European and External Relations Committee

Article 50 Treaty on European Union lawsuit and Scotland

Briefing paper by Professor Sionaidh Douglas-Scott

1. Some background on the legal action

A legal action has been lodged against the government, following the EU referendum result, to try to ensure Article 50 TEU is not triggered without an Act of the UK Parliament. This law suit is *The Queen (on the application of (1) Gina Miller (2) Deir Tozetti Dos Santos) v The Secretary of State for Exiting The European Union*.[1] This case will be heard on 13th and 17th of October 2016. The lead claimant solicitors are Mishcon de Reya who have instructed barristers, including Lord David Pannick QC, but others are also involved. Some have described this case as the most important constitutional case for at least a generation.

Art 50(1) simply states that 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.' The question is what form these 'constitutional requirements' take in the UK. The basis of the legal action is that the 'constitutional requirements' require that responsibility for triggering Art 50 TEU, and thus starting the Brexit process, falls to all members of the UK Parliament, rather than the Prime Minister or government acting through the Prerogative.[2]

At the initial administrative hearing for this case in July, Prime Minister May's counsel confirmed that she would not invoke Article 50 until 2017. The case is listed to be heard in the Divisional Court (ie High Court, London) in October by John Thomas, who is the Lord Chief Justice of England and Wales, the Head of the Judiciary and President of the Courts of England and Wales (and most senior judge outside of the UK Supreme Court). He will hear it in a specially-convened Divisional Court (probably with two other judges). All agreed that the case should be concluded speedily, and, if necessary, proceed to the Supreme Court on a fast-track basis, to be heard in or by December.

Also joined as interested parties are 'The People's Challenge Interested Parties', (PCIP) who are a number of UK and EU citizens living in England, Gibraltar, Northern Ireland, Scotland and Wales, as well as British citizens located in France. They are supported by funding raised through the crowdfunding platform, Crowdjustice. On 23 September 2016, the PCIP publicly released their skeleton argument for the Article 50 litigation. They

[1] Interested parties – (1) *AB and a child and others* and (2) *Grahame Pigney and Others* have also been joined to the action ('The People's Challenge Interested Parties') ,and there is also an intervener, named as 'George Birnie and others'.

[2] In brief, the Royal Prerogative comprises those powers officially held by the Queen, but in reality exercised by government ministers, that enable decisions to be taken without the backing of, or consultation with, Parliament

were the first to publish their arguments, but on 28 September the Government published their 'grounds of resistance' which are available here.[3]

Until 28 September, the Government refused to publish their grounds of resistance to the claim and indeed required the other parties to redact any reference to them in their own skeleton arguments. Following an application made to the High Court by Bindmans on behalf of the People's Challenge (available here) the High Court required the government to disclose their case for resisting the Article 50 challenge.

2. The People's Challenge Interested Parties' skeleton argument

The PCIP skeleton argument for the substantive hearing can be read here. It should be stressed that much of their argument overlaps with arguments made by the lead claimants Miller and Dos Santos, as they make clear, so it should not be thought that PCIP are making a singular case. But, in the absence of publication of other claimants' skeleton arguments, it is useful to refer to PCIP, to get a flavour of the nature of the legal challenge.

In summary, the PCIP argue that an Act of Parliament is necessary before Article 50 TEU can be triggered, because any use of executive prerogative power to trigger Article 50:

(1) has been removed by constitutional statutes;

(2) does not extend to removing fundamental citizenship rights; or

(3) would, in any event, be abusive if it were exercised to trigger the UK's withdrawal from the EU (assuming it subsists and extends to removing fundamental rights).

Briefly, the Government's response is that it is perfectly proper to use the prerogative in these circumstances, that in any case this matter is not justiciable being a matter of the highest policy reserved to the Crown, and further, the relief sought is constitutionally impermissible as it intrudes on parliamentary privilege.

To keep this briefing short, it focusses on those aspects of the arguments which are specifically of relevance to Scotland.

Argument in brief

In essence, the arguments are clustered around their first point, ((1) above[4]) that there is no prerogative power to trigger Art 50 TEU.

While PCIP acknowledge that there is no express statutory prohibition on using the prerogative to trigger withdrawal from the EU, they assert that there are several statutes by which Parliament has occupied the field of giving (or

[3] It is actually highly unusual to publish a skeleton argument.
[4] This is how they are presented in the Skeleton argument. However, there are also clearly devolution aspects to points (2) and (3) which could be further developed.

withholding) effect from EU Treaties in UK law. The existence of this legislation therefore removes any residual prerogative power 'by necessary implication'. Given this, use of prerogative would frustrate or substantially undermine the terms[5] of these statutes. As David Pannick, counsel for the lead claimant, put the argument in *The Times*, 'Article 50 notification commits the UK to withdrawal from the EU, and so is inconsistent with the 1972 act. Withdrawal is the object of the notification, and it is the legal effect. If, at the end of the negotiating period, parliament disagrees with the withdrawal which flows from the notification, there is nothing parliament could then do to prevent our withdrawal from the EU, which would frustrate the 1972 act. Therefore prerogative powers may not now be used.'[6]

In addition to UK-wide statutes (such as the ECA 1972 and EU Act 2011) the Devolution statutes, the Acts of Union and Good Friday agreement are also relevant in giving or withholding effect from the EU treaties in UK law, and hence there is a clear Scottish, (or devolution) angle to this litigation.

3. The argument relevant to Scotland explained in greater detail

This section sets out in more detail the arguments to be fund in the skeleton argument specifically concerning Scotland/devolution.

a) The devolution settlement across the UK is predicated on EU law

The devolution settlement across the UK is predicated on, indeed expressly defined by, the application of EU law. The devolution statutes provide for devolved governments (concurrently with the UK government) to observe, transpose and implement EU law, and preclude the devolved governments from legislating or acting in a manner contrary to EU law. The Scottish Parliament may not enact legislation which 'is incompatible ... with EU law' (s. 29(2)(d) Scotland Act 1998). Also the Belfast Agreement of 10 April 1998 (the so-called 'Good Friday Agreement') is premised on the UK's (and Republic of Ireland's) continued membership of the EU.

Many areas of devolved competence are shaped by the UK's EU's obligations, e.g. in relation to fishing, agricultural policy, environmental protection, the administration of EU structural funds, and public procurement.

In passing the devolution statutes, Parliament has relied on, and referred to, the implementation of, and continuing compliance with, EU law as a permanent feature of the internal constitutional arrangements between Westminster and the devolved legislatures and governments.

Only Parliament can change those arrangements. (And in doing so could normally be expected to comply with the Sewel Convention.[7])

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[5] A condition held relevant for displacing the prerogative in *Fire Brigades Union Case* [1995] 2 AC 513.

[6] *The Times*, 30 June 2016.

[7] The Sewel Convention is reflected in the Memorandum of Understanding between the UK Government and the Scottish Government and now also in section 28(8) Scotland Act 1998 –

Given the role of EU law in those legislative arrangements, the use of the prerogative to withdraw the UK from the EU is precluded by necessary implication.

b) Constitutional statutes

Additionally, further strengthening this argument, the ECA 1972, EU Act 2011, and the devolution statutes are 'constitutional statutes', namely they fundamentally alter and affect the constitutional framework of the UK. The courts have suggested a degree of entrenchment against repealing constitutional statutes (e.g. Laws LJ in *Thoburn v Sunderland City Council* [2003] Q.B. 151, paras 56-57) meaning that if Parliament wished to override such legislation it must explicitly state that the earlier, constitutional, statute is being overridden. Therefore constitutional statutes, which cannot be overridden even by Parliament except by express words must, on the same logic, be incapable of being overridden by the prerogative power alone.

c) The Acts of Union

The Acts of Union (the Union with Scotland Act 1706 and the Union with England Act 1707) are also relevant. These are also 'constitutional statutes'.

This is because there is a specific restriction in the Acts of Union concerning modifications to private law in Scotland. Article XVIII of the Union with Scotland Act 1706 harmonized trade laws in Scotland and England but otherwise put in place protection for the separate Scottish legal system following the creation of a unified Parliament.

The effect of Article XVIII is that the law of Scotland is only alterable by Parliament, subject to a distinction between public law and private law, namely that any alteration to Scots private law may be made only where Parliament determines that such alteration is for *the evident utility* of the people of Scotland.

The UK's withdrawal from the EU would result in a series of modifications to private law in Scotland (for example to employment rights and consumer rights derived directly from EU law). Under the terms of Article XVIII Act of Union, such alterations to Scots private law can only be made by Parliament *and* must be for the evident utility of the people of Scotland. The use of the prerogative to trigger the UK's withdrawal from the EU, with the inevitable consequences that follow from that, would modify Scots private law, without any decision by Parliament (including those MPs elected by the people of Scotland) that such alteration is indeed for the evident utility of the Scottish people, as required by Article XVIII.

That circumvention of Parliament's specified role in relation to the laws of Scotland is a matter of particular concern given that the result of the EU

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namely that the UK Parliament will not normally (as under section 28(7) of the Scotland Act 1998 it may) legislate on matters affecting the breadth of the devolved institutions' powers, without the consent of the Scottish Parliament.

referendum in Scotland, and subsequent statements by the Scottish Government and Members of the Scottish Parliament and Scottish MPs at Westminster, strongly indicate that the majority of Scots, and their elected representatives, do not consider that withdrawal of Scotland from the EU would be in their interests or for their 'evident utility'. The very purpose of Article XVIII is to protect Scotland's distinct legal identity and to ensure that any alteration to Scots private law is made by Parliament for the benefit of the people of Scotland (i.e. not simply in order to harmonise the position in Scotland with the position in England). EU law, and the individual rights and obligations that flow from it, are now an established part of Scots law - consistently with Article XVIII, it is Parliament that must decide whether to remove those rights and obligations from the law of Scotland.

4. The Government's response on devolution arguments

The Government maintains that the lawfulness of using the prerogative is not impacted by devolution legislation. The conduct of foreign affairs is a reserved matter such that the devolved legislatures do not have competence over it. Devolution legislation assumes the UK to be a member of the EU but does not require it to be so, and does not become unworkable as a result of commencement of withdrawal proceedings.

On the Acts of Union point, the government contends that it has been held that courts have no jurisdiction to consider the question of 'evident utility' arising from Article XVIII (citing eg *Gibson v Lord Advocate* 1975 SC) and also that EU provisions concern public rather than private rights.

For consideration

However, I would draw the Committee's attention to other caselaw in which Scottish courts have found the 'evident utility' provision to be justiciable (eg *Laughland v Wansborough Paper co. l*td 1921 1 SLT 341 and *Stewart v Heny* 1989 SLT).

EU law also most certainly does concern some private law rights (eg consumer protection) which can be exercised against individuals and companies rather than the State or other public bodies.

Moreover, in *Brown & Wright v Governor of HM Prison Saughton* (2003) the English Divisional Court applied Article XIX of the Act of Union, illustrating that the Act of Union is not a dead letter and that even English Courts sometimes apply it.

5. Conclusion: why is this important for Scotland?

This legal action reveals that the legal implications of the June referendum vote start to be felt at the very earliest stages of the Brexit process. Although the point has been made many times that repeal or amendment of domestic legislation to implement Brexit could trigger a LCM, this would be later on in the Brexit process. The legal action makes the charge that there are serious implications for devolution before withdrawal negotiations have even started.

They argue that Parliament must vote or even legislate and that the Prime Minister cannot use executive prerogative power, not just because for her to do so would completely undermine the ECA 1972, but because it would completely undermine devolution legislation and Acts of Union.

The Herald, 28 September, reported Nicola Sturgeon as saying that her administration was 'keeping a very close eye' on the court actions and would assess as they proceeded whether or not Edinburgh would become directly involved.

It should be stressed that, should the claimants win the case, this does not necessarily mean that Brexit will be voted down by Parliament or blocked. Parliament could agree Art 50 should be triggered, but could also set conditions on how the Government acts. Such legislation could also set conditions relevant for Scotland. This is a further reason why this law suit is important for Scotland.

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