

IN THE SUPREME COURT OF THE UNITED KINGDOM

**ON APPEAL FROM HER MAJESTY'S HIGH COURT OF JUSTICE
(ENGLAND AND WALES)**

QUEEN'S BENCH DIVISIONAL COURT (ADMINISTRATIVE COURT)

NEUTRAL CITATION: [2019] EHC 2381 (QB)

**LORD BURNETT OF MALDON CJ, SIR TERENCE ETHERTON MR & DAME
VICTORIA SHARP P**

**AND ON APPEAL FROM THE INNER HOUSE OF THE COURT OF SESSION
THE LORD PRESIDENT; LORD BRODIE & LORD DRUMMOND YOUNG**

NEUTRAL CITATION: [2019] CSIH 49

BETWEEN:

THE QUEEN

(on the application of GINA MILLER)

JOANNA CHERRY MP QC AND OTHERS

Claimant/Appellant

Petitioners/Respondents

-and-

-and-

THE PRIME MINISTER

THE ADVOCATE GENERAL FOR SCOTLAND

Defendant/Respondent

Respondent/Appellant

-and-

(1) THE LORD ADVOCATE

(2) THE COUNSEL GENERAL FOR WALES

(3) RAYMOND McCORD

(4) RT HON. SIR JOHN MAJOR KG CH

(5) BARONESS CHAKRABARTI CBE PC

(6) THE PUBLIC LAW PROJECT

Interveners

THE PRIME MINISTER AND ADVOCATE GENERAL FOR SCOTLAND'S
FURTHER SUBMISSIONS ON RELIEF

INTRODUCTION

1. These are the Prime Minister and Advocate General for Scotland's further submissions on relief, in the event the Court is minded to allow the English appeal and dismiss the Scottish appeal, save as relates to the form of interlocutor pronounced by the Inner House of the Court of Session.
2. As set out §23 and §§32-34 of the Prime Minister and Advocate General's written case, prorogation at the end of the session (when not done by Her Majesty in person) is a three stage process:
 - (1) The first stage is the tendering of advice to Her Majesty by the Prime Minister to prorogue Parliament. In this case, the advice was tendered on 28 August 2019.
 - (2) The second stage is the approval by Her Majesty of an Order in Council [Miller trial bundle, tab 49, p.362; electronic p.425], which sets the range of dates from, and the specific date to, which Parliament is prorogued. The Order in Council also directs the Lord Chancellor to prepare a commission under the Great Seal, which appoints Lords Commissioners who formally announce the prorogation in Parliament on behalf of the Queen. In this case, the Order in Council was approved by Her Majesty on 28 August 2019.
 - (3) The third stage is the reading of the Commission to both Houses of Parliament by the Lords Commissioners. It is this act which formally ends the session and prorogues Parliament. In this case, the Commission was read in the presence of both Houses on 9 September 2019.
3. The second and third stages are only necessary in cases where Her Majesty does not prorogue Parliament personally. Where Her Majesty did prorogue personally, prorogation would follow the advice without any intermediate step.

The third stage

4. It is convenient to consider the third stage before the second and first stages.
5. The Prime Minister and Advocate General's case is that the reading of the Commission to both Houses is a proceeding in Parliament for the purposes of art. IX of the Bill of Rights [Cherry/Auth/43/MS2893], which this court has no jurisdiction to question or impeach.

6. Article IX of the Bill of Rights does not define the term “*proceedings in Parliament*”. The issue was considered by this court in *R v Chaytor* [2011] 1 AC 684 [Miller Authorities, tab 36]. The question was whether the submission of expenses claims to the House of Commons Fees Office was a proceeding in Parliament. The test which the Supreme Court applied was whether an activity formed part of or was incidental to the “*core or essential business of Parliament, which consists of collective deliberation and decision making*”: per Lord Phillips at §62. That was a test designed to apply to activities occurring outside of each House and its committees, “*where the core or essential business of Parliament takes place*”: at §47.
7. It is submitted that the reading of the Commission forms part of the core and essential business of Parliament. The Prime Minister and Advocate General draw the Court’s attention to the following features about the third stage of the prorogation process:
 - (1) **First**, the reading of the Commission takes place in the Chamber of the House of Lords, with the House of Commons in attendance.
 - (2) **Second**, the third stage is recognised as part of the parliamentary process by House of Lords Standing Order No. 76 (which has been in force since 1621). It provides that:

“If Her Majesty is not personally present to prorogue Parliament at the close of a session, such prorogation is not to be by Writ, but by Commission directed unto some of the Lords of the Upper House; and they, being in their robes and seated on a form placed between the Throne and Woolsack, are to command the Usher of the Black Rod to let the Commons know the Lords Commissioners desire their immediate attendance in the House of Peers, to hear the Commission read; and the Commons being come up to the Bar of this House and standing uncovered, the Commission is to be read by the Clerk, after which Parliament is to be prorogued in such manner, and to such time, as is commanded by the said Commission.”
 - (3) **Third**, the third stage is also considered as part of parliamentary process in Erskine May, *Treatise on the law, privileges, proceedings and usage of Parliament*, (25th ed., 2019) at §8.8, the authoritative guide to parliamentary proceedings.
 - (4) **Fourth**, the Lords Commissioners are members of the House of Lords. In this case, they were the Rt Hon. the Baroness Evans of Bowes Park (Leader of the House of Lords and Lord Privy Seal); the Rt Hon. the Lord Hope of Craighead (Convener of the crossbench Peers) and the Rt Hon. the Lord Fowler (the Lord Speaker).

(5) **Fifth**, the reading of the Commission, and its effect is recorded in the official records of each House: Hansard. These state that prorogation and the end of the session occurred.¹

(6) **Sixth**, the reading of the Commission forms part of a broader parliamentary ceremony, in which Royal Assent is granted by Commission to Bills which both Houses have passed and the Queen’s Speech closing the Session is read to both Houses. In this case, Royal Assent was granted to the Parliamentary Buildings (Restoration and Renewal) Act 2019 and a Queen’s Speech closing the Session was read to both Houses. The ceremony is akin to that which occurs at the State Opening of Parliament at the start of a new Session.

8. In *R (Barclay) v Lord Chancellor* [2015] AC 276 [Cherry/Auth/34/MS2452], the Supreme Court unanimously held that the granting of Royal Assent was a proceeding in Parliament. That is significant because Royal Assent may be granted by Commission, including by the same commission which provides for the prorogation of Parliament. Per Baroness Hale of Richmond at §48 [MS2471]:

“Nor is the analogy with Royal Assent to Acts of the United Kingdom Parliament exact: the Queen in Parliament is sovereign and its procedures cannot be questioned in the courts of the United Kingdom.”

9. The Petitioners in their written case (§1.3) rely on various authorities for the proposition that the reading of the Commission is not a proceeding in Parliament. *Craig v Advocate General for Scotland* 2019 SC 230 concerned comments made by a Minister in Parliament, which contained the Government’s reasons for a decision not to commence primary legislation. Lord Malcolm held (at §§13-16), following the decisions of the Board in *Toussaint v AG of St Vincent and the Grenadines* [2007] 1 WLR 2825 and of the House of Lords in *Wilson v First County Trust (No.2)* [2004] 1 AC 816, that in such cases, the statement is relied upon “to explain the conduct occurring outside Parliament, and the policy and motivation leading to it”. It accordingly involves no breach of art. IX.

10. This principle is not engaged in this case. The reading of the Commission in Parliament is self-evidently not conduct occurring outside Parliament or an explanation for that conduct.

¹ *Hansard*, 9 September 2019, vol. 664, cols 647-650; *Lords Hansard*, 9 September 2019, vol. 799, cols 1399-1404; House of Commons Votes and Proceedings, 9 September 2019; House of Lords Minutes of Proceedings, 9 September 2019.

It is an act in its own right, with its own consequences, which occurs within Parliament in the presence of both Houses and forms a core part of the business of Parliament. Whereas reasons for a decision, for example, not to commence legislation may be given anywhere, the Commission can only be read in Parliament, and is effectual precisely because it is done there.

11. Lady Arden also referred in argument to the decision of the Supreme Court on relief in *Ahmed v HM Treasury* [2010] 2 AC 534, which was referred to in correspondence between the parties to both appeals. That case concerned subordinate legislation which had purportedly been made under statutory authority but was in fact *ultra vires*. The making of a statutory instrument is not a proceeding in Parliament and no argument to that effect was made in *Ahmed*. It is not an authority inconsistent with the Prime Minister and Advocate General's case, and the context – both in law and as a matter of practical consequences (see below) – is very different from the present case.
12. It is submitted, therefore, that Parliament remains prorogued until 14 October 2019 unless and until it is reconvened for the start of a new session by further proclamation pursuant to the Meeting of Parliament Act 1797 [Cherry/Auth/47/MS2919]. The Inner House therefore erred in pronouncing the interlocutor in the form that it did, if it was intended to suggest otherwise. That interlocutor should be recalled by this court, even in the event it is otherwise minded to dismiss the Scottish appeal.

The second stage

13. It is submitted that it is also not open to the Court to quash the Order in Council. It is no answer to say that Orders in Council have been quashed or reduced in other contexts. This is not akin to any other context. The Order in Council is the method by which the Commission for the prorogation of Parliament is authorised and directed to act on behalf of Her Majesty. The Lords Commissioners have no legal discretion and act solely as a result of, and under the authority of the Commission made pursuant to the Order in Council. The Order in Council is the means by which Her Majesty ensures Parliament is prorogued at the end of a session when she does not prorogue Parliament in person. It is incidental to the third stage and thus falls within the protection of article IX of the Bill of Rights: *Chaytor*, §62.

The first stage

14. There is no dispute between the parties that if the Prime Minister's advice is found to be unlawful, the court can so declare. The only remedy claimed by the Appellant in the claim form is a declaration that the advice was unlawful: [Miller trial bundle, tab 1, p.3; electronic p.9]. Similarly, the remedy claimed by the Petitioners was a declarator to that effect. The Prime Minister's Detailed Grounds of Resistance in the Divisional Court [Miller trial bundle, tab 3, p.41; electronic p.47] state, at §60, that: "*If (which is denied) the advice was unlawful, the Prime Minister will take the necessary steps to comply with the terms of any declaration made by the court.*" The Advocate General for Scotland reiterated that position in oral argument on the first day of the hearing of the appeals and this remains the position in both appeals.
15. If the advice is found to be unlawful, the Prime Minister cannot commit to take any more particular steps without knowing the terms of any declaration/declarator and the reasons for it. There seem to be three possible scenarios which might occur. The first two scenarios arise in the event the Court accepts the Prime Minister and Advocate General's submission that the reading of the Commission was a proceeding in Parliament.
16. **First**, the Court may find that the advice was unlawful, but its reasoning leaves open the possibility of a lawful decision to prorogue for a period of the same length or for a period longer than that which has already elapsed at the date of the order. In that event, the Prime Minister would be entitled to reconsider the question of prorogation on a lawful basis in accordance with the decision of the court. It would be for the Prime Minister, in accordance with the terms of any declaration/declarator, to consider whether to advise Her Majesty to bring forward the meeting of Parliament pursuant to the Meeting of Parliament Act 1797 [Cherry/Auth/47/MS2919], and if so, on what date. In this scenario, the court would and could not make any order purporting to require Parliament to be reconvened pending the Prime Minister's decision.² Parliament would remain prorogued pending that decision.
17. **Second**, the Court may find that it would be unlawful for Parliament to remain prorogued for any further period and that advising the Sovereign to bring forward the meeting of Parliament pursuant to the Meeting of Parliament Act 1797 is the only option lawfully open to the Prime Minister. In that event, a declaration would be sufficient on the basis that the Prime Minister would comply with the terms of a judgment having that effect. It would of

² See, e.g., *R (Litvinenko) v Secretary of State for the Home Department* [2014] HRLR 6, per Richards LJ at §75.

course be open to the Court to consider whether to make a mandatory order or interlocutor requiring the Prime Minister so to advise Her Majesty. However, the grant of mandatory relief is in the discretion of the court, and that discretion is to be exercised having regard to the facts as they stand now and the practical consequences of any order.

18. Whatever the precise form of remedy in this scenario, the Prime Minister and Advocate General draw the Court's attention to the very serious practical consequences which would flow from any mandatory order or interlocutor, given that bringing forward the meeting of Parliament would require both a meeting of the Privy Council and a new Queen's Speech (which is always the first item of business in any new session of Parliament), at a date earlier than currently planned.
19. A Queen's Speech, and the State Opening of Parliament which accompanies it, is a significant political, constitutional and ceremonial occasion, which ordinarily involves the Sovereign attending in person. As the Court will be well aware, the proper preparations for a Queen's Speech are a matter of thoroughgoing importance, including in relation to the content of that Speech. Extensive arrangements would have to be made, including as to security, to enable this to occur. These considerations lead to the need for any order that the Court makes, if necessary, to allow for these steps relating to the earlier meeting of Parliament to occur in an orderly fashion.
20. **Third**, in the event that the Court holds that the reading of the Commission was not a proceeding in Parliament (which is denied), the court could declare that the prorogation was unlawful, with the effect that Parliament was not prorogued and remains in session.³ However, depending on the court's reasoning it would still either be open or not open to the Prime Minister to consider a further prorogation.
21. Given the Prime Minister and Advocate General's position as to the amenability of the first stage of the process to declaratory relief, it is submitted that there is no need to examine whether the court has jurisdiction to grant any further relief in respect of the second and/or third stages. As a matter of principle in both English and Scots law, the court should only

³ There would be considerable practical uncertainty in this event as to the position in the interim, including whether both Houses had been adjourned (notwithstanding no decision to that effect) and who, if any one, could reconvene them.

grant the relief which is necessary in the circumstances of any case. No such relief beyond a declaration would be necessary in this case.

THE RT HON. LORD KEEN OF ELIE QC

ANDREW WEBSTER QC

For Advocate General for Scotland

19th September 2019

SIR JAMES EADIE QC

DAVID BLUNDELL

CHRISTOPHER KNIGHT

RICHARD HOWELL

For the Prime Minister