UKSC 2019/0192

In The Supreme Court of the United Kingdom
ON APPEAL
FROM THE QUEEN'S BENCH DIVISION
DIVISIONAL COURT
BETWEEN:

THE QUEEN on the application of

GINA MILLER

Appellant

– and –

THE PRIME MINISTER

Respondent

– and –

(1) BARONESS CHAKRABARTI CBE, PC
(2) COUNSEL GENERAL FOR WALES
(3) SIR JOHN MAJOR KG, CH
(4) LORD ADVOCATE ON BEHALF OF THE SCOTTISH GOVERNMENT

Interveners

WRITTEN SUBMISSIONS ON BEHALF OF THE FIRST INTERVENER

A Introduction

1. The central issue raised by this appeal is whether, and if so, in what way, the principle of parliamentary sovereignty operates as a check on the (purported) exercise of executive power to prorogue Parliament. This issue concerns the scope of the prerogative power. It is a question of law for determination by the courts. It is also an issue of central constitutional importance. It concerns the continuing status of parliamentary sovereignty as the fundamental principle of the constitution.

2. The First Intervener ("**1st Intervener**") respectfully makes these submissions in her capacity as Shadow Attorney General of Her Majesty's Loyal Opposition. In that capacity, it is incumbent on her to make clear the position of Her Majesty's Opposition and its Shadow Law Officers on this central constitutional issue.

3. Put simply, Her Majesty's Opposition respects the sovereignty of Parliament as the democratic branch of the State and the source of executive power. It accepts and avers that parliamentary sovereignty, as the fundamental principle of the constitution, necessarily determines the boundaries of the power to prorogue Parliament, including the purposes for which the power can be used.

4. The conclusion of the Divisional Court (Lord Chief Justice, Master of the Rolls, President of the Queen's Bench Division) in its judgment of 11 September 2019 ("**the Judgment**") that the decision of the Prime Minister to advise Her Majesty the Queen to prorogue Parliament is not justiciable subverts the constitutional orthodoxy that recognises the executive as subordinate and accountable to Parliament. The executive becomes the final arbiter of the extent of this important prerogative power and the lawfulness of its exercise, leaving wholly unchecked the exercise of this power in any and all circumstances. That is wrong both as a matter of law and as a matter of constitutional principle.

5. These submissions develop the following propositions:
   a. It is well-established that the existence and extent of a prerogative power, as well as its exercise, is justiciable.
   b. The prerogative power to prorogue, like all prerogative powers, is limited by the doctrine of parliamentary sovereignty. Being so limited, the power to prorogue cannot be used for the purpose of preventing Parliament from exercising its sovereign functions. Nor can it be used in circumstances where its effect will be to render Parliament incapable of exercising those functions.
   c. The limits of the prerogative power to prorogue were exceeded by the decision of the Prime Minster to bring about the prorogation of Parliament.

6. If, contrary to the above, the exercise of prerogative power was within the scope of the power to prorogue, the 1st Intervener agrees with the Appellant's

submissions that it was exercised unlawfully as it was exercised for an improper purpose and failed to take into account a relevant consideration.

B Justiciability

7. It is long established and incontrovertible that it is for the Courts to determine the existence and extent of prerogative powers: see in particular, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ("CSSU"), 398E (and the authorities there referred to) **[Authorities 1/11]**, cited with approval in *R (Bancoult) v Foreign Secretary (No 2)* [2009] 1 AC 453, at [69] (Lord Bingham) **[Authorities 2/22]**.[1] The key question in this case is to determine the boundaries of the prerogative power to prorogue Parliament. That exercise falls squarely within the purview of the courts.

8. Moreover, since *CSSU*, the exercise of the prerogative is not in itself immune from review (and is subject to the ordinary grounds of judicial review).[2] The 'controlling factor', established in that case, was not the source of the power but its subject matter: see 418B and Lord Roskill's non-exhaustive list of 'forbidden areas' **[Authorities 1/11]**.

9. Determining the scope of the prerogative power to prorogue Parliament, and the lawfulness of the exercise of that power, are questions that the courts can resolve

[1] See also Sales 'Crown Powers, the Royal Prerogative and Fundamental Rights' at p. 379 **[Authorities 5/84]**:

> "The most basic level of control of the Crown's prerogative powers is through the doctrine that the Crown only has such powers as are recognised by the courts, that is, the courts police the boundaries of prerogative power. The Crown's claims of constitutional authority are thus filtered through common-law doctrine, just as the distinct claims of constitutional authority by another locus of constitutional power, namely claims of parliamentary privilege by Parliament, are scrutinised. Whilst the common law is not exactly the source of prerogative power and parliamentary privilege, it is only to the extent that they are recognised by the common law and permitted to have operation that the authority claims which they embody are effective in law. This involves an examination of historical claims and practices over time."

[2] It is submitted that there can be no material distinction between prerogatives exercised by Government ministers in their own right (eg as was the case in *R (Miller) v Secretary of State for Exiting the EU* [2018] AC 61 **[Authorities 2/28]**) or through the advice they provide to Her Majesty the Queen which she is bound constitutionally to accept.

by reference to well-established principles of constitutional adjudication. As observed by Professor Mark Elliott in his commentary on the Judgment below:

> "When such questions arise in respect of statutory powers, they are resolved, first and foremost, by means of statutory construction: that is, the legislative text is examined and construed by the court, and the purposes for which the power can and cannot lawfully be used are thus determined. However, the process of statutory construction is rarely a purely literal one that entails recourse to nothing more than a dictionary, and it frequently involve the attribution of meaning to the statutory text by reference to broader relevant legal, including constitutional, principles. This approach is so well-established that authority need hardly be cited, but key examples — which illustrate the breadth of the approach — include *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 (in which constitutional principles relating to the existence of functioning institutions of government significantly influenced the interpretation of the relevant legislation), *R v Secretary of State for the Home Department, ex parte Simms* [2000] AC 115 (in which constitutional principles concerning individual rights played a major part in the interpretive process) and *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] AC 513 (in which the constitutional principle of the separation of powers assumed an axiomatic role).
>
> In the case of prerogative powers, there is plainly no formal textual starting-point such as there is when statutory powers are in play. It follows that it may be more difficult to determine the boundaries of such powers, including by reference to the purposes for which they can and cannot lawfully be used. It does not, however, follow that no such boundaries exist. Nor does it follow that questions as to the location of such boundaries are anything other than legal questions. Moreover, just as fundamental constitutional principle may cast light on the proper meaning of statutory texts — and thus on questions as to the proper and improper use of statutory powers — so fundamental principle may illuminate and determine the boundaries of prerogative power, including the purposes to which they can and cannot lawfully be put."[3]

10. This analysis runs directly counter to the principal argument advanced on behalf of the Prime Minister, and as accepted by the Divisional Court (at [54] and [57]), that there is no legal measure against which the decision of the Prime Minister can be reviewed and that as such the decision is not justiciable.

[3] Mark Elliott, Professor of Public Law, Cambridge University 'Prorogation and justiciability: Some thoughts ahead of the Cherry/Miller (No 2) case in the Supreme Court', Public Law For Everyone Blog (12 September 2019) (available at https://publiclawforeveryone.com).

11. It is also contrary to long-established principle that the prerogative power is part of, and subject to, the common law (which includes the principle of parliamentary sovereignty). See *R (Miller) v Secretary of State for Exiting the EU* [2018] AC 61 ("*Miller*"), at [45] (and the authorities referred to at [50]) **[Authorities 2/29]**:

> "The Crown's administrative powers as now exercised by the executive, ie by ministers who are answerable to the UK Parliament. However, consistently with the principles established in the 17th century, the exercise of those powers must be compatible with legislation and the common law. Otherwise, ministers would be changing (or infringing) the law, which, as just explained, they cannot do."

12. It is for this reason that the present case is indistinguishable from those cases concerning "the impact of the exercise of the power on particular individuals" (cf. Judgment, at [39]). It is simply untenable, on the one hand, to contend, that the effect of exercising a prerogative on an individual's rights (whether constitutional[4], under the ECHR[5], under a constitutional statute (e.g *Miller*) or otherwise[6]), renders a decision justiciable; whilst, on the other, contending that the effect of exercising the prerogative on the collective right to effective representation and the principles of democratic accountability and ultimately of parliamentary sovereignty does not.

13. Against this context, the 'political' nature of the decision cannot, in and of itself, be a proper basis for excluding the review of the Courts – whether in relation to the exercise of prerogative powers or otherwise. To the extent that the Divisional Court considered that "the criteria adopted by the courts for identifying non-justiciable exercises of prerogative power are whether they involve matters of

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[4] Eg *R v Home Secretary, ex p Bentley* [1994] QB 349, at 365E[4]; *Lewis v Attorney General for Jamaica* [2001] 2 AC 50 **[Authorities 3/41]**.

[5] *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1459 **[Authorities 3/34]**.

[6] *R (Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 **[Authorities 2/21]**; *R (Sandiford) v Secretary of State of Foreign and Commonwealth Affairs* [2016] AC 1457 **[Authorities 2/32]**.

"high policy" or are "political"" (Judgment, at [42])[7], the position was too broadly stated.

14. Many decisions taken in the exercise of an executive power at Ministerial level will invariably be political (and/or involve considerations of "high policy"). What is relevant is whether the decision, regardless of its political nature, can properly said to involve a breach of legal principle. As observed by Jacob Rowbottom[8], Professor of Law at the University of Oxford, it is a matter of public law orthodoxy that the courts can review the exercise of statutory powers for improper purposes, including political purpose. There is no reason why the same principles should not apply to the exercise of a prerogative power, simply by virtue of the source of that power being the prerogative rather than statute. This applies, a fortiori, where the prerogative to prorogue Parliament is (purportedly) exercised so as directly to undermine the legal principle of parliamentary sovereignty. In such a case, the exercise falls outwith scope of the power.

C Boundaries of the prerogative power to prorogue Parliament

Boundaries set by parliamentary sovereignty

15. As Professor Elliott explains[9]: "[a]ll legal powers held by the Government are legally finite, and their boundaries are determined, among other things, by reference to the purposes of which they may and may not legitimately be used. There is no good reason why this should not apply in the cases of the prorogation power."

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[7] The same argument was advanced in *Miller*. See Tom Poole, Professor of Law at the LSE, *The Strange Death of the Prerogative in England*, LSE Law, Society and Economy Working Papers 21/2017, available at http://eprints.lse.ac.uk/87575/1/Poole_Strange%20Death_Author.pdf:

> "One of the government's documents claimed that the matter was 'of high, if not the highest, policy; a polycentric decision based upon a multitude of domestic and foreign policy and political concerns for which the expertise of Ministers and their officials are particularly well suited and the Courts ill-suited.'

[8] J. Rowbottom, 'Political Purposes and the Prorogation of Parliament', U.K. Const. L. Blog (3rd Sept. 2019) (available at https://ukconstitutionallaw.org/).

[9] See n 3 above.

16. All prerogative powers, including the power to prorogue Parliament, are constrained by parliamentary sovereignty. This constraint is necessarily and directly relevant in the case of the prerogative to prorogue Parliament. As recognised by the majority of the Supreme Court in *Miller*, at [41] **[Authorities 2/29]**, the subordination of prerogative power to a sovereign Parliament was a consequence of the constitutional settlement put in place in 17th century:

> "Originally, sovereignty was concentrated in the Crown, subject to limitations which were ill-defined and which changed with practical exigencies. Accordingly, the Crown largely exercised all the powers of the state (although it appears that even in the 11th century the King rarely attended meetings of his Council, albeit that its membership was at his discretion). However, over the centuries, those prerogative powers, collectively known as the Royal prerogative, were progressively reduced as Parliamentary democracy and the rule of law developed."[10]

17. The reason why all prerogative powers are subordinate to, and constrained by, parliamentary sovereignty is that Parliament enjoys a democratic mandate whereas the executive does not, a point recognised by Lord Hoffman who, delivering the majority judgment in *Bancoult (No 2),* stated at [35] **[Authorities 2/23]**:

> "The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone."

18. It is therefore unsurprising that the claimed exercise of prerogative powers (and the exercise of the power to prorogue Parliament in this case) are matters which fall within the supervisory jurisdiction of the Courts given, in particular, "the role of the judiciary to uphold and further the rule of law": *Miller*, at [42].[11]

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[10] J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy (Oxford, Clarendon Press,* 1999) pp. 159-165 and 232-233.

[11] See also *Miller* (Divisional Court), at [18].

19. There are two aspects of the doctrine of parliamentary sovereignty which are relevant to determining the boundaries of the prerogative power to prorogue.

20. First, the primacy of an Act of Parliament[12] means that primary legislation cannot be subject to displacement by the Crown and conversely, the Crown's prerogative powers may be impliedly abrogated by primary legislation: see *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 **[Authorities 1/4]**; *Miller* (Supreme Court) at [48] **[Authorities 2/29]**. Further, "ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation": *Miller* at [51]. As such, the purpose of the prerogative to prorogue Parliament must require that it can only be exercised in a manner which respects the principle of parliamentary sovereignty. Where there is a conflict, the orthodox position is that the prerogative must give way.

21. Second, just as the principle of parliamentary sovereignty protects primary legislation in this way, so does the principle of parliamentary sovereignty protect the constitutional function of Parliament to scrutinise, debate, amend or repeal existing legislation or otherwise introduce new legislation. That is, and for the avoidance of doubt, the principle of parliamentary sovereignty requires more than compliance with primary legislation. This is for two reasons. First, Parliament's power to enact legislation is legally unlimited, subject to self-imposed restraints such as those contained in the European Communities Act 1972 ("**ECA 1972**") and the Human Rights Act 1998 ("**HRA 1998**"). As was recognised by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, at 552E: "The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body"[13] **[Authorities 4/42]**. The powers of the democratically elected legislature in general are to be protected for the same

[12] *Miller* (Supreme Court), at [42] and [45].

[13] In the *Fire Brigades Union* case, the Secretary of State could not use the Crown's prerogative powers to create a new Criminal Injuries Compensation Scheme which was incompatible with the scheme for which Parliament had legislated – *even though the statutory scheme was not yet in effect*.

underlying reason as are protected pieces of primary legislation enacted through the exercise of those powers.

22. The second reason is that the executive is subordinate and accountable to Parliament. In the Westminster system, where the executive derives its authority to govern from Parliament, the exercise of executive power is conditional upon executive accountability to Parliament. This aspect of parliamentary sovereignty was highlighted by the majority in *Miller* **[Authorities 2/29]**. In dismissing the Government's argument that ministers, in reliance on prerogative powers, could unilaterally withdraw from the EU Treaties without the need for parliamentary approval, the Supreme Court stated, at [90]:

> "Bearing in mind the unique history and the constitutional principle of Parliamentary sovereignty, it seems most improbable that those two parties had the intention or expectation that ministers constitutionally the junior partner in that exercise, could subsequently remove the graft without formal appropriate sanction from the constitutionally senior partner in that exercise, Parliament."

23. Similarly, the principle of parliamentary sovereignty would not permit the 'junior partner' (the executive) from removing itself from the scrutiny of Parliament at will. Such is the importance of parliamentary oversight of executive action as a feature of parliamentary sovereignty, this was also emphasised by the dissenting Justices in *Miller* **[Authorities 2/29]**. Lord Carnwath SCJ, at who identified this a key feature of the constitutional framework governing the case, at [149]:

> "It is wrong to see this as a simple choice between Parliamentary sovereignty, exercised through legislation, and the "untrammelled" exercise of the prerogative by the Executive. Parliamentary sovereignty does not begin or end with the Tin Council principles. No less fundamental to our constitution is the principle of Parliamentary accountability. The Executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law. That account is made through ordinary Parliamentary procedures."

24. This passage was referred to with approval by Lord Reed SCJ, at [240], who emphasised "the constitutional importance of ministerial accountability to Parliament". Indeed, just as the Court (in *Miller*) held (at [87]) that "Parliament having taken the major step of switching on the direct effect of EU law in the national legal systems by passing the ECA 1972 as primary legislation, it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again", it might (similarly) be said that the sovereign role of Parliament – which flows directly from the principle of parliamentary sovereignty – should not be capable of being "switched off" at will – by an unsupervised act of 'executive fiat'.

25. It is this fact - that the exercise of the prerogative serves to suspend the operation of Parliament itself - that marks out this case.[14] For this reason, judicial control in the present case would not be inconsistent with Lord Reed SCJ's observation (at [240]) that "Ministerial decisions in the exercise of prerogative powers, of greater importance than leaving the EU, have been taken without any possibility of judicial control: examples include the declarations of war in 1914 and 1939. For a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is to base legal doctrine on an assumption which is foreign to our constitutional traditions. It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary." Indeed, it is the 1st Intervener's submission that the Court not to intervene in the present case would be fraught with risk both for Parliament and the rule of law.

26. In light of the above, the principle of parliamentary sovereignty must require that the exercise of the prerogative power to prorogue Parliament is constrained

[14] As recognised by Lord President in *Cherry v Advocate General* [2019] CSIH 49 at [52]:

> "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."

within constitutional limits so as not to frustrate the sovereign discharge of Parliament's constitutional role.

Boundaries set by the purpose and function of prorogation

27. The boundaries of the power are further set by:

    a. the purpose or function of prorogation - to bring one parliamentary session to an end so as to commence a new parliamentary session other than by dissolution. In contrast, the function of dissolution is to bring about a general election.
    b. the impact of prorogation – the suspension of all parliamentary activity. In contrast, when Parliament is dissolved, there are no longer sitting Members of Parliament; rather dissolution precipitates (renewed) democratic accountability. Both prorogation and dissolution are moreover to be contrasted with recess - for which the House votes.
    c. the fact that all prerogative powers are to be exercised 'for the public good' (*Burmah Oil Company v Lord Advocate* [1965] AC 75, at 118 **[Authorities 1/8]**).[15]

28. It is the 1st Intervener's case that these are factors which further delimit the purpose for which the prerogative prorogue may lawfully be used. On this basis, and in light of the above, it is the 1st Intervener's case that the power to prorogue does not extend to (a) use which is designed to frustrate or prevent parliamentary activity and the discharge of Parliament's sovereign role and therefore clash with parliamentary sovereignty; and (b) exceptionally, use which cannot be justified by the function that prorogation is to serve and the public good as assessed in all the circumstances of the case.

[15] See also Sales 'Crown Powers, the Royal Prerogative and Fundamental Rights' at p. 382 **[Authorities 5/84]**. See also the opinion of the Lord President in *Cherry v Advocate General* [2019] CSIH 49 at [51], recognising good governance as a constitutional principle and basis for review of the scope of a prerogative power.

D Limits of the prerogative exceeded in this case

29. Applying the approach set out above, it is the 1st Intervener's case that the decision of the Prime Minister to bring about the prorogation of Parliament is unlawful as being outwith the scope of the prerogative to prorogue on either or both of the limbs identified above. It was thus taken without lawful authority.

The effect of the prorogation on parliamentary sovereignty takes it outside the scope of the power

30. First, even accepting the Prime Minister's evidential case as to the reasons for the prorogation (including its length and its timing), the 1st Intervener contends that in the very exceptional circumstances of the present case, the decision is outwith the scope of the prerogative.

31. This is because, first and foremost, the current prorogation interferes with, and due to the time-sensitive nature of Brexit-related matters, effectively negates, Parliament's ability to scrutinise Government activity and hold the executive to account. Where exercise of prerogative power to prorogue has the effect of preventing or frustrating Parliament's ability to hold the executive to account in relation to time-sensitive matters – there is a direct clash between the exercise of prerogative and the doctrine of parliamentary sovereignty. As a matter of well-established legal principle, in the case of a conflict between a prerogative power and parliamentary sovereignty, the former gives way to the latter.

32. Secondly, the current prorogation interferes with Parliament's legislative sovereignty. Parliament is unable to legislate whilst it stands prorogued. For certain time-sensitive matters, delaying Parliament's ability to legislate is tantamount to denying Parliament the exercise of that sovereign power.[16] The First Intervener adopts and endorses paragraphs 8-9 of the submissions made on

[16] See, by analogy, Professor Mark Elliott's explanation of why Government cannot delay putting a Bill forward for Royal Assent so as to render time-sensitive legislation a dead letter: Mark Elliott, Professor of Public Law, Cambridge University 'Brexit, the Executive and Parliament: A response to John Finnis', Public Law For Everyone Blog (2 April 2019) (available at https://publiclawforeveryone.com).

behalf of the Third Intervener before the Divisional Court as to the impact of prorogation in the period running up to exit day[17].

33. Prorogation of Parliament until 14 October 2019 will also prevent the effectual operation of the parliamentary oversight procedures contained in the EU (Withdrawal) Act 2018. There are currently 11 statutory instruments relating to exiting the EU that are waiting for consideration by the Joint Committee on Statutory Instruments. There are in excess of 20 statutory instruments relating to exiting the EU waiting for Affirmative Resolution (meaning that they must be debated in both Houses).

34. The First Intervener refers to the written submission filed by Public Law Project (proposed Intervener) ("**PLP**") ,which set out (i) the detailed legislative regime introduced by Parliament in the European Union (Withdrawal Act) 2018 to ensure that delegated legislation required for an orderly exit of from the EU is subject to due parliamentary scrutiny; and (ii) how prorogation until 14 October 2019 will allow insufficient time for statutory instruments pending before the European Statutory Instruments Committee or the Secondary Legislation Scrutiny Committee, or awaiting debate under the affirmative procedure, to be made in accordance with the standard procedures for parliamentary scrutiny specified in the 2018 Act.

35. In addition, Committees of both Houses, which have played a critical role in holding the Government to account for its Brexit policy, are unable to sit during prorogation.[18]

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[17] Defined in section 20 of the European Union (Withdrawal) Act 2018, as amended, as 31 October 2019.

[18] At the time of the current prorogation, the following Committee activity, directly relating to 'Brexit' matters, was scheduled to take place: the Prime Minister was scheduled to give evidence to the House of Commons Liaison Committee on 11 September; the House of Commons Home Affairs Committee was due to hold a session on 10 September 2019 to hear evidence as part of its inquiry into Home Office preparation for 'Brexit'; the House of Commons Exiting the EU Committee on-going inquiries into the progress of the UK's negotiations on EU withdrawal.

The function of the prorogation takes it outside the scope of the power

36. Further and in particular (a) the prorogation (in particular its length) cannot be justified by reference to the function that prorogation is to serve and the fact that, in contrast to periods when the House is in recess, all parliamentary activity is suspended; (b) its timing cannot be justified in the exceptional circumstances of the present case; and (c) the suspension of Parliament at this moment is further contrary to the public good.

37. In particular, the fact that there will be limited opportunity for parliamentary oversight before 31 October 2019 is directly contrary to the public good. The fact that the European Union (Withdrawal) Act (No 6) 2019 was enacted (on 9 September 2019 – the same day Parliament was prorogued) is itself no an answer to the range of matters in respect of which parliamentary oversight and scrutiny is necessary over this period. Rather, the Act (again[19]) evidences parliamentary opposition to a 'no-deal' exit from the EU – which underscores the need for parliamentary vigilance over the issues identified above.

The purpose of the prorogation takes it outside the scope of the power

38. In addition, there is sufficient evidence in this case which supports the inference that the main reason for the decision to bring about the prorogation of Parliament was to attempt to frustrate any parliamentary intention to block a 'no-deal' exit.[20] Whether this was for the purpose of strengthening the United Kingdom's negotiating position (as the Prime Minister has repeatedly claimed) or whether it was to enhance the prospect of a 'no-deal' exit (a matter of some controversy) –

[19] For further evidence of Parliament's opposition to a 'no-deal' exit from the EU see: the European Union (Withdrawal) Act (No 5) 2019, enacted in April 2019 to compel the Prime Minister to apply to extend the 12 April 2019 deadline; section 90(7) of the Finance Act 2019, which constrains the Government's powers to introduce measures for the purpose of maintaining the effect of tax legislation in the event that the UK leaves the EU without a deal.

[20] As found by the Court of Session, the circumstances of the current prorogation 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: *Cherry v Advocate General* [2019] CSIH 49 at [53] (Lord President); [89]-[91] (Lord Brodie) and Lord Drummond Young.

matters not for this analysis. The very aim to frustrate parliamentary activity (regardless of whether it is ultimately successful in the way intended) would render, without more, the (purported) exercise of the power to prorogue Parliament outwith the scope of the power.

E Exercise of prerogative power unlawful in this case

39. The 1st Intervener submits that the decision of the Prime Minister to bring about the prorogation of Parliament is an unlawful *exercise* of the prerogative to prorogue on the basis that it was exercised for an improper purpose and/or failed to take into account a mandatory relevant consideration, namely the impact of prorogation on the ability to deliver, and to deliver in accordance with the special parliamentary controls, the delegated legislation required for an orderly exist from the EU. In this respect the 1st Intervener agrees with the analysis of the Appellant and PLP.

F Conclusion

40. This case concerns no less than the preservation of Parliament's essential constitutional function to scrutinise the executive and hold it to account. The executive power to prorogue - uniquely in the constitution - has the ability, if unchecked, to deprive Parliament of the ability to perform that constitutional function.

41. The Prime Minister's use of the prerogative power in the present case has had that very consequence. Yet, through its finding that the decision of the Prime Minister to bring about the prorogation of Parliament was 'political' and thus immune from review, the Divisional Court shields the very use and abuse of the prerogative power which it is the role of the courts to guard against.

42. This has profound constitutional consequences. It exposes Parliament – the institution in which the sovereignty of the people resides – with the inability to protect itself from executive overreach and with no access to the courts to hold

the executive accountable for conduct that is contrary to the sovereignty of Parliament and the rule of law.

43. For these reasons set out above, the 1st Intervener respectfully invites the Court to allow the appeal.

DEOK JOO RHEE QC
CATHERINE DOBSON

39 ESSEX CHAMBERS
13 SEPTEMBER 2019