

**IN THE SUPREME COURT OF THE UNITED KINGDOM**  
**ON APPEAL FROM THE QUEEN'S BENCH DIVISION**  
**(DIVISIONAL COURT)**

**B E T W E E N:**

**THE QUEEN**  
**(on the application of GINA MILLER)**

**Appellant**

**- and -**

**THE PRIME MINISTER**

**Respondent**

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**WRITTEN SUBMISSIONS OF THE COUNSEL GENERAL FOR WALES<sup>1</sup>**

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**On Justiciability**

1. Here are five reasons why the Divisional Court was incorrect, and the Scottish Inner House was correct, on whether there is a non-justiciability bar:
2. First, because the analysis of justiciability should be integrated with consideration of the legal merits and not addressed in rigid isolation from them.
  - 2.1 The problem with addressing justiciability in isolation, so as to put consideration of the legal merits to one side, can be expressed as follows. (a) A central part of the legal merits analysis is the evaluation of whether and what legal standards are applicable. (b) If there are applicable legal standards then the claim is in principle justiciable. (c) Were there to be applicable legal standards but the claim to be non-justiciable, the Court would be countenancing breaches of those applicable legal standards by the executive, incapable of being addressed by the Court. (d) That would be an unacceptable lacuna for the rule of law.
  - 2.2 This is familiar thinking. When the House of Lords identified an integrated, and not an isolationist, approach as appropriate to the requirement of standing (under section 31 of the Senior Courts Act 1981) it was for equivalent reasons: see *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. Lord Diplock's famous statement about avoiding a "grave lacuna" for the rule of law was at 644E.

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<sup>1</sup> The Counsel General is the Law Officer of the Welsh Government, appointed by Her Majesty pursuant to section 49 of the Government of Wales Act 2006. These submissions reflect his position, and that of the Welsh Government.

- 2.3 The implications of the isolationist approach to justiciability in the present case are readily apparent. The Divisional Court did not address the central contested issue between the parties, as to a narrower and wider conception of Parliamentary Sovereignty: see §§7-11 below.
- 2.4 To test the logic of justiciability and legal standards, consider this example. Suppose Parliament has enacted primary legislation expressly imposing a statutory duty on Government to bring forward an instrument, put before Parliament by a specified date, for Parliamentary scrutiny within a specified time-frame. Suppose, when the critical time approaches, the Respondent exercises the prerogative power to advise Her Majesty to prorogue Parliament, consciously and purposely so as to avoid performing the statutory duty. This would be unlawful action on conventional legal grounds (even on the Respondent's narrow conception of Parliamentary sovereignty): prerogative power cannot be exercised incompatibly with the discernible will of Parliament (as *Miller (No. 1)* [2017] UKSC 5 [2018] AC 61 illustrated).
3. Secondly, because the principled scope of judicial review, foundationally underpinned by Courts identifying what the rule of law requires, secures that executive action be accountable for its compatibility (a) with contextually-calibrated public law standards and in particular (b) with established constitutional principles and values.

- 3.1 In *R (Cart) v Upper Tribunal* [2011] UKSC 28 [2012] 1 AC 663 this Court identified the following foundational principle (Lord Dyson at §122):

*... the scope of judicial review should be no more (as well as no less) than is proportionate and necessary for the maintaining of the rule of law ...*

The foundational question is therefore, as Lord Dyson later put it (at §133):

*... what scope of judicial review ... is required to maintain the rule of law?*

As Lady Hale explained (§51), the Court was agreed as to this being the central question in *Cart*. Lady Hale (at §51) and Lord Phillips (§89) each encapsulated the question as being:

*what level of independent scrutiny ... is required by the rule of law*

*Cart* was about judicial review of the Upper Tribunal and was one in the line of cases where the statutory scheme enacted by Parliament was said to have

the consequence that judicial review was removed or restricted. In the latest of those cases the principle identified by this Court was discussed in *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 [2019] 2 WLR 1219 by Lord Carnwath at §§131-132.

- 3.2 A theme of the justiciability cases is the question of whether there are or are not ‘manageable judicial standards’. However, legal standards which have “*an appropriate domestic foothold*” are ‘manageable judicial standards’. That was the essence of the point being made by Lord Mance in *Mohammed v Ministry of Defence* [2017] UKSC 1 [2017] AC 649 at §58. This is why it can be helpful to speak of whether a question of domestic law is engaged: see too the approach of Sedley J (and an impressive array of Counsel) in a case like *R v Secretary of State for Foreign and Commonwealth Affairs, ex p British Council of Turkish Cypriot Association* 19 March 1998 unrep. [1998] COD 336.
- 3.3 It is important to appreciate that the judicial standards which Courts apply in public law can, where appropriate, be contextually calibrated. This has been seen in the context of public law rationality. But it may extend also to judicial review on questions of ‘law’, where an authority with a public function is addressing questions arising under a special “law” (as has been the case with some religious authorities and was the case with some Visitors): see the discussion by Lord Carnwath in *Privacy International*, §3.1 above, at §67.
- 3.4 Returning to rationality and contextual-calibration, a Court may be satisfied in a particular area that the subject-matter is such that no Court can properly supervise rationality. This was the position regarding judicial review of an Act of the Scottish Parliament explained by Lord Reed in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 [2012] 1 AC 868 at §148: because of special considerations related to legislation as “*a matter of political judgment*” it would not be “*constitutionally appropriate*” for it to be reviewable *on grounds of irrationality*.
- 3.5 As can be seen (§4 below), public law is replete with other examples of contextual-calibration, especially in “*political*” and “*policy-laden*” contexts. Take the cases of *Hammersmith & Fulham London Borough Council* [1991] 1 AC 251 and *R v Secretary of State for the Environment, ex p Nottinghamshire County Council* [1986] AC 240 (the latter cited by Lord Reed in *AXA*, §3.4 above at §148). The position was this. There was a time (at least until *O’Connor v Chief Adjudication Officer* [1999] 1 FLR 1200, 1210F-1211B) when dicta from the House of Lords in those cases suggested that only an extreme form of

unreasonableness (so-called *Super-Wednesbury*) was applicable to an instrument of national economic policy laid before and approved by Parliament. This envisaged contextual-calibration, but never immunity. Even at the height of those dicta it was recognised by the House of Lords that an impermissible purpose (or “*improper motive*”) would be an available basis for judicial supervision (see *Hammersmith* at 597F-H).

- 3.6 These contextual-calibration cases, and indeed the justiciability cases, are classic illustrations of why ‘never say never’ is a valuable maxim: see *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] UKSC 54 [2016] 1 WLR 4164 at §35 (Lord Toulson); *R (Ullah) v Secretary of State for the Home Department* [2004] UKHL 26 [2004] 2 AC 323 at §48 (Lord Steyn).
- 3.7 Judicial review will and must, even in a contextually-restricted subject-matter area, ensure compatibility with what Lord Reed (in *AXA*, §3.4 above at §153) described as “*constitutional principles*”. So, as Lord Reed explained in the context of judicial review of an Act of the Scottish Parliament, judicial review would lie “*for example, if it were shown that legislation offended against fundamental rights or the rule of law*”. Fundamental constitutional principles and values include, most importantly: the rule of law (*AXA*, §3.4 above, at §153) including access to the Courts (*R (UNISON) v Lord Chancellor* [2017] UKSC 51 [2017] 3 WLR 409 at §66); and – centrally to the present case – Parliamentary sovereignty (*Miller No.1*, §2.4 above, at §43): as to which, see §§7-11 below.
- 3.8 What it means for the application of established constitutional principles to be at the heart of the judicial function was articulated by the Supreme Court of India, in language subsequently endorsed by Lord Bingham (for the Privy Council): see *Bobb v Manning* [2006] UKPC 22 at §§12-14, citing Bhagwati J in *State of Rajasthan v Union of India* AIR SC 1361 at §143 (subsequently discussed by Lord Hodge, for the Privy Council, in *Attorney-General of Trinidad and Tobago v Dumas* [2017] UKPC 12 [2017] 1 WLR 1978 at §17):

*This court is the ultimate arbiter of the Constitution and to this court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and, if so, what are the limits and whether any action of that branch transgresses such limits. It is for this court to uphold the constitutional values and to enforce the constitutional limitations. This is the essence of the rule of law.*

4. Thirdly, because “*political*” subject-matter is, by reference to established constitutional values, a basis for principled judicial restraint – where the applicability of grounds for judicial review may be cautiously and contextually calibrated – but it is not a basis for executive immunity and judicial abdication.

4.1 It is a cardinal principle of judicial review that the Court does not adjudicate on the political merits of executive decisions. Questions of politics are for politicians and Parliament. There are established constitutional principles which require that this is so. They are “*beyond the constitutional competence assigned to the courts under our conception of the separation of powers*” (Mohammed, §3.2 above, at §57). However, another cardinal principle is that questions of law are for the Courts, and there is no abdication of the judicial role because the decision is highly political or policy-laden. There are manageable legal standards, but they are not based on the Court’s assessment of the political merits.

4.2 The Home Secretary’s decision in the case of *Fire Brigades Union* [1995] 2 AC 513 was undoubtedly highly political – to place on ice the implementation of a statutory scheme – and as to the political merits of that action he was accountable to Parliament and not to the Courts. But the questions of legality of that action were for the Court. As Lord Diplock explained in that case (at 573B):

*[Ministers] are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.*

4.3 So it is that contextual-calibration, and not judicial abdication, is the principled solution. A variable intensity of review provides the principled restraint in judicial review of decisions “*depending essentially on political judgment*”: see *OFT v IBA Health Ltd* [2004] EWCA Civ 142 [2004] 4 All ER 1103 at §§90-92 per Carnwath LJ.

4.4 As Sir Thomas Bingham MR had put it in *R v Ministry of Defence ex p Smith* [1996] QB 517 at 556B-C:

*where decisions of a policy-laden, esoteric or security-based nature are in issue, even greater caution than normal must be shown.*

As Wade and Forsyth wrote in 1994 (*Administrative Law* 7<sup>th</sup> ed, p.404):

*Minister’s decisions on important matters of policy are not on that account sacrosanct against the unreasonableness doctrine, though the court must take special care, for constitutional reasons, not to pass judgment on action which is essentially political.*

It was after endorsing that passage in *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 WLR 1115 at 1130 that Laws LJ observed (at p.1131C) that: "*the more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision*". That was a contextual-calibration theme to which Lord Kerr, for this Court, returned in *Re Finucane's application for judicial review* [2019] UKSC 7 [2019] 3 All ER 191 at §§75-76.

- 4.5 On this principled, suitably cautious basis, so-called 'forbidden areas' come into the light of the rule of law. A classic example is the prerogative of mercy, whose journey from 'forbidden area' to the exercise of judicial review is well-charted, leading to the position described by Lord Hughes in *Pitman v State of Trinidad and Tobago* [2017] UKPC 6 [2018] AC 35 at §50 ("*the prerogative of mercy ... importantly is subject to judicial control through judicial review*", meaning "*the existence of independent judicial control*"). There are many other such examples, those relating to prerogative powers, those relating to political decisions, and those relating to political decisions in the exercise of prerogative powers.
- 4.6 A good example is national security. This was once described as being a paradigm 'forbidden area'. It was always the case that the Courts would respect the merits of the national security evaluation. However, as Lord Scarman explained when he reviewed the case-law in *Council of Civil Service Unions v Minister for the Civil Service ("GCHQ")* [1985] AC 374, there were legal standards even here. The Courts would scrutinise national security decisions to ensure that a decision was indeed, and on evidence, one based on national security grounds (see *GCHQ* at 406G-H). What emerged was the modern contextually-calibrated approach to national security decisions described in cases like *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 [2003] 1 AC 153. There, Lord Hoffmann said (at §54) of the appropriate judicial restraint and decision-maker's latitude:

*This does not mean the whole decision on whether deportation would be in the interests of national security is surrendered to the Home Secretary ...*

*It is important neither to blur nor to exaggerate the area of responsibility entrusted to the executive.*

- 4.7 There was a time when actions taken by Ministers in the exercise of prerogative powers in the context of 'foreign policy' were said to be a "*forbidden area*" but Lord Phillips – who used that very phrase in *Abassi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 [2003] UKHRR 76 at §106(iii) – explained and illustrated that there was no bar

on judicial supervision: the Court of Appeal addressed, on its legal merits, whether diplomatic action was compatible with the legitimate expectation which had arisen (see §68 et seq and see §§104-106).

5. Fourthly, because the Divisional Court was incorrect (DC judgment §67) to rely on the case of *Bobb v Manning* [2006] UKPC 22, where the Prime Minister of the Republic of Trinidad and Tobago was “*entitled to exercise his informed and political judgment*” in deciding not to call for a dissolution of Parliament, as supporting its conclusion on the non-justiciability of such decisions.

5.1 In *Bobb v Manning* the challenge was considered on the legal merits of its constitutional compatibility. It was not rejected on non-justiciability grounds, by reference to a lack of manageable judicial standards or otherwise. The Privy Council concluded that the Prime Minister was “*entitled to exercise his informed political judgment on whether, at that stage, the public interest required another dissolution ...*” It did not enter into the political merits of that political judgment. Lord Bingham did not continue with: “*... and therefore the decision is non-justiciable*”. His conclusion continued: “*... and there is nothing to suggest that he exercised his judgment inconsistently with the Constitution*”. As Lord Bingham explained, the Privy Council had reached that conclusion because the period of unaccountable government, albeit that it was the “*antithesis of the democratic model*”, was “*not reasonably avoidable*” (see §§15-17). Nor was *Wheeler v Office of the Prime Minister* [2008] EWHC 1409 (Admin), noted by the Divisional Court (DC Judgment §49), a case of non-justiciability because of political issues. That claim also failed on its merits, with the Court indicating that it needed to exercise proper restraint as to the political question of whether two treaties were substantively similar.

5.2 In *Bobb v Manning* there was a written constitution, but that is not a point of relevant distinction, because: (1) the issue is whether there are manageable judicial standards; and (2) justiciability is concerned not with source but with subject-matter. Indeed, it is not just established constitutional principles, but also basic public law standards (see eg. *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20 [2006] 1 WLR 3343 at §§20-21; *Brantley v Constituency Boundaries Commission* [2015] UKPC 21 [2015] 1 WLR 2753) which are applicable in principle to constitutional functions of a sensitive nature calling for judicial restraint.

6. Fifthly, because it is unsound to rest an adverse conclusion on justiciability upon whether the exercise of the power affects an individual.

- 6.1 A well-established governing principle is that the applicability of judicial review is based not on source, but on subject-matter. So the focus is on the nature of the power and not on whether it is the exercise of a prerogative power. It is, rightly, not suggested that the exercise of statutory powers in a sensitive area is justiciable or not depending on whether the exercise of power affects an individual. *Fire Brigades Union* (§4.2 above) is a good example.
- 6.2 Some of the cases about judicial review in sensitive areas involve a decision affecting an individual. Many do not. In relation to prerogative powers, *GCHQ* itself was not a case about a prerogative function exercised in relation to an individual. Nor of course was *Miller No. 1* (§2.4 above).
- 6.3 In the context of established constitutional principles, *UNISON* (§3.7 above) was not a case about the effect on an individual. The rule of law considerations in *National Federation* (§2.2 above) arose in a case which did not concern a decision affecting in individual.
- 6.4 It is not possible to identify a convincing reason in principle why the same subject-matter should be justiciable when the decision affects an individual, but should involve a non-justiciability bar because it stands to affect a wider group or engages the wider public interest. If anything, the latter should make an even stronger legal policy call for the Court's attention.

### **On Parliamentary Sovereignty**

7. Next, here are four reasons why the Inner House was right to reject the Respondent's narrow formulation of the established constitutional principle of Parliamentary Sovereignty (an issue which the Divisional Court did not address and resolve, because of its isolationist approach to justiciability).
8. First, because the constitutional principle of Parliamentary Sovereignty includes a conception of ongoing legislative autonomy, whereby Parliament is in a position to make (or amend) such primary legislation as it considers in the ongoing circumstances to be appropriate.
  - 8.1 This conception can clearly be seen in the well-established principle that Parliament remains free to legislate in such manner as it thinks fit, so that (for example) Parliament is not to be taken to have bound itself. As Laws LJ put it in *Cart* in the Court of Appeal [2010] EWCA Civ 859 [2011] QB 120 at §38, identifying as:



*... not a denial of legislative sovereignty, but an affirmation of it: ... the old rule that Parliament cannot bind itself. The old rule means that successive Parliaments are always free to make what laws they choose; that is one condition of Parliament's sovereignty.*

- 8.2 Another example of this wider conception in action is in the case-law on “constitutional statutes”, including *Miller No.1* itself (§2.4 above, at §67). The principle is that implied repeal is excluded. But that is the limit of the doctrine. Why? Because Parliament must retain the ongoing legislative autonomy, to amend or repeal by clear and express words. That is part of Parliamentary Sovereignty, as recognised by the Courts.
- 8.3 Another example of ongoing legislative autonomy can be seen in the scheme of the Human Rights Act 1998, conferring on the Courts the function of adjudicating on the compatibility of primary legislation with the rights enshrined in the European Convention on Human Rights. When Parliament gave the Courts the special mechanism of making a declaration of incompatibility under section 4 of that Act, leaving the matter to be reconsidered by Parliament, even in a situation of an abrogation of fundamental rights it was because of ongoing legislative autonomy as part of Parliamentary Sovereignty: *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 132A-B.
- 8.4 The role which ongoing legislative autonomy plays within Parliamentary Sovereignty is pithily encapsulated by Professor Paul Craig in “*Prorogation: Three Assumptions*” (UK Constitutional Law Blog, 10 September 2019), discussing the Respondent’s argument that there are no acceptable legal standards which can apply in the present case:

*If we accept such an argument then we recast the boundaries of Parliamentary sovereignty as traditionally conceived. Parliament remains omnipotent, in the sense that there are no bounds to its legislative authority, but the executive can determine when Parliament exercises that legislative authority. It can choose to prorogue Parliament whenever it so wishes, including in order to prevent Parliament exercising its voice, though legislation or otherwise, merely because the executive believes that what Parliament might do is undesirable. The executive’s decision in this respect is legally unchallengeable, irrespective of the ground on which the prorogation decision is based. If this represents the law then every text book, article and essay on constitutional law has missed this crucial qualification to the sovereignty of Parliament.*

9. Secondly, because Parliamentary Sovereignty extends to a conception of the judicially-identified objective intention and purpose of Parliament, which the Courts will protect from executive interference.

- 9.1 It is very familiar that the Courts look beyond the wording of Acts of Parliament and scrupulously defend and protect the intent and purpose of Parliament. This was seen clearly in *Miller No.1*, §2.4 above, which concerned the purpose and intention of the European Communities Act 1972. It was seen in *Fire Brigades Union* (§4.2 above). It is the underpinning of the *R v Tower Hamlets LBC ex p Chetnik Developments Ltd* [1988] AC 858 principle, developed by the Courts to secure that statutory power is exercised for the purpose for which it was conferred. It underpins the *Padfield v Minister of Agriculture Fisheries & Food* [1968] AC 997 principle, developed by the Courts to secure that the executive does not act so as to frustrate the objectively-identified purpose and intention of Parliament.
- 9.2 All of these examples again reflect not a narrow, but a broad, conception of Parliamentary Sovereignty, and one which is delineated by the Courts as part of their constitutional function. So, of course, does judicial analysis which sees all judicial review grounds as species of ‘ultra vires’: see eg. *Boddington v British Transport Police* [1999] 2 AC 143, 164B per Lord Browne-Wilkinson. For that to be even a tenable view demonstrates the breadth and dynamism of the constitutional principle of Parliamentary Sovereignty.
10. Thirdly, because Parliamentary Sovereignty includes a conception of Ministerial accountability to Parliament, as a cardinal feature of the constitutional framework within which judicial review itself operates.
- 10.1 As Lord Drummond Young rightly recognised in the Inner House in *Cherry and others v The Advocate General* [2019] CSIH 49, at §§99 and 114, Parliament’s “second essential constitutional function” is:
- ensuring that the policies of the executive are properly considered in a democratic body, and that the actions of the executive are subject to critical scrutiny, with representatives of the government reporting on and explaining those actions. In this way Parliament performs the fundamental role of protecting the country from the arbitrary exercise or abuse of executive power*
- The same thinking can be seen in Professor Craig’s analysis (§8.4 above).
- 10.2 In *Hoffmann-La Roche v Secretary of State for Trade and Industry* [1975] AC 295 at 352G (emphasis added), Lord Morris said this:
- it was for the Minister to form certain opinions and for the Minister to decide what, if any, action to take. Questions of policy were for him subject to the control of Parliament. Matters of judgement were matters for his judgment*

*subject to the control of Parliament. The only questions for a court are those based on suggestions that he acted unlawfully because he exceeded his powers or lacked powers.*

10.3 This Ministerial accountability to Parliament is a key feature of the constitutional landscape which sees judicial review designed as it is (see §§3.5 and 4.2 above). The approach in *Nottinghamshire*, §3.5 above, at 250G-H by Lord Scarman is a good example:

*Where Parliament has legislated that the action to be taken by the Secretary of State must, before it is taken, be approved by the House of Commons, it is no part of the judges' role to declare that the action proposed is unfair, unless it constitutes an abuse of power in the sense which I have explained; for Parliament has enacted that one of its Houses is responsible.*

The significance of Ministerial accountability to Parliament is something which has been invoked throughout the development of public law, as part of a constitutional separation of powers in which judicial restraint is essential.

10.4 Ministerial accountability to Parliament was strongly relied on by the Home Secretary in *Fire Brigades Union* (see 572D-573C, §4.2 above). It was invoked in *Miller No.1* (§2.4 above at §162), where the dissenting judgments of Lord Reed and Lord Carnwath emphasised its importance and regarded it as sufficient (see §§161-162, 240 and 249). What nobody doubted was that it was necessary.

11. Fourthly, because an authoritative description of the constitutional role of judicial review clearly rejects a narrow conception of Parliamentary Sovereignty.

11.1 This principle was famously articulated by Laws LJ in *Cart* (§8.1 above) at §38:

*... the need for ... an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it...The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective...*

This principle was endorsed on appeal to the Supreme Court (§30 per Baroness Hale) and accepted by Government in *Privacy International* (§3.1 above, see §115) where it was discussed by Lord Carnwath at §§131-132.

11.2 This principle would be impossible unless Parliamentary Sovereignty extends beyond the words used in a statutory ouster and include the broader, ongoing and dynamic conception.

## On unlawful action

12. Next, here are four reasons why the Scottish Inner House was correct on the legal merits, in finding that the Respondent's action in this case was unlawful (applying standards which the Divisional Court did not analyse).
13. First, because the Respondent's actions have - consciously and purposely - impeded the constitutional principle of Parliamentary Sovereignty whose conception extends to the ongoing legislative autonomy of Parliament (see §8 above). Moreover, the Respondent has done so at what is recognisably and plainly a critical time for adherence to the rule of law to be secured.
14. Secondly, because the Respondent's actions have - consciously and purposely - impeded the constitutional principle of Parliamentary Sovereignty whose conception extends to ongoing Ministerial accountability to Parliament (see §10 above). Moreover, the Respondent has done so at what is recognisably and plainly a critical time for adherence to the rule of law to be secured.
- 14.1 The position was perfectly encapsulated by Lord Drummond Young in the Inner House of the Court of Session (*Cherry*, §10.1 above at §106):

*The proroguing of Parliament suspends the operation of the body that is responsible for subjecting the executive to critical scrutiny ... The courts cannot subject the actings of the executive to political scrutiny, but they can and should ensure that the body charged with performing that task, Parliament, is able to do so.*

That, in two sentences, is why this claim should succeed.

- 14.2 Lord Mance provided a useful counterpoint for the present case when he spoke of "*non-justiciability of the royal prerogative ... explained on the basis that the appropriate forum for its control is Parliament*" (*Mohammed*, §3.2 above, at §57). In the present case the Respondent has acted to impede control in that very forum, and the Court's supervisory jurisdiction is invoked to secure that the Respondent remains accountable through that constitutionally appropriate forum.
15. Thirdly, because the Respondent's actions have - consciously and purposely - impeded and frustrated the purpose and intention of Parliament, objectively identifiable through the legislation which Parliament has enacted in the present context, to retain continuing legislative autonomy and the ongoing capacity to secure Ministerial accountability to Parliament (see §9 above).

- 15.1 Parliament's intention and purpose, so far as ongoing legislative autonomy and supervision through Ministerial accountability is clearly identifiable from what Parliament has done and said.
- 15.2 Take the specific provisions of the European Union (Withdrawal) Act 2018 in relation to withdrawal agreement, or non-agreement. Section 13(14) clearly contemplates the statutory starting point of a clear 21 sitting days for Parliamentary scrutiny of any withdrawal agreement, subject to a ministerial exercise of discretion (see Constitutional Reform and Governance Act 2010 ss.20 and 22(1)). The Respondent's action has foreclosed on that starting point, so that it could not be achieved or even considered.
- 15.3 The European Union (Withdrawal) Act 2019 also compellingly illustrates Parliament's overarching intention as to ongoing supervision and legislative autonomy reflected in concrete provision considered by Parliament appropriate, in the context of the absence of an agreement.
- 15.4 The European Union (Withdrawal) (No.2) Act 2019 gives further reinforcement to the objectively identifiable purpose, that Parliament was intended to have a continuing role in the withdrawal process. By section 1(4), the Prime Minister is to seek an extension under Article 50(3) TEU should Parliament fail to approve either a 'deal' or 'no-deal' scenario, the express purpose of any such extension being to enable Parliament to "*debate and pass a Bill to implement the agreement between the United Kingdom and the European Union*". By section 2 of the new Act, the Government is to publish and provide for Parliamentary approval a progress report on its negotiation with the EU. And by section 3(3), Parliament is expressly granted a right to veto any offer of an extension by the EU upon a request being made by the Prime Minister.
- 15.5 Parliament undoubtedly intended and understood, when passing the enactments above, that its ability to act, react and supervise as circumstances unfolded would be and remain intact. Parliament could keep the matter under close review and act as appropriate.
16. Fourthly, because the Respondent, having acted in any one of these ways, has acted unlawfully. So far as what the Respondent has consciously and purposely done, and what the Courts should make of his characterisation of it in these proceedings, the position is convincingly analysed by the Inner House and particular assistance can be derived from materials such as those provided by Sir

John Major, and the principle explained in the Appellant's skeleton argument in the Divisional Court at §72.

### **On the importance for Wales**

17. Finally, here are three reasons why the issues in this case have particular and distinct consequences for Wales.
18. First, the Respondent's impugned actions have impeded the ability of the National Assembly for Wales to engage in dialogue with the Westminster Parliament, that dialogue being a fundamental feature of the United Kingdom's constitution, and they have done so at a critical time.
  - 18.1 The National Assembly for Wales is a democratically elected legislature, mandated both by Parliament, through the Government of Wales Act 2006, and the people of Wales to represent and defend the interests of Wales and its population.
  - 18.2 A key feature of the role of the National Assembly is the dialogue that takes place between it and the Westminster Parliament on matters in devolved and reserved areas. In *Miller No.1* the Supreme Court recognised (§2.4 above at §151) that this dialogue plays "*a fundamental role in the operation of our constitution*".
  - 18.3 This dialogue has never been more important than now, as the UK considers whether and how it is to leave the EU. The National Assembly has been active in its communications with Westminster, providing legislative consent motions to numerous statutes enacted by Parliament in devolved areas (such as the European Union (Withdrawal) Act 2018 and the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019) and scrutinising the subordinate legislation made by both the Welsh Ministers and UK Ministers under the delegated powers conferred by the European Union (Withdrawal) Act 2018. And it has conveyed its findings and analysis of the impact of potential withdrawal agreements, or non-agreements, to the Westminster Parliament and is particularly active in its joint scrutiny with Westminster of executive action in the field of the UK's future international trade policy.
  - 18.4 The lengthy prorogation resulting from the Prime Minister's actions precludes any further dialogue of this kind.

19. Secondly, major Bills that were before Parliament and to which the National Assembly had consented have by reason of prorogation now fallen away. These Bills covered topics of the utmost significance for Wales: trade, agriculture and fisheries. The National Assembly has not legislated in this area, and had consented to Westminster doing so, on the understanding that the Westminster Parliament would make appropriate legislative provision on these matters in good time for the UK's withdrawal. Those Bills having fallen now places the legislative burden back on to the National Assembly, under extreme time constraints.
20. Thirdly, prorogation has severely curtailed proper scrutiny, by both the Westminster Parliament and devolved administrations, over Ministerial exercise of the broad 'Henry VIII' powers to make secondary legislation under the European Union (Withdrawal) Act 2018.
  - 20.1 Since the announcement of prorogation in August, the UK Government has made statutory instruments relating to withdrawal under the urgent 'made affirmative' procedure provided for in the European Union (Withdrawal) Act 2018 (paragraph 5 of Schedule 7). In doing so, it has bypassed the scheme of Parliamentary scrutiny that would otherwise occur before such statutory instruments were made.
  - 20.2 Some (e.g. the Animal Health and Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019) have been made without the UK Government adhering to the constitutional convention of seeking the consent of the Welsh Ministers, thereby removing the opportunity for proper scrutiny by and dialogue with the body which represents the interests of Wales and its population. It has done so notwithstanding it had reiterated its commitment to that constitutional convention as part of the Intergovernmental Agreement signed by the Welsh and UK Governments on 25 April 2018.
21. In the present circumstances, it is all the more important that the Westminster Parliament is sitting and effective in the weeks running up to 31 October 2019, so that these two legislatures can continue to communicate with one another and the Westminster Parliament can give proper consideration to the impact that any agreement, or non-agreement, might have on Wales.

**MICHAEL FORDHAM QC**  
**CELIA ROONEY**  
**HOLLIE HIGGINS**  
**Blackstone Chambers**

**16 September 2019**