

SUPREME COURT CONFIRMS THAT UK PARLIAMENT MUST APPROVE USE OF BREXIT TREATY TRIGGER

R (Miller & Dos Santos) v Secretary of State for Exiting the European Union [2017] UKSC 5

Introduction

By a decision handed down on 24 January 2017 in *R (Miller & Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5, an 11-member UK Supreme Court dismissed an appeal by the British Government against a decision of a 3-member Divisional Court (comprising the Lord Chief Justice, the Master of the Rolls and Lord Justice Sales) that ministers of the British Government cannot rely on prerogative powers to serve pursuant to Article 50 of the Treaty on the European Union (“TEU”) a notice of an intention to withdraw from the European Union but, instead, according to the constitutional requirements of the United Kingdom, can only do so after prior authorisation by an Act of Parliament. The Supreme Court also decided that it was not a requirement for the British Government to consult and/or obtain the consent of the devolved legislatures prior to serving such a notice.

Background

In summary, Article 50 TEU provides that, an EU Member State may decide to withdraw from the EU “in accordance with its own constitutional requirements” (Article 50(1) TEU). An EU Member State wishing to withdraw shall serve a notice of that intention (Article 50(2) TEU) (“Article 50(2) Notice”). In the absence of an agreement for withdrawal between the remaining EU Member States and the withdrawing EU Member State, the treaties governing the EU (“the EU Treaties”) “shall cease to apply” to the withdrawing EU Member State within 2 years of service of an Article 50(2) Notice. Following a nation-wide referendum in June 2016 (which produced a majority in favour of leaving the EU), the British Government proposed to serve an Article 50(2) Notice by using its “prerogative powers” (i.e. powers formerly vested in the Crown and now exercised on behalf of the Crown by government ministers – specifically, in this case, the power to make and withdraw from treaties), and therefore without the need for the consent of the Westminster Parliament.

The applicants commenced legal proceedings contending that such a move by the British Government would be unlawful because it would not be in accordance with the UK’s constitutional requirements, including the requirement that Parliament is sovereign, as required by Article 50(1) TEU (“the Principal Issue”). Additional issues were raised through references from the Attorney General of Northern Ireland and the courts of Northern Ireland regarding whether the terms on which powers have been devolved by statute from the Westminster Parliament to the “devolved legislatures” of Scotland, Northern Ireland and Wales either require the consultation and/or the agreement of the devolved legislatures before an Article 50(2) Notice is served or otherwise operate so as to restrict the British Government’s power to do so (“the Devolution Issues”).

Hearing

As regards the Principal issue, the claimants argued, with reference to the terms of the

European Communities Act 1972, that:

- (1) there was a well-established rule that the prerogative powers could not be used or did not allow for the government to conduct an act that would result in a change to the domestic law of the UK;
- (2) withdrawal from the EU Treaties would be such a change in the domestic law of the UK;
- (3) therefore the British Government could not use the prerogative powers to serve an Article 50(2) Notice that would inevitably result in the above change in the domestic law of the UK;
- (4) therefore the consent of Parliament was required before an Article 50(2) Notice could be served.

As regards the Devolution Issues, the Supreme Court was required to consider whether the provisions of, in particular, the Northern Ireland Act 1998 required primary legislation and the consent of the Northern Ireland Assembly and/or the people of Northern Ireland before an Article 50(2) Notice could be validly served. Further, the Supreme Court considered: (a) the effect of the devolution settlements which required each of the devolved legislatures to act in accordance with EU law; and (b) the effect of the Sewel Convention whereby the Westminster Parliament will not normally legislate on devolved matters without the prior agreement of the relevant devolved legislature(s).

Decision

The Supreme Court has decided:

- (a) By a majority of 8 (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge) to 3 (Lord Reed, Lord Carnwath and Lord Hughes), that the Secretary of State for Exiting the European Union's appeal be dismissed – that the terms of the European Communities Act 1972 (giving effect to UK membership of the European Union) are not consistent with the exercise by government ministers of prerogative powers to withdraw from the EU Treaties and, therefore, that an Act of Parliament is required to authorise ministers to serve an Article 50(2) Notice.
- (b) Unanimously, that neither the Northern Ireland Act 1998 nor the Sewel Convention gives rise to a legally enforceable obligation requiring the British Government to consult and/or obtain the consent of the devolved legislatures prior to serving an Article 50(2) Notice.

As regards the Principal Issue, the majority held:

- (1) that Section 2 of the European Communities Act 1972, by authorising a partial transfer of legislative competences to the institutions of the EU, enabled the process by which EU law became an independent and overriding source of domestic UK law for the time that the European Communities Act 1972 remained in force;
- (2) that it was not in dispute that the UK's ceasing to be a party to the EU Treaties would change UK domestic law and would affect the rights conferred on UK residents by EU law;
- (3) that there was a crucial difference between, on the one hand, changes in UK law that resulted from changes in EU law, and, on the other hand, changes in UK law resulting from withdrawal from the EU Treaties (the Supreme Court thus rejected the British Government's argument that the European Communities Act 1972 did not exclude the prerogative power for ministers to withdraw from the EU Treaties but in fact actually catered for the exercise of such a power because it gave effect to EU law only so long as the power of withdrawal was not exercised);

- (4) that withdrawal from the EU Treaties would cause a fundamental change to the constitutional arrangements and domestic law of the UK by shutting off the source of EU law;
- (5) that the serving of an Article 50(2) Notice would inevitably lead to that fundamental change;
- (6) that the constitution of the United Kingdom required such fundamental changes to be effected by legislation from Parliament;
- (7) further, withdrawal from the EU Treaties would remove certain existing domestic rights of UK residents – which also rendered impermissible the withdrawal from the EU Treaties without prior the authorisation of Parliament;
- (8) clear wording would have been required in the European Communities Act 1972 if it had been intended to authorise ministers to withdraw from the EU Treaties and no such clear wording existing. The European Communities Act 1972 envisaged ministers participating in the EU law-making processes, not withdrawing from them (which was the opposite).

As regards the Devolution Issues, the Supreme Court held:

- (1) that, although the devolution legislation had been enacted on the assumption that the UK would be an EU Member State, it did not require the UK to remain an EU Member State;
- (2) that relations with the EU and other foreign affairs matters were matters for the UK Government and Parliament, rather than the devolved legislatures;
- (3) that the withdrawal of the UK from the EU will change the competence of the devolved legislatures and institutions and will remove the existing responsibilities to comply with EU law;
- (4) that the provisions of the Northern Ireland Act 1998 relied upon were not relevant to the issues in this case;
- (5) that the Sewel Convention operated as a political constraint on the UK Government and had an important role in the operation of the UK constitution, but that the policing of the Sewel Convention was not within the constitutional remit of the UK courts;
- (6) overall, the devolved legislatures do not have a veto on the UK's decision to withdraw from the EU.

Concluding Remarks

The Supreme Court's decision represents an important decision on matters of constitutional law as well as being of obvious political significance notwithstanding that the Supreme Court correctly made it expressly clear that the issues in these proceedings have nothing to with matters such as the merits of the result of the June 2016 referendum, the timetable for withdrawing, the terms for withdrawing or the future relationship between the UK and the EU (all of which are political matters).

29th January 2017