the government pursue its appeal, and risk losing in the Supreme Court as well? Or will it ask Parliament to approve the giving of the article 50 notice, instead? Will the government even survive?

The Court's decision in detail

The issue: "*The sole question … is whether, as a matter of … constitutional law …, the Crown – acting through the executive government of the day – is entitled to use its prerogative powers to give notice under Article 50 for the United Kingdom to [leave] the European Union*"

Common ground: The parties agreed that:

1. The Court is being asked a legal question: can the prerogative power be used to give, and/or to decide to give, the article 50 notice that will start the process of UK withdrawal from the EU, without Parliament approval?
2. A notice under article 50 cannot be withdrawn, once given; and it cannot be given on a conditional or qualified basis. If it is given, the inevitable result will therefore be the UK's complete withdrawal from the EU; and
3. Parliament is sovereign, and Parliamentary legislation is supreme. Parliament can change UK law in any way it likes. There is no superior law, unless Parliament allows that to happen. Parliament has only done this once, by making the European Communities Act 1972 (ECA). But Parliament is still sovereign: it can amend or repeal the ECA, if that is what it wants to do.

There has been some discussion in the UK press about whether this dispute might eventually end up before the Court of Justice of the European Union (CJEU). Issues 1 and 3 are almost entirely issues of UK law, so the CJEU

would have nothing to say about them. Issue 2 raises questions of European law, which the CJEU could be asked to resolve, but it is unlikely to be asked to do so (at least for now).

Issue 3 is interesting in itself, because so much of the #Brexit debate has been about Parliamentary sovereignty and taking back control, when Parliament has always been sovereign and in complete control.

The principles of UK constitutional law: The Royal Prerogative is "*a relic of a past age*". The government can only use the prerogative power "*for a case not covered by statute*". Parliament can restrict or remove the prerogative, but the prerogative cannot displace an Act of Parliament. International treaties are made and unmade using the prerogative – but the prerogative cannot be used to change domestic law.

The domestic effect of EU law and the ECA: When Parliament made the ECA, it changed the UK's law to give effect to the legal rights and obligations in the European Treaties, and the Directives and Regulations that would be made under them. The Crown could not have used the prerogative to achieve this result. An Act of Parliament (the ECA) was required. One of the results is that UK domestic law now includes 3 categories of rights and obligations that are derived from European law:

1. Rights that *could* be replicated in UK law, if the UK withdraws from the EU. For example, the rights of workers under the Working Time Directive. Parliament could choose to retain these rights in domestic law – and the Great Repeal Bill is expected to have this effect;
2. The rights that UK citizens and companies enjoy in the other European Union Member States under the Treaties and the sectoral Directives (including Solvency II). For example, the right to move freely within the European Union, and the right for UK citizens and companies to establish themselves in another EU Member State, if that is what they want to do; and
3. Rights that *could not* be replicated in UK law. For example the right to stand as a member of the European Parliament, to vote in European Parliamentary elections, and to seek a reference to the CJEU.

The UK's article 50 notice will deprive UK citizens of their category 1 rights (unless they are replicated in UK law). It will also deprive UK citizens of their ability to ask the CJEU for a definitive ruling on the nature and scope of these rights, and that will materially alter UK domestic law as well.

Withdrawal from the EU will also undo the category 2 rights that Parliament intended to bring into effect when it made the ECA. And these rights are also "*of major importance*". So it would be "*surprising*" if they could be removed "*simply through action by the Crown under its prerogative powers*", without Parliamentary approval. In fact, the ECA means "*the Crown has no prerogative power to effect a withdrawal from the Community Treaties on whose continued existence the EU law rights … in category [1] and [3] depend … and … the wider rights of British citizens in category [2] also depend. The Crown therefore has no prerogative power to [give] notice under Article 50 …*" either.

The claimants' principal arguments: the claimants' principal argument was that, as a matter of general constitutional law, the Crown cannot change UK domestic law unless Parliament has given it the authority to do so, "*expressly, or by necessary implication by an Act of Parliament*". In the Court's view this is right; and "*the ECA 1972 confers no such authority on the Crown*". So again, "*the Crown cannot give notice under Article 50 …*"

Comments: Although this is a decision of a court at first instance, the bench was very senior, comprising 3 Appeal Court judges: Lord Chief Justice (Lord Thomas of Cwmgiedd), the Master of the Rolls (Sir Terence Etherton) and Lord Justice Sales.

At one of the early case management conferences, Lord Justice Leveson indicated that he thought this matter might "leap-frog" the Court of Appeal and go directly to the Supreme Court. We anticipate that this will happen, but a procedure will have to be followed first. This will include an application to the Supreme Court, for permission to "leap-frog" the Court of Appeal because (for example) the issues are of fundamental constitutional importance, and time is of the essence. This application will have to be submitted within a month from today, and there is at least a risk that Supreme Court will not grant it. That said, we understand that the Supreme Court is anticipating an application, and that it has cleared some time in its list so that it can hear an appeal in December. We also understand that the Supreme Court is likely to sit as a full panel of Justices – something that it only does on matters of extreme constitutional importance (and might never have done before). In this case there are 11 appointed Supreme Court Justices (one vacancy exists on the panel).

This decision lays out the current position under the law of England and Wales, and it will stand unless and until

the issues are heard and determined by the Supreme Court. If nothing else, it makes one thing absolutely clear: "*the most fundamental rule of UK constitutional law is that … Parliament is sovereign and … legislation enacted by … Parliament is supreme … Parliament can, by enactment of primary legislation, change the law … in any way it chooses*." The government cannot.