Article 50 litigation—putting a spotlight on the UK’s constitution

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Public Law analysis: With government arguing that the principles of international law allow prerogative powers to unmake treaties, and claimants defending the sovereignty of Parliament, Article 50 TEU has thrown light onto the UK constitution. James Libson and Katy Colton of Mishcon de Reya survey the arguments already heard, and what might lie ahead in the government’s appeal.

Original news
R (on the application of Miller and another) v Secretary of State for Exiting the European Union (George Birnie and others intervening) [2016] EWHC 2768 (Admin), [2016] All ER (D) 19 (Nov)

The Divisional Court held that the defendant Secretary of State did not have power under the Crown’s prerogative powers to give notice pursuant to Article 50 of the Treaty on European Union for the UK to withdraw from the EU. That was based on constitutional principles including that the Crown could not use its prerogative powers to alter domestic law and the prerogative powers operated only on the international plane.

What were the key arguments raised?

The sole question in the case was whether, as a matter of constitutional law, the government, acting under royal prerogative powers, can give notice under Article 50 TEU for the UK to leave the EU.

The claimants’ position was that the royal prerogative cannot be used to trigger Article 50 TEU, because the triggering of Article 50 inevitably would result in fundamental rights enacted by Parliament being swept aside once the withdrawal process is completed. It is a fundamental principle of the UK constitution that the Crown’s prerogative powers cannot be used to diminish or abrogate rights unless Parliament has given such authority. There is no express wording in the European Communities Act 1972 (ECA 1972) or subsequent legislation which confers such authority.

The government argued that the conduct of international relations, including the making and unmaking of treaties, is a matter for the Crown in the exercise of its prerogative powers. There is no express wording in ECA 1972 which abrogated the Crown’s use of prerogative powers in relation to the EU Treaties. The government further argued that as a withdrawal treaty would contain a provision requiring ratification by Parliament, it follows that Parliament will in effect have the opportunity to authorise the withdrawal.

What were the strongest and weakest lines of argument (in your personal assessment)?

The key argument of the government—that it could rely on prerogative powers to alter domestic law—flies in the face of the long-established and fundamental principle of Parliamentary sovereignty. While the government sought to rely on the Crown’s powers to make international treaties to circumvent the doctrine of Parliamentary sovereignty, this ignored the extraordinary nature of the issue to be decided. The Crown usually cannot and does not alter domestic law in its conduct of international relations. Yet, as the parties agreed, the triggering of Article 50 would have a profound effect on the rights enjoyed by UK and British citizens under domestic law. Only Parliament can prescribe or alter these rights.

In addition, the argument that Parliament will ratify any withdrawal agreement is equally flawed. By the time a withdrawal agreement has been reached, the Crown will have circumvented Parliament and decided which (if any) EU rights will be kept and which will be revoked. Parliament would be constrained to either ratify the withdrawal agreement—however inadequate it considers it to be—or face the complete removal of all rights of UK citizens under the EU Treaties when the two year period for negotiating a withdrawal agreement with the EU expires.

What happens now that the judgment has been delivered and what other legal issues might be contested as part of the litigation?

The government has confirmed that it will appeal.
During the hearing before the Divisional Court, the government accepted that:

- triggering Article 50 TEU will have profound consequences for the rights of citizens, and
- a notice under Article 50 TEU is irrevocable and cannot be conditional

The government is therefore extremely unlikely to be able to change its position on these key points. Instead, it is likely that the appeal will focus on whether the European Union Referendum Act 2015 conferred authority on the Crown to withdraw from the EU without further Parliamentary approval.

*Interviewed by Julian Sayarer.*

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