

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

Lord President

Lord Brodie

Lord Drummond Young

SUMMARY OF THE OPINION OF THE COURT

In the Reclaiming Motion by

JOANNA CHERRY QC MP AND OTHERS

Petitioners

for

JUDICIAL REVIEW

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

Respondent: Johnston QC, N Taylor; HM Advocate General for Scotland

11 September 2019

The Inner House of the Court of Session has ruled that the Prime Minister's advice to HM the Queen that the United Kingdom Parliament should be prorogued from a day between 9 and 12 September until 14 October was unlawful because it had the purpose of stymying Parliament.

A petition for judicial review was raised by 79 petitioners, 78 of whom are parliamentarians at Westminster, on 31 July 2019, seeking inter alia declarator that it would be unlawful for the UK Government to advise HM the Queen to prorogue the UK Parliament with a view to preventing sufficient time for proper consideration of the UK's withdrawal from the European Union (Brexit).

A substantive hearing was fixed for Friday, 6 September, but on 28 August, on the advice of the Prime Minister, HM the Queen promulgated an Order in Council proroguing Parliament on a day between 9 and 12 September until 14 October. The Lord Ordinary (the judge hearing the case at first instance) refused to grant interim orders preventing the prorogation, but brought the substantive hearing forward to Tuesday, 3 September. On the eve of the hearing, in obedience of its duty of candour, the respondent lodged some partially redacted documents exhibiting some of the Government's deliberations regarding prorogation, going back to 15 August.

The Lord Ordinary dismissed the petition. He found that the PM's advice to HM the Queen on prorogation was, as a matter of high policy and political judgment, non-justiciable; the decision to proffer the advice was not able to be assessed against legal standards by the courts.

The reclaiming motion (appeal) was heard by the First Division of the Court of Session over 5 and 6 September. Parliament was prorogued in the early hours of Tuesday, 10 September.

All three First Division judges have decided that the PM's advice to the HM the Queen is justiciable, that it was motivated by the improper purpose of stymying Parliament and that it, and what has followed from it, is unlawful.

The Lord President, Lord Carloway, decided that although advice to HM the Queen on the exercise of the royal prerogative of prorogating Parliament was not reviewable on the normal grounds of judicial review, it would nevertheless be unlawful if its purpose was to stymie parliamentary scrutiny of the executive, which was a central pillar of the good governance principle enshrined in the constitution; this followed from the principles of democracy and the rule of law. The circumstances in which the advice was proffered and the content of the documents produced by the respondent demonstrated that this was the true reason for the prorogation.

Lord Brodie considered that whereas when the petition was raised the question was unlikely to have been justiciable, the particular prorogation that had occurred, as a tactic to frustrate Parliament, could legitimately be established as unlawful. This was an egregious case of a clear failure to comply with generally accepted standards of behaviour of public authorities. It was to be inferred that the principal reasons for the prorogation were to prevent or impede Parliament holding the executive to account and legislating with regard to Brexit, and to allow the executive to pursue a policy of a no deal Brexit without further Parliamentary interference.

Lord Drummond Young determined that the courts have jurisdiction to decide whether any power, under the prerogative or otherwise, has been legally exercised. It was incumbent on the UK Government to show a valid reason for the prorogation, having regard to the fundamental constitutional importance of parliamentary scrutiny of executive action. The circumstances, particularly the length of the prorogation, showed that the purpose was to prevent such scrutiny. The documents provided showed no other explanation for this. The only inference that could be drawn was that the UK Government and the Prime Minister wished to restrict Parliament.

The Court also decided that it should not require disclosure of the unredacted versions of the documents lodged by the respondent.

The Court will accordingly make an Order declaring that the Prime Minister's advice to HM the Queen and the prorogation which followed thereon was unlawful and is thus null and of no effect.