Neutral Citation Number: [2019] EWHC 2381 (QB)

Case No: CO/3385/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 September 2019

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON SIR TERENCE ETHERTON
MASTER OF THE ROLLS
THE RT HON DAME VICTORIA SHARP DBE
PRESIDENT OF THE QUEEN'S BENCH DIVISION

- - - - - - - - - - - - - - - - - - - -

Between:

THE QUEEN on the application of GINA MILLER	**Claimant**
and	
THE PRIME MINISTER	**Defendant**
and	
THE RT HON THE BARONESS CHAKRABARTI CBE	**First Intervener**
and	
THE COUNSEL GENERAL FOR WALES	**Second Intervener**
and	
THE RT HON SIR JOHN MAJOR KG CH	**Third Intervener**
and	
THE LORD ADVOCATE	**Fourth Intervener**

- - - - - - - - - - - - - - - - - - - -

Lord Pannick QC, Tom Hickman QC and Warren Fitt (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Sir James Eadie QC, David Blundell, Christopher Knight and Richard Howell (instructed by **Government Legal Department**) for the **Defendant**

Deok Joo Rhee QC (instructed by **Howe & Co Solicitors**) for the **First Intervener**
Michael Fordham QC, Hollie Higgins and Celia Rooney (instructed by **Legal Services Department, Welsh Government**) for the **Second Intervener**
Lord Garnier QC, Tom Cleaver and Anna Hoffmann (instructed by **Herbert Smith Freehills LLP**) for the **Third Intervener**
The Rt Hon W James Wolffe QC (Lord Advocate), James Mure QC, Alan Maclean QC and Christine O'Neill (instructed by **Baker & McKenzie LLP**) for the **Fourth Intervener**
Hearing date: 5 September 2019

- - - - - - - - - - - - - - - - - - - -

JUDGMENT

The Lord Burnett of Maldon CJ, Sir Terence Etherton MR, Dame Victoria Sharp P:

1. On Wednesday 28 August 2019 at a Privy Council held at the Court at Balmoral Her Majesty ordered that Parliament should be prorogued from a date between 9 and 12 September until 14 October 2019. The order was made on the advice of the Prime Minister. These proceedings were started later the same day. The main issue we have to decide is whether the decision of the Prime Minister to seek the prorogation of Parliament is justiciable (is capable of challenge) in Her Majesty's courts or whether it is an exclusively political matter. We heard argument on Thursday 5 September and the following morning gave our decision. We concluded that the decision of the Prime Minister was not justiciable. It is not a matter for the courts. In formal terms we granted permission to apply for judicial review but dismissed the claim. We acceded to an application that any appeal from our order could leap-frog to the Supreme Court pursuant to section 12(3A)(c) of the Administration of Justice Act 1969 should leave to appeal be granted.

2. Parallel proceedings were progressing in Scotland. They had been issued long before the order to prorogue Parliament had been made in the context of a growing concern that the Prime Minister might secure prorogation either side of the date appointed by statute for the departure of the United Kingdom from the European Union, currently 31 October 2019. Their focus changed following the prorogation order. On Wednesday 4 September Lord Doherty sitting in the Outer House of the Court of Session dismissed the claim. He too concluded that this was not a matter for the courts. An appeal is proceeding in the Inner House of the Court of Session. We have had the advantage of reading Lord Doherty's judgment.

3. We heard oral argument from Lord Pannick QC for the claimant and Sir James Eadie QC for the Prime Minister. In the week between the commencement of these proceedings and the hearing we received a large number of applications from individuals and bodies to intervene or be joined as claimants. Many came too late to enable the parties to deal with any submissions within the very tight timetable to which we were operating. We took steps to ensure that the Lord Speaker and Speaker were notified of the proceedings but, entirely understandably, neither chose to place submissions before the court. We acceded to four applications to intervene in writing: from the Shadow Attorney General on behalf of the Official Opposition; from The Rt Hon Sir John Major KG CH, who was Prime Minister between 1990 and 1997; from the Counsel General for Wales on behalf of the Welsh Government; and from the Lord Advocate on behalf of the Scottish Government. All supported the claimant. We have been assisted by the written materials provided. We record our thanks to all those representing both the parties and the interveners for the assistance

we have been given and acknowledge the pressure under which they have worked over the last few days.

Prorogation

4. A decision to prorogue Parliament is made by the Sovereign formally on the advice of the Privy Council but in reality on the advice of the Prime Minister. It is a prerogative power. By constitutional convention the Sovereign invariably acts on the advice of the Prime Minister. Parliament is prorogued between sessions. The new session begins with a Queen's Speech which sets out the Government's legislative agenda. There is no fixed duration for a session of Parliament although as a matter of recent practice each session usually lasts about a year. As it happens, the current session of Parliament has lasted since 21 June 2017, over two years. Prorogation brings to an end all proceedings in both Houses for the current session. Practical arrangements exist for some pending legislation to be carried over into the next session so that it does not have to start again and before prorogation there is usually a "wash-up" period to enable the passage of bills approaching completion of parliamentary stages. All business of both Houses is immediately suspended upon prorogation and does not recommence until the new session starts with a State Opening of Parliament. Amongst the consequences of prorogation are that no legislation may be discussed or passed, no questions asked of ministers and select committees do not continue to function. For practical purposes, Parliament ceases to operate whilst it stands prorogued.

5. Prorogation is different from dissolution. Parliament is dissolved pending a general election. Until recently, dissolution was a matter for the Prime Minister of the day who would ask the Sovereign to dissolve Parliament. Constitutional experts, for example the late Professor R. V. Heuston, consider that the Queen retains a personal discretion both to refuse a Prime Minister's request for a dissolution and to dissolve Parliament without a request. But in modern times the reality invariably has been that when asked to dissolve Parliament the Sovereign has agreed. This too was an example of the exercise of the Royal Prerogative, but Parliament legislated in the Fixed-term Parliaments Act 2011 to prescribe exhaustively the circumstances in which a general election may be called. Section 6 of that Act preserved unaltered the prerogative power to prorogue Parliament.

6. Prorogation should also be contrasted with the adjournment of either or both Houses during a session, including for a recess. That is commonplace. Either House can, if it chooses, sit without interruption. But both Houses adjourn from day to day whilst they are sitting and from one week to another. They also may, and customarily do, adjourn for much longer periods. Those include, for example, over Christmas and the New Year, Easter and Whitsun and over the summer. Parliament adjourned on 25 July 2019 for its summer recess and

reassembled on Tuesday 3 September. It has been customary for Parliament to go into recess for a period to coincide with party conferences, usually about three weeks. The House of Commons briefing paper on the Brexit Timeline (No 7960 13 August 2019) includes in its future timetable a period from mid-September to early October for party conferences, but that would be a matter for decision by both Houses. Whilst standing adjourned or in recess the business of Parliament continues to some extent. In particular, select committees continue with their investigations and may direct inquiries to ministers and written questions may be asked of ministers.

Statutory References to Prorogation

7. There are statutory references to prorogation other than in the Fixed-term Parliaments Act 2011. The Succession to the Crown Act 1707 was concerned with ensuring that Queen Anne would be succeeded on the throne by a Protestant. It expressly preserved the power of the Queen and her heirs and successors to prorogue Parliament. The Meeting of Parliament Act 1797 empowered the Monarch to foreshorten a period of prorogation by giving notice that Parliament should reassemble. The Prorogation Act 1867 was designed to simplify the way in which Parliament could be prorogued whilst Parliament was in recess, but did not apply to prorogation at the end of a session. All of these statutes recognise the power to prorogue. The Civil Contingencies Act 2004 by section 28 and the Reserve Forces Act 1996 by section 52(8) both make provision for prorogation to be curtailed in given circumstances.

8. The Northern Ireland (Executive Formation etc) Act 2019 received Royal Assent on 24 July 2019. It is concerned with extending the period allowed for forming an Executive in Northern Ireland from 25 August 2019. Section 3 requires the Secretary of State, on or before 4 September 2019, to report to both Houses on progress towards the formation of an Executive; and make arrangements for motions in both Houses to be moved by ministers within five days of the report being laid. Those obligations continue to arise periodically thereafter. Section 3(4) provides that if it is impossible for ministers to move the motions because Parliament stands prorogued or adjourned, then Parliament should be summoned using the powers contained in The Meeting of Parliament Act 1797. This illustrates the undoubted power of the Crown in Parliament to legislate to ensure that Parliament sits notwithstanding prorogation. Sir James also submits that, by a side wind it could be said, it is at least possible that Parliament will be called back into session during the period of prorogation. We were not told the date on which the Secretary of State published his report nor whether motions were moved in accordance with section 3. For the moment, the position remains unclear.

The Decision to Prorogue

9. The Rt Hon Theresa May MP resigned as leader of the Conservative Party on 7 June 2019. The Rt Hon Boris Johnson MP won the subsequent leadership competition on 23 July and following the resignation from office of Mrs May became Prime Minister on 24 July 2019. During the leadership campaign the issue of whether Parliament might be prorogued either side of 31 October was raised and not ruled out by a number of the candidates, including the Prime Minister. Earlier in the year there had been a lively debate between constitutional experts and lawyers about both the constitutional propriety and legality of proroguing Parliament in advance of exit day. It was sparked by writings of Professor John Finnis in advance of the exit date then fixed by statute, namely 29 March 2019.

10. On 15 August 2019 a submission entitled "Ending the Session" was made to the Prime Minister. Its author was Nikki da Costa, the Director of Legislative Affairs at 10 Downing Street. It noted that the current session was the longest since records began and that all the bills announced in the last Queen's Speech had received Royal Assent or were paused awaiting the next session. Filling parliamentary time had become difficult and there was an expectation that the Prime Minister would "set out a refreshed domestic agenda". The first week's business (i.e. following Parliament's return on 3 September) had already been announced. The submission recommended dedicating the second week to "wash-up bills" (as noted those close to completing the passage through Parliament), expected to take no more than three or four days. Ms da Costa recommended that Parliament should be prorogued on a date between 9 and 12 September and return for a Queen's Speech on 14 October. The period of the recommended prorogation was explained as including "the long-standing conference recess".

11. In a description of the background to the decision Ms da Costa explained that Parliament had been considering small, low priority bills and that business managers of both Houses were asking for new bills to ensure that Parliament was using its time gainfully. She identified a problem in introducing new bills now, namely that unless the session was to continue for at least four to six months more, they might fall when the session otherwise ended. The last Prime Minister had been aware of these tensions. Dates had been placed in the diary for a Queen's Speech in April/May 2019 and in October 2019 but at the time, October was considered a very late end to the session. Ms da Costa suggested that the decision was now pressing. She explained that the Prime Minister had to make two decisions. First, when to end the session; and secondly, but subject to the availability of Her Majesty, when to hold the State Opening of the new session. She added, "the decision will be influenced by practical, legal and political considerations".

12. The passage in the submission dealing with legal issues has properly been redacted because it contains privileged legal advice. The practical considerations identified the need to leave enough time for Parliament to complete the passage of some bills thus pointing to between 9 and 12 September rather than the previous week. The proposed date for the Queen's Speech allowed sufficient time to prepare the new legislative agenda. An earlier date would be "extremely pressured". Furthermore, returning on 7 October would interrupt the conference of the Scottish National Party which does not traditionally benefit from the conference recess. The political considerations were summarised in these terms:

> "14. Finally, politically it is essential that Parliament is sitting before and after the EU Council [17/18 October] – MPs and Peers must be in a position to consider what is negotiated, and hopefully pass the Withdrawal Agreement Bill. If there is no deal, they need to have an opportunity to hear what you have to say, and respond accordingly.
>
> 15. From the Government's perspective, it is equally important that key votes associated with the Queen's speech – traditionally seen as matters of confidence – fall at a time when parliamentarians are best placed to judge your programme, and whether to endorse it. If the Queen's Speech is on 14th October, the usual six day debate would mean votes fall on 21st 22nd October. Parliament would have the opportunity to debate your Government's overall approach to Brexit in the run up to the EU Council and then vote on this once we know the outcome of the council. The debate on the Loyal Address can be truncated, but ideally it would be coming to a close anyway immediately after the EU Council.
>
> 16. This does mean there will be a vote risk in mid to late October, but that might also have political benefits: those MPs most anxious about no-deal may welcome the Government facilitating key votes on a known date close to the EU Council, and the chance to table amendments, rather than having to find some peculiar mechanism which tears up convention and parliamentary procedure.
>
> 17. By contrast a Queen's Speech on 8/9th October would put the key votes at the same time as the EU Council – forcing MPs to make critical decisions on the future of the UK government before they've seen the result of the negotiations.
>
> 18. Finally it must be recognised that the situation has become more complicated because prorogation, on its own and separate from a Queen's Speech has been portrayed as a potential tool to prevent MPs intervening prior to the UK's departure from the EU on 31st October. Despite usually being an annual affair, there

> will be nervousness about prorogation even to start a new session. The dates proposed seek to provide reassurance by ensuring that parliament will sit for three weeks prior to exit, and that a maximum of seven sitting days are lost separate of the period usually set aside for conference recess."

13. Ms Da Costa continued by noting that there was no statutory provision governing the length of prorogation but that it is usually under ten days. In the first half of the 20th century it had usually been much longer. There had been five occasions since 1980 when Parliament stood prorogued for more than ten days, the longest being 21 days. The proposal was for prorogation for up to 34 calendar days but "given the expected conference recess period of typically three weeks, the number of sitting days lost by such prorogation would be far less than that: 1–3 sitting days during the week commencing 9th September, and 4 sitting days during the week commencing 7th October." She added that it would be undesirable to leave "wash-up" until after the conference recess or to interrupt it. She concluded by noting that there was no record of the House of Commons sitting in late September or early October since the start of the 20th century.

14. The Prime Minister placed a tick against the recommendation and added a short covering note:

> "1. The whole September session is a rigmarole introduced … to show the public that MPs were earning their crust
>
> 2. So I don't see anything especially shocking about this prorogation
>
> 3. As Nikki notes, it is OVER THE CONFERENCE SEASON so that the sitting days lost are actually very few."

Statutory Control of the Brexit Process

15. The European Union Referendum Act 2015 a referendum to be held on continued membership of the European Union. It was held on 23 June 2016. The result was a majority for leaving the European Union. A Member State must initiate the process prescribed under Article 50 of the Treaty of the European Union to achieve exit. The period specified between giving notice and departure is two years, unless extended by mutual agreement. The question arose whether primary legislation was required to authorise the giving of notice or whether the Government could use prerogative powers to do so. The Supreme Court decided that statutory authority was required: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 ("*Miller No.1*").

16. Parliament thereafter enacted the European Union (Notification of Withdrawal) Act 2017 which provided the Prime Minister with the necessary legislative

authority. On 29 March 2017 the Prime Minister gave notification of the intention of the United Kingdom to leave the European Union pursuant to Article 50(2). Its effect was that unless time was extended the United Kingdom would leave on 29 March 2019.

17. The next legislative step was the European Union (Withdrawal) Act 2018. It makes provision for the repeal of the European Communities Act 1972 and (in broad terms) for the retention in domestic law of much European Union law on exit day. Exit day was defined in section 20(1) as 29 March 2019, but that date could be extended by regulation made by statutory instrument. Section 13 requires parliamentary approval of the outcome of negotiations between the United Kingdom Government and the European Union. It was in those circumstances that the House of Commons eventually came three times to reject the withdrawal agreement concluded between the Government and the European Union.

18. On 20 March 2019, following a failure to secure parliamentary approval of the deal, Mrs May sought an extension of the Article 50 period. The European Council approved an extension until 22 May if the deal were to be approved by Parliament but only to 12 April if it were again rejected. The necessary regulations were made to redefine "exit day". Given Parliament's continued rejection of the deal, the extension was the shorter of the two. It was in those circumstances that Parliament enacted the European Union (Withdrawal) Act 2019 which empowered the House of Commons to require the Prime Minister to seek a further extension of the Article 50 period to a specified date. In accordance with the statutory provisions, the Government sought an extension to 31 October which was agreed by the European Council on 10 April 2019. The necessary regulations to redefine "exit day" for the purposes of the European Union (Withdrawal) Act 2018 were made the following day.

Recent Developments

19. The central contention of the claimant set out in her witness statement is that "the purpose of the prorogation is to prevent or frustrate Parliament from holding the Government to account and, in particular, from passing legislation that would require the Prime Minister to take steps to avoid the UK leaving the EU without an agreement … under Article 50(3) of [the] Treaty of the European Union."

20. Lord Pannick draws our attention to an interview given by the Prime Minister to Sky News on 30 August 2019 in which he said that "the more our friends and partners think at the back of their minds that Brexit could be stopped, that the UK could be kept in by Parliament, the less likely they are to give us the deal that we need and so that is why I really hope that MPs will allow the UK to do

a deal …". That is said to illustrate the true reason, or at least part of the reason for prorogation: to stop Parliament undermining the negotiations.

21. Political and parliamentary events are capable of moving quickly with the result that legal proceedings, however much expedited, may be outpaced. As we prepare these reasons those events are continuing to develop. Parliament returned on Tuesday 3 September. The Rt Hon Sir Oliver Letwin MP proposed a motion that Members of Parliament should "take control of the Order Paper". That motion passed. On Wednesday 4 September the European Union (Withdrawal) (No. 6) Bill was introduced into the House of Commons and passed all its stages. The Prime Minister opposed it inside and outside Parliament with the argument he had deployed on Sky News. The Bill was sent to the House of Lords. On Thursday 5 September (the day on which we were hearing argument) a motion was passed in the House of Lords that the normal rules on how Lords business runs should be suspended, to allow the remaining stages of the bill to be brought to a conclusion at 17.00 on Friday 6 September. That is what happened. The bill received Royal Assent on Monday 9 September as the European Union (Withdrawal)(No. 2) Act 2019. The Act "makes provision in connection with the period of negotiations for withdrawing from the European Union" including steps that would follow the failure of the European Union and the Government to agree a revised deal in mid-October.

22. On 4 September the Prime Minister failed to secure the agreement of the House of Commons in accordance with the Fixed-term Parliaments Act to hold a general election; and again on Monday 9 September. The Act requires a two thirds majority of Members of Parliament to support a motion to trigger a general election. The other mechanism found in the Act requires the Government to lose a motion of no confidence followed by a failure of the House to pass a motion of confidence. The opposition has decided thus far not to table a motion of no confidence in the Government.

The argument for the claimant

23. Lord Pannick made submissions which he says are informed by and take account of those made by the Interveners. He submits that the Prime Minister's advice to Her Majesty to prorogue Parliament is an unlawful abuse of power, substantially influenced by extraneous and improper considerations, and the court has a duty to intervene on ordinary public law principles, albeit recognising the wide discretion accorded to the Prime Minister. The decision breaches the legal principle of Parliamentary Sovereignty because the effect of prorogation is to remove the ability of Parliament to enact legislation as it sees fit on issues relating to the arrangements for this country to leave the European Union, when time is of the essence, because of the existing deadline of 31 October 2019. Prorogation also prevents Parliament from performing its other

'scrutiny' functions which inform its decisions on this vital issue of public policy.

24. The argument focuses on three issues: Parliamentary Sovereignty; the factual circumstances which Lord Pannick says demonstrate that the claimant's case is well-founded on the merits; and justiciability.

25. The starting point taken by Lord Pannick is his characterisation of the principle of Parliamentary Sovereignty. He submits this is not confined to the principle that the Crown in Parliament is sovereign, and that primary legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. It is a much broader legal principle than that. It entails the right of Parliament to make any law it sees fit and is therefore 'engaged' by a decision of the Executive to advise the Queen to exercise a prerogative power in order to 'prevent or impede' Parliament from sitting and making law as it thinks appropriate.

26. Lord Pannick accepts that in normal circumstances, the exercise of the prerogative does not undermine Parliamentary Sovereignty and there would have to be a manifest abuse of the prerogative power for that to occur. He accepts the Prime Minister has a broad discretion in deciding when to advise the Queen that Parliament should be prorogued. He submits, however, that on the extraordinary facts of this case, there has been such a manifest abuse:

> (1) because of the exceptional length of the prorogation, during a critical period, when time is of the essence;
>
> (2) because the Prime Minister provides no reasonable justification on the facts for requiring a prorogation of such exceptional length; and
>
> (3) because the evidence demonstrates that the decision of the Prime Minister is infected by 'rank bad reasons' for the prorogation, namely that Parliament does nothing of value in September and the risk that Parliament will impede the achievement of his policies, both of which demonstrate a fundamental failure on the Prime Minister's part to understand the principle of Parliamentary Sovereignty.

27. On justiciability, Lord Pannick submits the case law demonstrates that the mere fact that the source of a power is the prerogative, or that the fact that the power is exercised in the form of an Order in Council made by the Queen, on the advice of the Privy Council, does not exclude judicial review. All depends on the context. Further, rather than categorising certain prerogative powers as justiciable, and others as not, the correct approach for the court is to proceed with caution (and sometimes extreme caution) when considering whether there is any legal basis for a complaint, and the 'higher the policy context' the less likely that is to be. Whilst therefore there may be areas where it is inconceivable

that the courts would intervene, the preferable analysis is not to identify or categorise such cases as non-justiciable *per se*, but to identify such cases as ones where there are no appropriate or judicial or legal standards for the court to apply and upon which it could properly be invited to intervene. In other words, Lord Pannick develops a submission that there are no areas of prerogative power into which the courts may not inquire. Nothing is non-justiciable in that sense.

28. He submits, however, that he does not need to go that far in the present case. It suffices to say that only in the most exceptional circumstances should the court conclude that a claim that is otherwise well-founded on the merits, fails for lack of justiciability, and, Lord Pannick submits, this is not such a case. The court might conclude (contrary to the claimant's submissions) that the legal principle of Parliamentary Sovereignty, as identified by the claimant, does not assist her case; or applying that principle, there is no abuse of power and no basis for intervention on conventional public law grounds on the facts. If, however, the claimant's case in these respects is established, as he submits it is, then it cannot be right for the court to say it has no jurisdiction to review the decision under challenge. This would be to deny the claimant a remedy, despite the identification of a relevant legal principle, and the breach of it.

The Interveners

29. As Lord Pannick says, his arguments reflect and encompass what is said on behalf of the Interveners, who support the claimant's grounds for judicial review. We therefore refer more briefly to their submissions.

30. Ms Deok Joo Rhee QC on behalf of the Shadow Attorney General submits that the principle of Parliamentary Sovereignty should protect the freedom of Parliament to scrutinise and introduce new legislation. This requires that the prerogative power to prorogue Parliament be constrained within constitutional limits so as not to frustrate the discharge of Parliament's constitutional role. On the facts of this case prorogation would frustrate the ability of Parliament to carry out its legitimate role to vote on a motion of no confidence under the Fixed-term Parliaments Act 2011. There is also a cogent case that the Prime Minister's decision is vitiated by an improper purpose and/or by improper or irrelevant considerations, that is, to strengthen the Government's negotiating position with the European Union by frustrating Parliamentary activity to 'block' a 'no-deal' exit from the European Union.

31. The Counsel General of Wales is the Law Officer of the Welsh Government, appointed by Her Majesty pursuant to section 49 of the Government of Wales Act 2006. Mr Michael Fordham QC's submissions on the Counsel General's behalf reflect the position of the Welsh Government. Mr Fordham emphasises it is a matter of serious concern that the supervisory and legislative autonomy of Parliament should be suspended at this critical time when it is vital that the

National Assembly of Wales is able to continue its dialogue with Westminster on the United Kingdom's exit from the European Union and for Parliament to continue its scrutiny of executive action. This is a case concerning judicially competent supervision of justiciable executive action to secure executive accountability and legislative autonomy through and in the forum of Parliament under the separation of powers. He submits the Prime Minister's actions in advising Her Majesty enjoy no immunity from the court's supervisory jurisdiction. Where foundational constitutional principles are invoked in judicial review, the courts apply principles of constitutionality little different from those which exist in countries with a written constitution. This means the court is the ultimate arbiter of the constitution. The reason why primary legislation enacted thus far about withdrawal from the European Union has not included provisions to regulate the position as exit day draws closer is because Parliament intended and understood that its ability to act and supervise would remain intact.

32. Sir John Major, through written submissions of his counsel, Lord Garnier QC, supported by a witness statement in which Sir John gives evidence based on his experience as a long-serving Parliamentarian and a former Prime Minister, addresses the question of legitimate and illegitimate purposes in the context of a review of the exercise of prerogative powers of this kind. It is said on his behalf that it is a basic part of the constitutional framework of the United Kingdom that Parliament has the right to make or unmake any law whatever, and it follows from the existence of that right, that Parliament must be permitted to convene and exercise its law-making powers if it wishes to do so. It is unlawful to exercise the power of prorogation if the purpose of doing so is to obstruct Parliament from enacting legislation with which the Prime Minister disagrees or to frustrate it from convening to debate and legislate on an issue at all. The justification for prorogation, that the Prime Minister wishes to advance an ambitious programme of domestic legislation, cannot be a true and complete explanation. There is no reason why Parliament must be prorogued in order for the Government to pursue a legislative programme. Even if that were wrong, it would only be necessary to terminate the existing session and commence a new one, and the new session could commence a few days after the old; certainly there is no practical reason why a five-week period might be needed to meet the stated purpose of prorogation. The inference is inescapable that there is a link between the unexplained length of prorogation and the obvious political interest that the Prime Minister has in there being no activity in Parliament during that time.

33. The Lord Advocate is the Senior Scottish Law Officer. He is, by virtue of his office, a member of the Scottish Government and represents the Scottish Government in litigation before the courts. He has applied to intervene in these proceedings because of the implications of the decision under review for the

interests of the Scottish Parliament and the Scottish Government in the context of the withdrawal of the United Kingdom from the European Union. The Lord Advocate submits that in the factual circumstances of this case, the abuse of power lies in the timing and duration of prorogation, its effect on a fundamental principle – namely accountable government – and the marked absence of any compelling justification offered for its timing and length. In the circumstances, it may be inferred that the purpose of the decision under review is to insulate the Government from Parliamentary scrutiny for what is, in the context of the date of anticipated withdrawal, a significant period of time. In any event, the decision has a disproportionate impact on a fundamental constitutional principle, namely the principle of responsible government, where there is no compelling justification for that impact.

Discussion

34. It is now well established, and was common ground before us, that decisions and actions of the Executive are not immune from judicial review merely because they were carried out pursuant to an exercise of the Royal Prerogative. That was settled by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ("*CCSU*"), in which it was held that the controlling factor in determining whether the exercise of prerogative is subject to review by the courts is not its source but its subject matter.

35. In that case Lord Roskill (at 418B) gave the following description of a number of prerogative powers which he thought could not be subject to review by the courts:

> "Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process."

36. As Lord Pannick observes, matters have moved on since those comments were made by Lord Roskill. In some of the cases mentioned by Lord Roskill the exercise of the prerogative has been regulated by statute. For example, the provisions of the Constitutional Reform and Governance Act 2010 relating to the ratification of treaties, and the provisions of the Fixed-term Parliaments Act 2011 regulating the holding of general elections. In other cases, the courts have now accepted the justiciability of decisions of the Executive relating to the grant of pardons, foreign affairs and national security: see *R v Secretary of State for the Home Department, ex p. Bentley* [1994] QB 349 (grant of pardons); *Lewis v*

Attorney General of Jamaica [2001] 2 AC 50 (prerogative of mercy); *R v Secretary of State for Foreign and Commonwealth Affairs, ex. p Everett* [1989] QB 811 (refusal of passports); *R (Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; [2003] UKHRR 76 (foreign relations/diplomatic representations); approved by the Supreme Court in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697 at [50]ff); *R* (Y*oussef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1457 (the conduct of foreign relations in the UN Security Council).

37. We do not, however, accept the proposition of Lord Pannick, advanced in the course of oral submissions, that the jurisprudential stage has now been reached where there is no longer any exercise of common law prerogative powers which is immune from judicial review, that is to say non-justiciable, but that there are merely areas in which the courts must proceed with caution. Lord Pannick derives that formulation from the following statement of Lord Carnwath in *Youssef* (at [24]) in connection with the decision of the Secretary of State to agree to the proposal of the Sanctions Committee of the United Nations Security Council to place the claimant on a list of persons to be treated as associated with an Islamic terrorist group:

> "The source of [the Secretary of State's] powers under domestic law lay not in any statute but in the exercise of prerogative powers for the conduct of foreign relations. That did not make it immune from judicial review, but it is an area in which the courts proceed with caution …"

38. It is clear, reading that statement in its context, that Lord Carnwath was not there laying down a general proposition applicable to all exercises of common law prerogative powers but was making it by reference to the particular facts and issue in that case. That is apparent from his citation with approval (at [25]) of the following passage in the judgment of Taylor LJ in *Everett* summarising the effect of *CCSU*:

> "The majority of their Lordships indicated that whether judicial review of the exercise of prerogative power is open depends upon the subject matter and in particular upon whether it is justiciable. At the top of the scale of executive functions under the prerogative are matters of high policy, of which examples were given by their Lordships; making treaties, making war, dissolving Parliament, mobilising the Armed Forces. Clearly those matters, and no doubt a number of others, are not justiciable. But the grant or refusal of a passport is in a quite different category. It is a matter of administrative decision, affecting the rights of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases."

39. Lord Carnwath said (at [26]) that the facts in *Youssef* fell somewhere between the two ends of the spectrum indicated by Taylor LJ. He expressly confirmed that the conduct of foreign policy through the United Nations "is clearly not amenable to review in the domestic courts so far as it concerns relations between sovereign states". He went on to say, however, that the distinguishing factor in *Youssef* was that "the Security Council's action, through the 1267 Committee, is directed at the rights of specific individuals, and in this case of an individual living in the United Kingdom". It is indeed notable, as observed by Sir James Eadie, that all the cases relied upon by Lord Pannick as extending the power of the courts to review exercises of prerogative powers to areas which Lord Roskill in *CCSU* thought were non-justiciable concern the impact of the exercise of the power on particular individuals.

40. There are many other statements, in cases binding on this court, that the first question when considering the court's power to review the exercise of prerogative powers is whether the subject matter of the power is non-justiciable. They include *Abassi* at [106(iii)], *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] AC 453 at [105], *Mohammed (Serdar) v Minister of Defence* [2017] AC 649 at [8], [33] and [56] and the cases cited and quoted below.

41. It is central to Lord Pannick's submissions that we should explore the facts first, for the purpose of deciding whether there has been a public law error, and then turn to justiciability; and then in the limited sense of deciding whether "caution" should forestall intervention. We are unable to accept that submission. The question of justiciability comes first, both as a matter of logic and of law.

42. The criteria adopted by the courts for identifying non-justiciable exercises of prerogative power are whether they involve matters of "high policy" or are "political". In this way the courts, whose function it is, have marked out the separation of powers between the judicial and the executive branches of government, a fundamental feature of our unwritten constitution. In the present case the Prime Minister contends that the advice to Her Majesty to prorogue Parliament, which was given effect in the Order in Council of 28 August 2019, was political.

43. The refusal of the courts to review political questions is well established. In *A v Secretary of State for the Home Department* [2005] 1 AC 68, Lord Bingham said (at [29]) in relation to the application of Article 15 ECHR and whether there was a public emergency threatening the life of the nation:

> "The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the

> court. It is the function of political and not judicial bodies to resolve political questions."

44. The issue whether there was a public emergency threatening the life of the nation was justiciable because it arose for consideration under the Human Rights Act 1998; but the principle Lord Bingham articulated reflects the approach of the courts in deciding the question of justiciability of prerogative powers where questions do not arise in a statutory context or which affect individual rights.

45. In *Gibson v Lord Advocate* 1975 SC 136, 144 Lord Keith said:

> "The making of decisions upon what must essentially be a political matter is no part of the function of the Court, and it is highly undesirable that it should be. The function of the Court is to adjudicate upon the particular rights and obligations of individual persons, natural or corporate, in relation to other persons or, in certain instances, to the State."

46. *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390, concerned the question whether the election by the Northern Ireland Assembly of a First Minister and Deputy First Minister was legally valid and raised issues linked to the dissolution of the Assembly under the provisions of the Northern Ireland Act 1998. Lord Bingham said (at [12]):

> "It would no doubt be possible, in theory at least, to devise a constitution in which all political contingencies would be the subject of predetermined mechanistic rules to be applied as and when the particular contingency arose. But such an approach would not be consistent with ordinary constitutional practice in Britain. There are of course certain fixed rules, such as those governing the maximum duration of parliaments or the period for which the House of Lords may delay the passage of legislation. But matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the Crown (whether to grant a dissolution). Where constitutional arrangements retain scope for the exercise of political judgement they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude".

47. Almost all important decisions made by the Executive have a political hue to them. In the present context of non-justiciability, the essential characteristic of a "political" issue is the absence of judicial or legal standards by which to assess the legality of the Executive's decision or action. That is reflected in the last sentence of the passage from Lord Bingham's speech in *A v Secretary of State*

just quoted. It was stated more directly in the joint judgment of Lord Neuberger, Lord Sumption and Lord Hodge in *Shergill v Khaira* [2015] AC 359 at [40]:

> "The issue was non-justiciable because it was political. It was political for two reasons. One was that it trespassed on the proper province of the executive, as the organ of the state charged with the conduct of foreign relations. The lack of judicial or manageable standards was the other reason why it was political."

48. The point was also made elegantly in two decisions of the Divisional Court.

49. *Wheeler v Office of the Prime Minister* [2008] EWHC 1409 (Admin) (DC) concerned the claimant's case that the Government's promise to hold a referendum in relation to the European Union Constitutional Treaty gave rise to a legitimate expectation that a referendum would be held in relation to the Lisbon Treaty. The Divisional Court said at [34]:

> "We have expressed ourselves cautiously on the materiality of those various differences between the Constitutional Treaty and the Lisbon Treaty. We have done so because there is a further and deeper difficulty facing the claimant in relation to this issue. The court is in a position to determine the extent of factual differences between the two treaties, but how is it to assess the materiality of the differences that it finds? Whether the differences are sufficiently significant to treat the Lisbon Treaty as falling outside the scope of an implied representation to hold a referendum in respect of a treaty "with equivalent effect" must depend primarily, as it seems to us, on a political rather than a legal judgment. There are, as Mr Sumption submitted, no judicial standards by which the court can answer the question. The wide spectrum of opinion, both within and outside the United Kingdom, to which the parties have drawn the court's attention with regard to the extent of similarity or difference between the two treaties serves to underline the point."

50. In *McClean v First Secretary of State* [2017] EWHC 3174 (Admin) (DC) the claimant sought permission to review a confidence and supply agreement entered into between the Conservative Party and the Democratic Unionist Party of Northern Ireland. Sales LJ said at [21]:

> "The claimant says that the government had an illegitimate conflict of interest when it made the relevant decisions to enter into the confidence and supply agreement and to announce spending commitments in accordance with it. In my view this is not remotely arguable as a contention of law. In this political context there is no relevant standard of impartiality or disinterestedness which has been breached. The confidence and supply agreement is a political agreement made in a context where some form of political agreement was inevitable and

> indeed required if a stable government was to be formed. All political parties seek to promote particular interests and particular interested points of view. That is the nature of the political process, and the disciplines to which they are subject are the usual political ones of needing to be able to command majorities in the House of Commons on important votes and of seeking re-election at the appropriate time. The law does not super-impose additional standards which would make the political process unworkable."

51. The Prime Minister's decision that Parliament should be prorogued at the time and for the duration chosen and the advice given to Her Majesty to do so in the present case were political. They were inherently political in nature and there are no legal standards against which to judge their legitimacy. The evidence shows that a number of considerations were taken into account. We have summarised them extensively already. They included the need to prepare the Government's legislative programme for the Queen's Speech, that Parliament would still have sufficient time before 31 October 2019 to debate Brexit and to scrutinise the Government's conduct of the European Union withdrawal negotiations, that a number of days falling within the period of prorogation would ordinarily be recess for party conferences, and that the current parliamentary session had been longer than for the previous 40 years. The Prime Minister had also been briefed in Ms da Costa's submission that it was increasingly difficult to fill parliamentary time with appropriate work and, if new bills were introduced, either the existing session would have to continue for another four to six months at a minimum or they would be introduced knowing that they would fall at the end of the session. All of those matters involved intensely political considerations.

52. The principal focus of the claimant's criticism of the prorogation in her witness statement is its duration and what she says is its purpose and impact in preventing or frustrating Parliament from holding the Government to account, including passing legislation that would require the Prime Minister to take steps to avoid the United Kingdom leaving the European Union without an agreement. The interveners express similar criticism and concern. They assert that a period of five weeks between sessions is far more than the few days required and usual. They suggest that the reasonable inference is that it has been motivated, or at least influenced by, the effect that it would have in preventing or frustrating Parliament from passing legislation to prevent the United Kingdom leaving the European Union without an agreement.

53. Sir John Major observed in his witness statement that Members of Parliament vote to approve recess dates. Although they do not meet during recess, other Parliamentary business can continue, and it is possible for Parliament to be recalled. This underscores Lord Pannick's submission that prorogation and

recess are very different creatures; and supports his contention that, in public law terms, having regard to the possibility of the recess was irrational.

54. All of these arguments face the insuperable difficulty that it is impossible for the court to make a legal assessment of whether the duration of the prorogation was excessive by reference to any measure. There is no legal measure of the length of time between Parliamentary sessions. There is not even a constitutional convention which governs the matter, albeit that constitutional conventions are not justiciable: see *Miller No. 1* at [136] and following. The skeleton argument for the Prime Minister notes that there have been a number of occasions in modern times during which Parliament was prorogued for a lengthy period. It was, for example, prorogued on 1 August 1930 until 28 October 1930; on 18 September 1914 until 27 October 1914 and then further prorogued until 11 November 1914; and on 17 August 1901 until 5 November 1901.

55. Those facts also highlight that Parliament may be prorogued for various reasons. There is no statute, other law or any convention which requires Parliament to sit in constant session. The purpose of prorogation is not limited to preparing for the Queen's Speech. We have noted that under The Meeting of Parliament Act 1797 and The Prorogation Act 1867 there can be a proclamation shortening or extending the period of prorogation. Prorogation has been used by the Government to gain a legislative and so political advantage. One of the most notable examples of that was its use to facilitate the speedy passage of what became the Parliament Act 1949. Under section 2 of the Parliament Act 1911 a non-money Bill could only be enacted without the consent of the House of Lords if it was passed in three successive sessions by the House of Commons. In order to procure the speedy enactment of the 1949 Act the Government arranged for a session of minimal length in 1948. Parliament was prorogued on 13 September 1948 to the following day. Following the passage of the Parliament Bill by the House of Commons, it was then prorogued again on 25 October 1948. Accordingly, even if the prorogation under consideration in the present case was, as the claimant and the interveners contend, designed to advance the Government's political agenda regarding withdrawal from the European Union rather than preparations for the Queen's Speech, that is not territory in which a court can enter with judicial review.

56. In his reply to Sir James' submissions, Lord Pannick said "this case is concerned with the question of how long the prorogation should be". If the purpose or primary purpose of prorogation is to undertake preparations for the Queen's Speech, it would still be impossible for the court to state whether the period of prorogation is excessive. That would require the court to examine and assess how much time it was legitimate for the Government to spend on its preparations in relation to each aspect of its proposed legislative programme,

the detail of which has not been made public. There is no legal measure by which the court could form a proper judgment on that matter. That too is purely political.

57. Moreover, it is impossible for the court to assess by any measurable standard how much time is required "to hold the Government to account", including passing legislation that would require the Prime Minister to take steps to avoid the United Kingdom leaving the European Union without an agreement. That has been graphically highlighted by the speed with which the European Union (Withdrawal) (No. 6) Bill was enacted. As we have already mentioned, it completed all its parliamentary stages between Wednesday 4 and Friday 6 September 2019 and received Royal Assent on Monday 9 September 2019. The ability of Parliament to move with speed when it chooses to do so was illustrated with clarity and at the same time undermined the underlying premise of the cases advanced by both the claimant and the interveners, namely that the prorogation would deny Parliament the opportunity to do precisely what it has just done.

58. Lord Pannick sought to circumvent those difficulties in the claimant's case, and to cut through what is a consistent approach found in many cases by advancing a novel and sophisticated argument resting on Parliamentary Sovereignty. The argument has a number of strands, as broadly described earlier:

(1) One of the fundamental principles of our constitution is Parliamentary Sovereignty, which can be traced back to the Case of Proclamations (1611) 12 Co Rep 74; *Miller No. 1* at [43] and the other cases mentioned in *Miller No. 1* at [45], [48] and [51], *British Railways Board v Pickin* [1974] AC 765 at 798H-799A, the Bill of Rights 1688 and the Scottish Claim of Right Act 1689.

(2) Parliamentary Sovereignty entails the right of Parliament to make any law it sees fit (*Miller No. 1* at [43]), and both the Government and the Prime Minister are subordinate to Parliament (The Cabinet Manual at [1]-[2] and *Miller No. 1* at [45]). Parliament has a constitutional responsibility to hold the government to account.

(3) There is an inextricable link between Parliamentary Sovereignty and the Rule of Law. That is because Parliament makes laws, courts exist in order to ensure (among other things) that the laws made by Parliament are applied and enforced, including ensuring that the Executive carries out its functions in accordance with the law. The people have a right to unimpeded access to the courts, without which the work done by Parliament may be rendered nugatory and the democratic election of Members of Parliament may become a meaningless charade (*R (UNISON) v Lord Chancellor* [2017] 3 WLR 409 at [68]).

(4) Irrespective of any political accountability of the Prime Minister and of the Government to Parliament, the courts have a constitutional duty fundamental to the Rule of Law to enforce rules of constitutional law (see the judgment of the Divisional Court in *Miller No. 1* at [2016] EWHC 2768 (Admin), [2018] AC 61 at [18] and *R v Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] 2 AC 513 at 572E-H).

(5) Prorogation may, depending on the facts and circumstances of the case, amount to a breach of Parliamentary Sovereignty insofar as it prevents Parliament from deciding what the law of the land should be and is not reasonably necessary to fulfil the proper objective of prorogation (adopting the test in the *UNISON* case at [80]).

(6) This provides a proper legal measure which the courts can apply to determine on the facts of the present case the legality of the advice on prorogation. It is different from dissolution to enable a general election to take place, which was a personal prerogative of the Crown at common law prior to the Fixed-term Parliaments Act 2011.

(7) Applying that measure, the advice was unlawful and an abuse of power because Parliament will be silenced for far longer than is necessary to prepare for the Queen's Speech. That is the purpose, or at least the stated purpose, for the prorogation. No explanation has been given by the Prime Minister in these proceedings which justifies the length of the prorogation. It is a reasonable inference from the evidence, including the fact that different justifications have been given publicly by the Prime Minister for the prorogation and its length, that the advice to Her Majesty was motivated or at least influenced by improper considerations. They showed a misunderstanding of Parliamentary Sovereignty and Parliament's role, namely its function of considering, debating and enacting such laws as it sees fit. Such improper considerations included the Prime Minister's dislike of the views of Members of Parliament, his concern that Parliament might undermine the Government's strategy in negotiating an exit deal and his impression of Parliament as a potential threat to his policy of exiting the European Union whether or not a deal can be done – "do or die, come what may".

(8) It is not, therefore, necessary in the present case to say how long the prorogation should be to be lawful and it is irrelevant that there may be some limited opportunity for Parliament to conduct its affairs prior to 31 October 2019.

(9) The fact that the decision to prorogue was incorporated in an Order in Council does not make it non-justiciable (*Bancoult* at [35], [71], [105] and [141]). The order could be quashed or revoked and Parliament recalled, but in any event the Prime Minister accepts that, if the advice to Her Majesty was unlawful, he will take the necessary steps to comply

with the terms of any declaration made by the court making a quashing order unnecessary.

59. We shall return to Sir James' submission that Lord Pannick's expansive description of Parliamentary Sovereignty is incorrect in going well beyond the principle that the Queen in Parliament is sovereign in the sense that it may enact whatever it wishes by way of primary legislation, subject to its own self-imposed restraints such as the European Communities Act 1972 and the Human Rights Act 1998. We consider that the analysis advanced on behalf of the claimant (and interveners) founders for other reasons.

60. In the first place, alongside the principle of Parliamentary Sovereignty, the separation of powers, reflecting the different constitutional areas of responsibility of the courts, the Executive and Parliament, is also a fundamental principle of our unwritten constitution. As we have said earlier, the line of separation is set by the courts in the present context by reference to whether the issue is one of "high policy" or "political" or both. In the circumstances and on the facts of the present case the decision was political for the reasons we have given. Secondly, the purpose of the power of prorogation is not confined to preparations for the Queen's Speech. It may be used for a number of different reasons, as, on the evidence, it has been in the present case. Such reasons may, depending upon the precise facts and circumstances, extend to obtaining a political advantage. Thirdly, again as we have already said, even if the prorogation in the present case must be justified as being to enable preparations for the Queen's Speech, the decision how much time to spend and what decisions to take for such preparations is not something the court can judge by any measurable standard.

61. The concept of Parliamentary Sovereignty recognises that the Queen in Parliament is able to make law by primary legislation without legal restraint, save such restraint as it has imposed on itself for the time being. Parliament cannot bind its successors, but the prime example of self-imposed restraint is found in the European Communities Act 1972 which cedes primacy over statute to European Union law. This concept of Parliamentary Sovereignty was discussed in *Jackson v Attorney General* [2006] 1 AC 262 by Lord Bingham at [9] and Lady Hale at [159]. The interpretation of legislation is for the courts which seek to give effect to the intention of Parliament divined from the statutory language, examined in accordance with established principles of statutory interpretation.

62. Lord Pannick relies upon the passage at [68] in Lord Reed's judgment in the *UNISON* case to support the novel and wider legally enforceable concept of Parliamentary Sovereignty. Lord Reed summarised the functions of Parliament and the courts, noted that amongst the functions of the courts is to ensure that the Executive carries out its functions in accordance with law and that in

principle people must have unimpeded access to the courts. The *UNISON* case was concerned with the introduction by statutory instrument of substantial fees for those commencing proceedings in the Employment Tribunal, the effect of which was to deny access to many potential litigants. That went beyond what was reasonably necessary to fulfil the objective of the legislation which empowered fees to be set. We are unable to extract from the passages relied upon (or the extensive discussion of the Rule of Law and access to justice found in Lord Reed's judgment) the principle contended for by the claimant.

63. Lord Pannick's formulation of a wider legally enforceable concept of Parliamentary Sovereignty, distilled to its essence as an ability to conduct its business unimpeded, runs into similar difficulties in identifying measures against which allegedly offending action may be judged. Moreover, there is another fundamental objection to expanding the legal concept of Parliamentary Sovereignty in the manner contended for. The expanded concept has been fashioned to invite the judicial arm of the state to exercise hitherto unidentified power over the Executive branch of the state in its dealings with Parliament.

64. The constitutional arrangements of the United Kingdom have evolved to achieve a balance between the three branches of the state; and the relationship between the Executive and Parliament is governed in part by statute and in part by convention. Standing Orders of both Houses elaborate the procedural relationship between the Executive and Parliament. This is territory into which the courts should be slow indeed to intrude by recognising an expanded concept of Parliamentary Sovereignty.

65. The spectre was raised in argument of a Government seeking to rule without Parliament or, at the least, dispense with its sitting for very lengthy periods. A series of technical arguments was raised by Sir James to point to the practical impossibility of such a course, including the need for the vote of funds to govern and the need annually to extend the Armed Forces Act 2006.

66. We do not believe that it is helpful to consider the arguments by reference to extreme hypothetical examples, not least because it is impossible to predict how the flexible constitutional arrangements of the United Kingdom, and Parliament itself, would react in such circumstances.

67. For completeness, we note that there is nothing in *Miller No. 1*, which concerned very different issues and ultimately rested on statutory interpretation, that is inconsistent with what we have said. The same is true of the *Fire Brigades Union* case. We also agree with Sir James that *Bobb v Manning* [2006] UKPC 22, which is relied upon by the Counsel General for Wales, and concerned, among other things, whether the decision of the respondent Prime Minister of the Republic of Trinidad and Tobago not to call for a dissolution was unlawful and contrary to the constitution, is against the claimant rather than in her favour.

The Judicial Committee of the Privy Council rejected that challenge on the ground that the respondent "was entitled to exercise his informed and political judgment".

Conclusion

68. For all these reasons we concluded that the claim must fail. In our view, the decision of the Prime Minister to advise Her Majesty the Queen to prorogue Parliament is not justiciable in Her Majesty's courts.