R v The Prime Minister; Cherry and Others v Advocate General for Scotland

In the Supreme Court of the United Kingdom

Before Lady Hale, President; Lord Reed, Deputy President; Lord Kerr; Lord Wilson; Lord Carnwath; Lord Hodge; Lady Black; Lord Lloyd-Jones; Lady Arden; Lord Kitchin; and Lord Sales.

Judgment delivered on 24 September 2019 by Lady Hale and Lord Reed giving the unanimous judgment of the Court.

The Hon. D. L. Harper AM

Former Judge of the Court of Appeal of the Supreme Court of Victoria

In this judgment, the Supreme Court of the United Kingdom held that an Order in Council by which the Queen purported to prorogue the UK Parliament from mid-September to mid- October 2019 was unlawful. It is therefore not surprising that the Court described it as of 'grave constitutional importance'.[1] It is likely to be important in Australia as well. It is also of interest because it has been characterised by the conservative media as something it is not. An analysis of both its importance and its limitations might therefore be of interest.

On 27 August 2019 (or possibly the following day; the date of the relevant conversation is not clear) the UK Prime Minister, Boris Johnson, advised the Queen that the UK Parliament should be prorogued for a period of about five weeks: from a date between 9th and 12th September until 14 October. The Queen was bound to accept that advice, and did so. On 28 August a meeting of the Privy Council was held at Balmoral, and the

[1] Supreme Court judgment, paragraph 26.

necessary Order in Council was made. The issue before the Supreme Court was whether that Order was lawful.

The Prime Minister's lawyers argued that

> *… the court should decline to consider the challenges with which these appeals are concerned, on the basis that they do not raise any legal question on which the courts can properly adjudicate: that is to say, that the matters raised are not justiciable. Instead of the PM's advice to Her Majesty being reviewable by the courts, they argue that he is accountable only to Parliament. They conclude that the courts should not enter the political arena but should respect the separation of powers.*[2]

On 4 September the Lord Ordinary of Scotland agreed. On appeal, that decision was overturned. The appeal court (the 'Inner House' of Scotland) unanimously held that the advice given to the Queen was justiciable, that it was motivated by the improper purpose of stymying Parliamentary scrutiny of the Executive, and that it and the prorogation which followed were therefore of no effect.

Meanwhile, as soon as the prorogation was announced, a declaration that the advice was unlawful had been sought from the High Court of England. On 11 September that application was refused on the ground that the issue was not justiciable. As in Scotland, the decision was unanimous.

Appeals were brought to the Supreme Court from both lower courts. Those appeals were heard on 17, 18 and 19 September. A unanimous judgment was delivered five days later. The speed with which each of the courts dealt with the matters before them was remarkable.

The power to prorogue Parliament is one of the prerogative powers of the Crown. It is generally exercised, as a matter of course, on the PM's advice. But it is not an unlimited power. As early as 1611, in the *Case of Proclamations,*[3] it was held that Charles 1 could not use any of the Crown's prerogative powers to alter the law: 'The King hath no

[2] Supreme Court judgment, paragraph 28.

[3] (1611) 12 Co Rep74.

prerogative but that which the law of the land allows him'; and just as, in Australia, the courts – not Parliament or the Executive – determine the limits of constitutional power, it is the courts of the UK which decide what 'the law of the land allows'.[4]

It follows, according to the Supreme Court, that the question 'whether a prerogative power exists, and if it does exist, its extent … undoubtedly lies within the jurisdiction of the courts and is justiciable, *as all the parties to these proceedings accept*'.[5] The Court later added that 'it is well established, *and is accepted by counsel for the Prime Minister*, that the courts can rule on the extent of prerogative powers'.[6]

This presented a problem for the PM. It is also a problem for those critics of the judgment who accuse the Court of making new law. The relevant legal principles are long established. And if (i) the courts can rule on the existence and extent of the prerogative powers, and if (ii) the power to prorogue Parliament is one of those powers, how could the PM argue that his advice to the Queen is not justiciable? His lawyers attempted to get around these difficulties by submitting that his decision to seek the Queen's consent to the exercise of the prerogative power was, in the circumstances in which the request was made, so clearly exclusively political that the occasion for judicial intervention did not arise. In that sense, the argument ran, the issue was not justiciable. The PM also relied upon a precedent known as *Civil Service Unions v Minister for the Civil Service*[7] for the proposition that the power to prorogue is an 'excluded category', a category the exercise of which is not challengeable in the courts and is therefore non-justiciable. But (so the Supreme Court held) the *Civil Service Unions* case was distinguishable. Unlike *R v The Prime Minister*, it concerned the lawfulness of the exercise of a prerogative power *within* its lawful limits. That brought it into an 'excluded category'. By contrast, *R v The Prime Minister* concerned the lawful limits themselves.

Another difficulty for the PM's lawyers has its source in the nature and effect of the power to prorogue. The (unwritten) constitution of the UK provides for the sovereignty of Parliament as the sole repository of legislative power, and as the body to which the executive government is accountable. The prerogative power to prorogue Parliament

[4] Supreme Court judgment, paragraph 32.

[5] Supreme Court judgment, paragraph 35 (my emphasis).

[6] Supreme Court judgment, paragraph 52 (my emphasis).

[7] [1985] AC 374.

cannot, therefore, impermissibly restrict either the power to legislate or the ability of Parliament to hold the Executive accountable to it. The question which the Supreme Court had to answer was whether a prorogation of some five weeks constituted, in the circumstances which then obtained, either or both an impermissible restriction on the sovereignty of Parliament or an impermissible restriction on the power of Parliament to hold the Executive accountable to it.

The nature and effect of the prorogation of Parliament is relevant when answering that question. While Parliament is prorogued, neither House can meet. Accordingly, neither House can debate or pass legislation. Nor can either House debate Government policy. No member may ask questions of Ministers. They may not meet and take evidence in committee. In general, Bills which have not yet completed all their stages are lost, and will have to start again from scratch in the next session of Parliament. At the same time, the Government remains in office and can exercise its powers to make delegated legislation and bring it into force. It may also exercise all the other powers which the law permits. Thus:

> … the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Indeed, if Parliament were to be prorogued with immediate effect, there would be no possibility of the PM being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished. In such circumstances, the most that Parliament could do would amount to closing the door after the horse had bolted.[8]

The Supreme Court held that a prorogation of some five weeks:

> … will be unlawful if the prorogation has the effect of frustrating, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[9]

[8] Supreme Court judgment, paragraph 33.

[9] Supreme Court judgment, paragraph 50.

The circumstances which obtain when prorogation is contemplated will inform the issue of its lawfulness. As the Supreme Court noted, the issue before it arose *in circumstances which have never arisen before and are unlikely ever to arise again. It is a 'one off'.*[10] Britain might leave the European Union by 31 October. It might do so without the Union's agreement. This is an outcome about which Parliament has reservations. On 9 September the *European Union (Withdrawal) (No. 2) Act* received the Royal Assent. It requires the PM on 19 October to seek from the European Council, by letter in the form prescribed in a schedule to the Act, an extension of the Brexit date by three months – unless by then Parliament has either approved a withdrawal agreement or approved leaving without one. The Government is bound by that law (although the PM has said that he would rather die in a ditch than seek an extension).

The Supreme Court held that a prorogation of five weeks or thereabouts would have the effect of frustrating the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. Furthermore, there was no reasonable justification for creating that situation.

In coming to this conclusion, the Court took into account the evidence of John Major, the former Prime Minister, who responded to Johnson's claim that a five week prorogation was necessary to prepare for a whole raft of new legislation to be announced in the Queen's speech when Parliament reassembled on 14 October. The former Prime Minister said that about six days was all that was necessary.

Given that the purported prorogation which followed the PM's advice to the Queen did have the effect of unjustifiably frustrating Parliament's ability to carry out its constitutional functions, the Court concluded that it was therefore unlawful and void. In those circumstances it was unnecessary to decide whether the PM had lied to the Queen.

In my opinion, the effect of the judgment is to preserve the constitutionally-protected role of Parliament. That is a result which is consistent with democratic principle. Commentators in *The Australian* see things differently. Henry Ergas, in an article entitled 'Judges May Disagree, but History Backs Boris Johnson',[11] which was published on Friday 27 September, looked back to the 19th century. In that era Parliament was

[10] Supreme Court judgment, paragraph 1.

[11] *The Australian, 27 September 2019, p.12.*

sometimes prorogued for six months at a time. But Ergas does not acknowledge that the UK was different then. It had a much smaller and less active government. No income tax. No social services. A tiny public service. No universal adult franchise. No Government broadcasting its dissatisfaction with an important piece of legislation, binding on the Government, such as the *European Union (Withdrawal) (No. 2) Act.* Ergas castigated the Supreme Court for failing – when under extreme pressure of time – to analyse the use of the prerogative power in the 19th century. The Court acted 'cavalierly' when dismissing the 'key factor' that is 'Parliament's jealously guarded control over appropriations which obliged governments to respect an annual budget cycle' (and, it seems, entitled Prime Ministers to advise the prorogation of both Houses for much of the remainder of the year). Two centuries ago, Ergas points out, Prime Ministers could use prorogation as a means 'for managing deeply divided parliaments. … It was therefore entirely unsurprising that Johnson, who knows British history better than most, turned to the instrument his predecessors so frequently relied on in similar cases – only to have that instrument snatched away'.

The Supreme Court did not proceed to ask whether the PM lied to the Queen. But it had reason to believe that Johnson sought the prorogation not because he thought that a five-week break would result in the healing of Parliament's deep divisions but because, the prorogation being granted, there would not be enough time either before or after prorogation for the Parliament to frustrate a no-deal Brexit on 31 October if Johnson and Europe could not reach an agreement, acceptable to Parliament, in the meantime.

Greg Sheridan, Janet Albrechtsen and Gerard Henderson each see the judgment of the Supreme Court as an assault on the will of the people as expressed in the referendum of 23 June 2016. According to Sheridan, 'What the political class can't get through the ballot box, it is determined to get through the courts or any other institution it controls'.[12]

Janet Albrechtsen has re-named the litigation officially known as *R v The Prime Minister.* For her, a name which is more appropriate because it reflects the bias of the Supreme Court bench is *The People's PM v The Elites*. According to her:

[12] 'The Slings and Arrows of Outraged Elites', *The Australian,* 28-29 September 2019, p.15.

> A cheeky, cranky people who voted to leave the EU will get riled all over again after 11 judges unanimously declared that Johnson's prorogation of Parliament was void. … The Court has handed Johnson more material to present himself as the lead in The People's PM v The Elites with an added responsibility of taking issue with an activist judiciary used by those trying to usurp the democratic will of the people.[13]

Gerard Henderson's article proceeds on the basis that 'most of the electorate is at odds with the position of most of their representatives. … [M]ost Brits decided to exit the EU in June 2016. … The decision of the Supreme Court has damaged the Westminster system of government'.[14]

It is in these circumstances pertinent to examine the cogency of these statements. How well did and does the referendum result reflect the will of the people? If 'the people' means the population of the UK, only 26 percent voted for Brexit. If the electorate equates to 'the people' then only 37 percent of the people voted for Brexit. 'The people' entitled to vote in the Scottish independence referendum of 2014 included those of 16 years of age and older. EU citizens resident in Scotland were also enfranchised. Both classes were included because both had a material interest in the outcome. By contrast, both were excluded from the UK referendum.

It is true that (fractionally under) 52 percent of those who voted on 23 June 2016 opted to leave. But the notion that then or now they were united in wishing for the same Brexit is fanciful. It is certain that some were and are in favour of a 'no deal' departure. It is equally certain that some were not and are not. No Brexit terms were put to the people during the referendum campaign. Nobody knew what terms the EU would accept. The PM was then David Cameron. The PM is now Boris Johnson, who came to office not after the election to government of the party he leads, but pursuant to internal Conservative Party rules. Much has changed since the referendum was held, and a clearer view of the chaos of the process of departure is now available. It is safe to assume that Parliament collectively knows more about the problems and opportunities on offer than the 37 percent who voted to leave. Parliament is opposed to a 'no deal' Brexit. It is also safe to assume that some who voted to leave now wish

[13] 'Boris Puts a Cracker Up the Parliamentary Backside', *The Australian,* 28-29 September 2019, p.21.

[14] 'Britain's Supreme Court Sides with 'European' Progressives', *The Australian,* 28-29 September 2019.

to remain. In June 2016 so little was known about the consequences of departure from Europe that only the 'remainers' knew what they were voting for.

I add that the democratic credentials of the referendum are also besmirched unless it was made clear before the vote that the result would be taken as binding upon Parliament no matter what. The results of referenda which might effect constitutional or other substantial change are not necessarily binding; in Australia, constitutional change requires the approval of a majority of electors in a majority of States. A substantial number of UK electors who voted to leave, or who failed to vote, may have voted to remain had they been aware that a minority of those entitled to vote, being a bare majority of actual voters, could compel the nation to leave without any agreement between the UK and the EU, or with an agreement the terms of which were entirely unknown.

In any event, it is very poor journalism, and unethical politics, to posit that Brexit on 31 October 2019, with or without any presently concluded agreement with the EU, is the will of 'the people'. An attack on the Supreme Court on the basis that it not only engaged in politics but, being so engaged, acted not in accordance with the law but on behalf of the 'elites' and thus 'usurped the will of the people' is in my view an attack so lacking in justification as to demean those who mount it.