Appeal nos: UKSC 2019/0192 & 2019/0193

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM HER MAJESTY'S HIGH COURT OF JUSTICE (ENGLAND AND WALES)
QUEEN'S BENCH DIVISIONAL COURT (ADMINISTRATIVE COURT)
NEUTRAL CITIATION: [2019] EHWC 2381 (QB)
LORD BURNETT OF MALDON CJ, SIR TERENCE ETHERTON MR & DAME VICTORIA SHARP P

BETWEEN:

THE QUEEN

(on the application of GINA MILLER)

Claimant/Appellant

-and-

THE PRIME MINISTER

Defendant/Respondent

AND ON APPEAL FROM THE INNER HOUSE OF THE COURT OF SESSION
THE LORD PRESIDENT; LORD BRODIE & LORD DRUMMONG YOUNG
NEUTRAL CITATION: [2019] CSIH 49

BETWEEN:

JOANNA CHERRY MP QC AND OTHERS

Petitioners/Respondents

-and-

THE ADVOCATE GENERAL FOR SCOTLAND

Respondent/Appellant

CASE FOR THE PRIME MINISTER AND ADVOCATE GENERAL FOR SCOTLAND

INTRODUCTION

1. Pursuant to the Prime Minister's advice ("**the advice**"), Her Majesty approved an Order in Council ("**the Order in Council**") on 28 August 2019 proroguing Parliament from a day no earlier than 9 September 2019 and no later than 12 September 2019 until 14 October 2019.

2. On 6 September 2019, the Divisional Court (Lord Burnett of Maldon CJ, Sir Terence Etherton MR and Dame Victoria Sharp P) dismissed the English Appellant's ("**the Appellant's**") claim for judicial review of the advice, for the reasons contained in a unanimous judgment ([2019] EHWC 2381 (QB)) handed down on 11 September 2019 ("**the English Judgment**"). It concluded at §85 that "*the decision of the Prime Minister to advise Her Majesty the Queen to prorogue Parliament is not justiciable in Her Majesty's courts.*"

3. On 11 September 2019, the Inner House of the Court of Session (the Lord President, Lord Brodie and Lord Drummond Young) recalled an interlocutor of the Outer House pronounced by Lord Doherty ([2019] CSOH 70, "**the Lord Ordinary's opinion**") dismissing the Scottish Petitioners' ("**the Petitioners'**") petition for judicial review and declared the advice and any prorogation following it to be unlawful, for reasons ([2019] CSIH 49) given on 12 September 2019 ("**the Scottish Judgment**").

4. Between the hearings before the Divisional Court and the Inner House and the handing down of the English and Scottish Judgments two things of particular note occurred:

   (1) The first is that the Bill which was under consideration by Parliament when the cases were heard (a copy of the Bill as it passed the House of Commons was provided to the Divisional Court) has now been enacted as the European Union (Withdrawal) (No.2) Act 2019 ("**the new Act**"). The fact that it was introduced, debated and has now been enacted by Parliament before the prorogation is of obvious significance and is returned to below.

   (2) The second is that Parliament was in fact prorogued pursuant to the Order in Council by Lords Commissioner reading a commission to both Houses of Parliament on 9 September 2019.

5. The Appellant's and Petitioners' case is that the advice was unlawful because its alleged effect is (and its alleged intention was) to prevent Parliament from considering matters relating to withdrawal from the EU – and in particular from enacting legislation to deal with the possibility of a no-deal withdrawal; and this would undermine the democratic principle on which Parliamentary sovereignty is based.

6. It is submitted, **first**, that the underlying claims are non-justiciable. Both longstanding authority and principle indicate that in some areas, there are no judicial or manageable

standards by reference to which the courts could assess the lawfulness of Ministerial decisions. The exercise of this prerogative power, concerning the length of prorogation, is one of those areas. It is intrinsically one of high policy and politics, not law. For reasons of constitutional propriety, it is assigned to the Executive, subject to control by Parliament through legislation, and not the courts. This is not merely a question of affording decision makers a variable margin of discretion. Moreover, the frequency of sessions of Parliament is not governed by legal rules: it is well settled that the courts do not enforce constitutional conventions, which rest on a careful constitutional and political balance.

7. The controlling principle contended for by the Appellant and the Petitioners (impeding the exercise of Parliament's legislative functions and/or its function of holding the Executive to account) would moreover require the courts to invent a new principle of entirely uncertain scope. This is not the territory in which the courts are adjudicating on rights. The principle contended for would, both in its formulation and application, require the judiciary to adjudicate on classically non-justiciable issues. The Appellant and Petitioners do not identify whether the principle they contend for applies to anything which restricts sitting time in Parliament; whether prorogation must be for the shortest possible time; the factors which would justify a longer or shorter prorogation; or how the courts are to decide which legislation would or might be enacted by Parliament if it did sit. The application of such a principle would involve the courts entering the political arena; and require them (against some unidentified standard) to make judgements about the sufficiency of time for Parliament to legislate on a particular matter, and about the legality of political judgements.

8. **Secondly**, the will of Parliament is expressed in legislation duly enacted by the Queen in Parliament. The Appellant and the Petitioners identify no primary legislation which the advice and the Order in Council contravene or would frustrate. The position is to the contrary: Parliament has regulated its own sittings by legislation in specific contexts (including recently and in the present context by s.3 of the Northern Ireland (Executive Formation etc) Act 2019 ("**NIEFA**"), but not generally, and has expressly preserved the prorogation prerogative. It is not for the courts to devise further, additional controls on Parliamentary sittings beyond those already set out in legislation. That would be a negation, rather than an affirmation, of Parliamentary sovereignty.

9. **Thirdly**, the claim is both academic, and untenable on the facts. Under the terms of s.3 of NIEFA and the Order in Council, Parliament was able to sit after the summer recess until 9 September 2019 and will be able to sit on and after 14 October 2019. Parliament was, and will be able to use that time for any purpose, including legislating at pace, if it wishes. Recent events could not more graphically illustrate that fact: the new Act was introduced, considered and enacted by Parliament before the prorogation even began; and it could have legislated, but did not legislate, to ensure that Parliament continued to sit during the prorogation if that had been Parliament's wish.

10. **Fourthly**, and in any event, the advice given by the Prime Minister to Her Majesty was lawful, and the reasons for prorogation were neither irrelevant nor illegitimate.

THE FACTUAL AND LEGAL CONTEXT

The UK's withdrawal from the EU

11. Section 1 of the European Union Referendum Act 2015 provided for a referendum on the question whether the UK should leave or remain a member of the EU. On 23 June 2016, it was decided by a majority of those who voted in the referendum that the UK should leave the EU.

12. On 24 January 2017, this Court decided by a majority that primary legislation was required in order to authorise a notification of withdrawal under Article 50(2) of the Treaty on European Union ("**TEU**"): see *R (Miller) v Secretary of State for Exiting the EU* [2018] AC 61 ("***Miller***").

13. Subsequently, Parliament passed the European Union (Notification of Withdrawal) Act 2017 ("**the 2017 Act**"). Section 1(1) provides: "*The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.*" This provided the requisite legislative authority for the Prime Minister to notify the intention of the UK to withdraw from the EU under Article 50(2).

14. On 29 March 2017, the then Prime Minister formally notified the EU of the UK's intention to withdraw under Article 50(2) TEU. In accordance with Article 50(3) TEU, the UK's withdrawal would take effect two years after the date of the notification, unless any extension of time was agreed between the UK and the European Council.

15. On 26 June 2018, the European Union (Withdrawal) Act 2018 ("**EUWA**") was enacted. EUWA makes provision for the repeal of the European Communities Act 1972 ("**ECA 1972**") and for the retention in domestic law of, in broad terms, existing applicable EU law following withdrawal on "*Exit Day*". Exit Day was defined in s.20(1) as 29 March 2019. That definition was amended by regulations made under s.20(4) EUWA to 12 April 2019, giving effect to an agreement reached between the Government and the European Council under Article 50(3) to that effect.

16. On 10 April 2019, the Government agreed with the European Council a further extension under Article 50(3) TEU until 31 October 2019. The terms of the formal agreement are set out in European Council Decision 2019/584/EU of 11 April 2019 [2019] OJ L101/1.

17. On 11 April 2019, the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations 2019 were made and came immediately into force. Regulation 2 amended ss.20(1) and (2) of the EUWA in accordance with the terms of the further extension agreement.

18. On 9 September 2019, the new Act was passed. It came into force on the same day (see s.5(5)). This case is not about its terms or precise effect.

19. Two final matters are to be noted. First, no motion of no confidence in the Government has been passed. Second, the Government has twice moved a motion seeking the requisite majority under s.2(1)(b) of the Fixed-term Parliaments Act 2011 ("**FTPA**") for dissolution of Parliament and an early election. The requisite majority was not present on either occasion. No doubt these decisions also reflect the fact that those in Parliament vote in what they or the various represented parties consider to be their own political interests and advantages. There is a series of political battles being fought on a regular basis both within and without Parliament.

Prorogation and the sittings of Parliament

20. Following the dissolution of a Parliament, Her Majesty has power under s.3(4) of FTPA to summon a new Parliament by proclamation to a date appointed therein. Pursuant to ss.I-II of the Meeting of Parliament Act 1694 ("**the 1694 Act**"), which was made applicable to the United Kingdom Parliament by s.VII of the Succession to the Crown Act 1707 ("**the 1707 Act**") and the Union with Ireland Act 1800, a new Parliament must be summoned within three years of the dissolution of the previous Parliament. A

Parliament which has been summoned is dissolved by operation of law 25 working days before the polling day for the next parliamentary general election as determined by FTPA: see s.3(1)-(2) of FTPA.

21. By convention, each Parliament, during its existence, is divided into a number of sessions, which begin with a Speech from the Throne by the Sovereign. The division of a Parliament into sessions is recognised by statute: see, *e.g.*, s.2 of the Parliament Act 1911 and s.2 of the Interpretation Act 1978.

22. Prorogation is a prerogative power of the Crown, exercised by the Sovereign, during the life of a Parliament. The existence of the prerogative has itself been recognised and expressly preserved: see s.VII of the 1707 Act and s.6(1) FTPA. Its exercise is the subject of no legislative regulation or control. By convention, the prerogative of prorogation is exercised on the advice of the Prime Minister as leader of Her Majesty's Government.

23. Prorogation terminates the current Parliamentary session or postpones the date on which a Parliament which has been summoned pursuant to s.3(4) of FTPA or already prorogued would otherwise meet.[1] At the end of the session, it may be done by Her Majesty in person or by the appointment of a body of commissioners by letters patent under the Great Seal of the Realm. The Prorogation Act 1867 ("**the 1867 Act**") applies to prorogation otherwise than at the end of a session (see s.2) and, as the long title indicates, was intended to simplify the means by which prorogation could be effected. Section 1 of the 1867 Act provides that:

> "*Whenever (save as herein-after excepted) Her Majesty shall be pleased, by and with the advice of the Privy Council of Her Majesty, to issue her royal proclamation to prorogue Parliament from the day to which it shall then stand summoned or prorogued to any further day being not less than fourteen days from the date thereof, such proclamation shall, without any subsequent issue of a writ or writs patent or commission under the Great Seal of the United Kingdom, be a full and sufficient notice to all persons whatever of such the royal intention of Her Majesty, and the Parliament shall thereby stand prorogued to the day and place in such proclamation appointed, notwithstanding any former law, usage, or practice to the contrary.*"

24. The 1867 Act therefore shows that Parliament recognised that it is lawful to prorogue Parliament for periods of 14 days or more when Parliament has already been prorogued or is yet to meet. This means that double or even triple prorogations of Parliament can occur. For example, on 17 August 1901, Parliament was prorogued until 5 November that year.

[1] Parliament is also often prorogued immediately before its dissolution.

It was further prorogued by two proclamations until 16 January 1902.[2] Parliament stood prorogued for a total period of 151 calendar days, or nearly 5 months.

25. Blackstone recognised the possibility of prorogations of such length, noting, in relation to the duration of certain parliamentary privileges, that prorogations exceeding 80 days were rare but possible:

> "*These privileges however, which derogate from the common law, being only indulged to prevent the member's being diverted from the public business, endure no longer than the session of parliament, save only as to the freedom of his person: which in a peer is for ever sacred and inviolable; and in a commoner for forty days after every prorogation, and forty days before the next appointed meeting; which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time.*"[3]

26. The length of each session of Parliament and the frequency between sessions is regulated by constitutional convention and expediency and not by law. That was not always so. Under s.6 of the Triennial Act 1641, it was enacted that: "*noe Parliament henceforth to bee assembled shall be dissolved or prorogued within fiftie dayes att the least after the time appointed for the meeting thereof*". That provision was repealed by s.1 of the Triennial Act 1664 expressly on the basis that it was in derogation of the prerogative. Parliament has not subsequently sought to legislate generally in respect of its own sittings.

27. The conventional practice is that there should be a new session of Parliament in each year.[4] The principle is, however, a flexible one. The existing session has, for example, lasted for more than two years (it began on 13 June 2017) and is the longest since the Civil War.

28. Where Parliament desires that it should meet when it stands prorogued, it legislates to that effect:

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[2] *Hansard*, 17 August 1901, vol. 99, col. 1338; *London Gazette*, 4 November 1901, supplement 27371, p.7136; *London Gazette*, 10 December 1901, issue 27385, p.8713.

[3] 1 Com 2.

[4] Parliament incorporated this convention into various Dominion constitutions in the nineteenth and twentieth-centuries: see, *e.g.*, s.20 of the British North America Act 1867; s.6 of the constitution contained in s.9 of the Commonwealth of Australia Constitution Act 1900; s.22 of the Union of South Africa Act 1909; s.11(1) of the Government of Ireland Act 1920; and s.19(1) of the Government of India Act 1935. It has never been placed on a statutory basis in the UK.

(1) Section V of the 1707 Act requires Parliament, when it stands adjourned or prorogued at the time of the death of the Sovereign, to convene immediately thereafter.

(2) Section 52(8) of the Reserve Forces Act 1996 requires, when at the time of a call-out order of reserve forces in case of national emergency Parliament stands adjourned or prorogued for a period of more than five days, that a proclamation be issued within five days for Parliament to meet.

(3) Similar provision is made in relation to emergency regulations by s.28 of the Civil Contingencies Act 2004. (That Act repealed s.1 of the Emergency Powers Act 1920, which had made similar provision for the meeting of Parliament if prorogued when a proclamation of emergency was made.)

(4) Section 8 of the Appellate Jurisdiction Act 1876 (which was repealed by the Constitutional Reform Act 2005) provided that the House of Lords could sit and act to hear appeals during any prorogation of Parliament, but not generally. This was done for the purpose of "*preventing delay in the administration of justice*".

29. The most recent example of such legislation is s.3 of NIEFA. This expressly requires that Parliament meets in the run up to the UK's exit from the EU on 31 October 2019 and specifically addresses the position should Parliament stand prorogued or adjourned within that period. Section 3(1) to (5) of NIEFA provides as follows:

> "*(1) The Secretary of State must, on or before 4 September 2019, publish a report explaining what progress has been made towards the formation of an Executive in Northern Ireland (unless an Executive has already been formed).*
>
> *(2) The Secretary of State must make arrangements for—*
>
> > *(a) a copy of each report published under subsection (1) to be laid before each House of Parliament by the end of the day on which it is published,*
> >
> > *(b) a motion in neutral terms, to the effect that the House of Commons has considered the report, to be moved in the House of Commons by a Minister of the Crown, and*
> >
> > *(c) a motion for the House of Lords to take note of the report to be tabled in the House of Lords and moved by a Minister of the Crown.*
>
> *(3) The motions required under subsections (2)(b) and (c) must be moved in the relevant House by a Minister of the Crown within the period of five calendar days beginning with the end of the day on which the report is laid before Parliament.*

(4) If, as a result of Parliament standing prorogued or adjourned, a Minister of the Crown cannot comply with the obligations in subsection (2) or (3), a proclamation under the Meeting of Parliament Act 1797 shall require Parliament to meet on a specified day within the period within which compliance with subsection (3) is required and to meet on the five following days (other than Saturdays, Sundays or a day which is a bank holiday in the United Kingdom or in any part of the United Kingdom) to allow for compliance with subsection (3).

(5) The Secretary of State shall make a further report under subsection (1) on or before 9 October 2019 and at least every fourteen calendar days thereafter until either an Executive is formed or until 18 December 2019, whichever is the sooner…"

30. Thus:

    (1) If, at a time when a Minister of the Crown is obliged by ss.3(2) or (3) to lay a report before each House of Parliament or to move a motion, Parliament were to stand prorogued or adjourned, a proclamation under the Meeting of Parliament Act 1797 will require Parliament to meet on a specified day and to meet on the five following days (other than Saturdays, Sundays or bank holidays): see s.3(4).

    (2) So long as there is no Executive in Northern Ireland, from a date on or before 4 September until 18 December 2019, reports must be laid before Parliament and motions moved in terms of s.3: see s.3(1) & (5).

    (3) The result is that Parliament will meet regularly in accordance with the timetable laid down in s.3. Moreover, it is evident that, in enacting s.3, Parliament knew that Exit Day was 31 October 2019. It decided to enact s.3 in that light. Section 3 plainly indicates an acceptance by Parliament that it could be prorogued for a period covered by it.

31. The position is therefore that the prerogative itself has been preserved. When Parliament wishes to ensure that it sits it can, and has, made specific provision to that effect. It has not otherwise or generally imposed any legislative control on the exercise of the prerogative power, which is thus for the Executive to exercise unconstrained by such control. The present situation thus does not engage the principle in *Attorney General v De Keyser's Royal Hotel* [1920] AC 508, contrary to what is implied in §17(2) of the Appellant's written case. There has been no statutory scheme occupying the field of the prerogative and thus by necessary implication restricting it; quite the reverse.

The advice to prorogue Parliament

32. The decision to prorogue Parliament is contained in the Order in Council. It provides that:

> "*the Parliament be prorogued on a day no earlier than Monday the 9th day of September and no later than Thursday the 12th day of September 2019 to Monday the 14th day of October 2019, to be then holden for the despatch of divers urgent and important affairs, and that the Right Honourable the Lord High Chancellor of Great Britain do cause a Commission to be prepared and issued in the usual manner for proroguing the Parliament accordingly.*"

33. Under the terms of the Order in Council, the prorogation took effect when the Lords Commissioner read the Commission in Parliament. This occurred on 9 September 2019. It was a proceeding in Parliament. The prorogation includes a period in which both Houses would customarily have been in recess on account of the party conferences.

34. The Order in Council was made on the advice of the Prime Minister. The reasons for that advice are set out in the documents which were disclosed before the court below.

35. Contrary to the suggestion at §8 of the Appellant's written case, it is not (and never has been) asserted that Her Majesty enjoys no personal prerogative in this context or that she is obliged to accept the advice of the Prime Minister. However, this is not an issue which arises for determination on the present appeal. Nor is it a matter for the court. Whether Her Majesty enjoys a personal prerogative in any particular case is a question of constitutional convention, not law. For the reasons given below, the courts have no jurisdiction to determine the scope of, or to enforce constitutional conventions.

The English proceedings below

36. The Appellant's claim for judicial review was issued in the Administrative Court on the day the Order in Council was approved by Her Majesty. A rolled-up hearing, in which the Court considered the Appellant's application for permission to claim judicial review, and if permission were granted, the substance of her claim, was held on 5 September 2019 before a Divisional Court. On 6 September 2019, the Divisional Court ordered that (a) permission to claim judicial review was granted, but (b) the claim was dismissed, for reasons which would follow. On the Appellant's application, the Divisional Court granted a certificate under s.12(3A)(c) of the Administration of Justice Act 1969, permitting a leapfrog appeal to this Court, on the basis that a point of law of general public importance

was involved in its decision and that the benefits of earlier consideration by this Court outweighed the benefits of consideration by the Court of Appeal.

37. In the English Judgment, the Divisional Court held, in summary, as follows:

(1) Decisions of the executive are not immune from judicial review merely because their source is the prerogative. The controlling factor is the subject matter, not the source of the power: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ("***GCHQ***"). While matters had moved on since *GCHQ*, there remained areas in which the exercise of the prerogative was non-justiciable. The correct approach as a matter of law and logic was to assess justiciability first, before exploring the facts for the purpose of identifying any public law error. Exercises of the prerogative involving matters of high policy or politics were non-justiciable. The essential characteristic of a political issue is the absence of judicial or legal standards by which the legality of Executive action can be assessed: §§34-50.

(2) The Prime Minister's advice (a) to prorogue Parliament and (b) for what length were inherently political and there are no legal standards against which to judge its legality. There was no legal measure (or even a non-justiciable constitutional convention) governing the length of time between parliamentary sessions. Parliament had been prorogued for lengthy periods in the modern era. It could be prorogued for various reasons, including for legislative and political gain by the Government, and not simply for the purpose of preparing for a Queen's Speech. Even if the prorogation had been for the purpose of advancing the Government's political agenda on withdrawal from the EU, that would not have been unlawful. Even if the purpose of prorogation were limited to undertaking preparations for a Queen's Speech, it would still be impossible for the court to determine how much time was excessive. It was also impossible to assess by any measurable standard how much time was required to hold the Government to account, including for the purpose of passing legislation on EU withdrawal. That was illustrated by the speed with which the new Act had been passed: §§51, 54-57.

(3) The Appellant's attempt to expand the concept of Parliamentary sovereignty from a power to legislate without restraint into a legally enforceable principle under which Parliament would be able to conduct its business unimpeded provided no answer to the lack of judicial or legal standards. It was also contrary to the principle of the

separation of powers. The Appellant's expanded concept of Parliamentary sovereignty would involve the courts exercising a hitherto unidentified power over the executive in its dealings with the legislature. The spectre of the Government seeking to rule without Parliament or dispense with its sittings for very lengthy period was a practical impossibility and not a helpful basis for testing the arguments: §§58, 60, 62-67.

The Scottish proceedings below

38. On 31 July 2019, the Petitioners lodged their petition at the Court of Session, seeking to challenge any prorogation with the intention and aim of denying before Exit Day any further parliamentary consideration of the withdrawal of the UK from the EU. This was subsequently reformulated in terms of denying sufficient time for proper parliamentary consideration.

39. The Petitioners were granted permission to proceed by Lord Doherty on 8 August 2018. On 4 September, following a hearing on the previous day, the Lord Ordinary refused the relief sought in the petition. He found the exercise of the prerogative power to prorogue Parliament was non-justiciable. That was consistent with the rule of law and required by the separation of powers. Prorogation was consistent with the Claim of Right 1689 and did not render any statutory provision futile. Even if the petition was justiciable, nothing before him had persuaded him the reasons were unlawful ones: Lord Ordinary's Opinion, §§25, 27-28, 30-31, 32, 34.

40. The Petitioners reclaimed to the Inner House. Following a hearing on 5-6 September 2019, the Inner House pronounced an interlocutor on 11 September 2019 recalling the interlocutor of the Lord Ordinary and declaring that any prorogation which followed thereon was unlawful. The Inner House granted the Advocate General for Scotland permission to appeal to this court.

41. In the Scottish Judgment, the Inner House held, in summary, as follows:

    (1) (Lord Drummond Young dissenting) the law recognised a principle of non-justiciability.

    (2) A challenge to a decision to prorogue Parliament was justiciable in the courts if that decision was motivated by a desire to restrict parliamentary sitting time.

(3) It could be inferred on the material before the court the reason for the prorogation in this case was a desire to restrict parliamentary sitting time.

ENGLISH AND SCOTTISH LAW

42. The existence of prerogative powers is recognized in the same way in Scotland as in England, and it has been held at the highest level that their scope is the same. In *Burmah Oil Company v Lord Advocate* [1965] AC 75, the issue was whether compensation was payable for damage to property by the Crown in anticipation of an enemy invasion of British territory. The House of Lords held by a majority that compensation was payable. All of their Lordships were of the view that the answer was the same under the law of England and the law of Scotland: per Lord Reid at 98G-99A, per Viscount Radcliffe at 113F-114A, per Lord Pearce at 157D-E, per Lord Upjohn at 164A-C. As Lord Hodson stated at 139D-E of the contention that English and Scottish law might differ:

    "*Nor would I expect such a contention to be raised seeing that the Crown, in and out of Parliament, occupies the same position and performs the same duties in each of the two realms.*"

43. The utility and appropriateness of there being common principles of public law throughout the UK has been recognized in relation to a number of other issues of general importance. One is the question whether statutes bind the Crown: *Lord Advocate v Strathclyde Regional Council* 1990 SC (HL) 1, 16 per Lord Keith (also reported at [1990] 2 AC 580). Another is the scope of s.21 of the Crown Proceedings Act 1947: *Davidson v Scottish Ministers* 2006 SC (HL) 41. As Lord Upjohn noted in *Burmah Oil* at 164C:

    "*it would be most astonishingly inconvenient if, notwithstanding that England and Scotland have been united since 1707, the Crown had the right to seize and use the property of its subjects on the suspected approach of the enemy if they landed on the south bank of the Tweed on terms different from those if they chose to land on the north bank.*"

44. All of this reasoning applies *a fortiori* to the question whether the prerogative power of prorogation is non-justiciable. It would not just be "*inconvenient"* if different principles, or a different approach, applied as between the jurisdictions. The power relates to the United Kingdom Parliament, and the relationship between the three pillars of the state. There should be commonality of principle and approach.

45. Further, the necessary corollary of the creation of the United Kingdom Parliament by the Acts of Union between (a) England and Scotland and (b) Great Britain and (what is now)

Northern Ireland is that the extent of the prerogative power to prorogue the United Kingdom Parliament, and the question of whether the exercise of that power is justiciable in the courts, must be the same in each part of the United Kingdom.

46. The creation of a single United Kingdom Parliament explains why the law of parliamentary privilege is the same in England as in Scotland. *Per* Lord Reid in *Adams v Guardian Newspapers* 2003 SC 425, at §13:

> "*There is little modern authority in Scotland on the issue of parliamentary privilege; but it was common ground before me, and appears to me to be clear, that the law on this matter is, in general at least (and subject to any divergences arising in consequence of other differences between Scots and English law, eg as to procedure) the same in Scotland as elsewhere in the United Kingdom. No difficulty arises, in particular, from the fact that the Bill of Rights was passed by the Convention Parliament in England and had its Scottish equivalent in the Claim of Right (the latter being less specific on the issue of freedom of speech). As Mitchell explains (at p 125), doctrines of parliamentary privilege were more fully developed in 1707 in England than in Scotland, and it was therefore natural that the greater should be accepted as the basis of the privileges of the Union Parliament (quite apart from the natural tendency of that Parliament to refer to precedents which were familiar to the majority of its members). The assignment of a particular local origin is in any event unlikely to be important, since the current scope of parliamentary privilege depends on wider considerations.*"

The same is true of the prorogation prerogative.

47. The different decisions of the Divisional Court and the Inner House in this case did not result from any substantive difference between English and Scots public law. As the Lord President noted at §51, the Inner House's decision did not depend on "*any speciality of Scots constitutional law*". The law the Inner House purported to apply in this case was the same law, applicable throughout the United Kingdom, which the Divisional Court applied.

<u>NON-JUSTICIABILITY</u>

Generally

48. The exercise of a power is not immune from review simply by virtue of its prerogative source. However, the converse is not true: not all prerogative powers are subject to review simply because they involve the exercise of power. The true principle is that

whether the exercise of a power is reviewable depends on its subject-matter, nature and context.

49. The essential principles were set out in GCHQ, where at 407F Lord Scarman observed that "*the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.*" At 418A-C, Lord Roskill held that:

> "*But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. 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. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.*"

50. Although the House of Lords held the civil servants had established a legitimate expectation of consultation in relation to changes to their terms and conditions of service, the claim failed in *GCHQ* precisely because of the Prime Minister's determination that consultation should not occur for reasons of national security. Contrary to what is asserted in §35 of the Appellant's written case, the decision did not, for the majority, turn on any question of rationality. The claim was non-justiciable once it had been shown by evidence that national security was the real reason for the decision not to consult. Per Lord Fraser at 402C-D:

> "*The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security.*" (see also per Lord Diplock at 412F, per Lord Roskill at 420D-421H.)

51. Following the decision in *GCHQ*, and in accordance with it, the courts have occasionally been prepared to entertain challenges to the exercise of particular prerogative powers to a greater extent than in the past. In no case, however, has it been held that there is no

principle of non-justiciability in public law. All of the authorities since *GCHQ* recognise the continuing existence and importance of that principle.

52. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811, 820B-D Taylor LJ held:

> "*The majority of their Lordships [in GCHQ] 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.*" (see also at 817A-B per O'Connor LJ)

53. In *R v Home Secretary, ex parte Bentley* [1994] QB 349, 363A, the Divisional Court held that the courts could review a decision not to exercise the prerogative of mercy, but noted that:

> "*The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so?*"[5]

54. In *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] 3 LRC 298, the Court of Appeal recognised that a decision as to whether to make diplomatic representations on behalf of an individual was justiciable, notwithstanding its prerogative source. Lord Philips MR stated at §85 "*that the issue of justiciability depends, not on general principle, but on subject matter and suitability in a particular case*". He further held at §103 that "*the court cannot enter the forbidden areas, including decisions affecting foreign policy*".

55. The continued existence of a principle of non-justiciability is supported by three recent decisions of this Court:

    (1) In *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2716 ("***Sandiford***"), the Court held that a refusal to exercise a prerogative power to fund foreign litigation was subject to judicial review. That was because, as

[5] The Divisional Court held at 365E-G that the Secretary of State had fettered his discretion by refusing to consider whether to grant a conditional pardon. That conclusion is inconsistent with the decision of this court in *Sandiford*.

the joint judgment of Lord Carnwath and Lord Mance made clear at §65, "*[i]t does not raise any real issue of foreign policy.*"

(2) In *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1457, it was conceded that the courts could review a decision of the Foreign Secretary to "*lift the hold*" on the designation of the claimant by the United Nations Security Council as a person involved in terrorism. Lord Carnwath (for the Court) reviewed the authorities and affirmed the subject matter test in *GCHQ*: §§24-25. He held at §26:

> "*The present case falls somewhere between the two ends of the spectrum indicated by Taylor LJ. The conduct of foreign policy through the United Nations, and in particular the Security Council, is clearly not amenable to review in the domestic courts so far as it concerns relations between sovereign states. The distinguishing factor in the present context is 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. Furthermore, at the time the decision was taken, the Security Council procedures provided no other means for the individual to challenge their decision.*"

(3) In *Serdar Mohammed v Ministry of Defence* [2017] AC 649, the Court affirmed the existence of the defence of Crown act of state in private law. It was common ground in that case that certain decisions of high policy in the conduct of foreign relations were non-justiciable: §31 per Lady Hale. The Supreme Court went further, however, by recognising that the courts would decline to rule on tort claims arising out of military operations even though the subject matter was entirely suitable for judicial determination. It would be inconsistent for the courts to pass judgment on the legality of military operations overseas because the conduct of foreign affairs and defence were vested in the Executive: §§27, 33 per Lady Hale, §§72-74 per Lord Mance, §88 per Lord Sumption, §§101,105 per Lord Neuberger.

56. The authorities, therefore, clearly establish that the exercise of some powers, whether their source is statute or the prerogative, is non-justiciable. While the courts have on occasion been prepared to review the exercise of prerogative powers where (a) their character is of an administrative nature, (b) they are exercised in an individual case or (c) have some profound impact on individual rights, it remains the case the exercise of certain powers remains non-justiciable. The paradigmatic examples are decisions of high policy in defence and foreign affairs and domestic politics.

57. It is no answer to these authorities, as suggested in §34 of the Appellant's written case, to say that the courts have jurisdiction to review prerogative Orders in Council in other contexts,[6] that the advice in this case was approved by an Order in Council and so the prorogation prerogative must be justiciable. Whether the prerogative is justiciable depends on a prior assessment of its subject-matter, nature and context, and not the means by which it is effected. The Order in Council is a means by which the prerogative is exercised, but not the only means. As noted above for example, in the context of prorogation, it is also possible for Her Majesty to prorogue Parliament personally.

Non-justiciable political questions

58. The rationale for the courts refusing to enter the political field is two-fold. It flows from the limits on their ability to apply judicial or manageable standards to determine the lawfulness of the exercise of prerogative power in some contexts; and from considerations of constitutional propriety, having regard to the separation of powers. As the joint judgment of Lords Neuberger, Sumption and Hodge explained in *Shergill v Khaira* [2015] AC 359 at §40, in a passage discussing non-justiciability generally (from §§37-43):

> "*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.*"

59. The exclusion of the courts from such political questions is well-established. In *A v Secretary of State for the Home Department* [2005] 1 AC 68, Lord Bingham explained 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.*"

60. In *Gibson v Lord Advocate* 1975 SC 136 ("***Gibson***"), Lord Keith stated at 144:

> "*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*

[6] See, for example, *R (Barclay) v Secretary of State for Justice* [2015] AC 276.

persons, natural or corporate, in relation to other persons or, in certain instances, to the State."

61. In *Wheeler v Office of the Prime Minister* [2008] EWHC 1409 (Admin) (DC), the claimant contended that the Government's promise to hold a referendum on the EU Constitutional Treaty involved an implied representation that a referendum would be held in relation to any treaty having equivalent effect; that this gave rise to a legitimate expectation that a referendum would be held on the Lisbon Treaty as a treaty having equivalent effect to the Constitutional Treaty. The Divisional Court observed in §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.*"

62. The Court observed at §43:

> "*In our view a promise to hold a referendum lies so deep in the macro-political field that the court should not enter the relevant area at all. If the government, on election, had promised the electorate that it would call a further general election after, say, three years in office, it is to our mind unthinkable that this would be held to give rise to a legitimate expectation enforceable in the courts: the consequences of going back on such a promise would be a matter for Parliament and, when the opportunity next arose, for the electorate to determine. The same must be true of a promise to afford the electorate the opportunity to vote in a referendum on a particular issue such as the Lisbon Treaty. Indeed, the position may be considered stronger in relation to such a referendum since, unlike the calling of an early general election, the decision lies as we have said with Parliament and not with the executive.*"

63. 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 stated 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."

64. He continued at §22:

> "*I also agree with the further answer to this ground of claim which the defendants have put forward. That answer is that in any event this ground of claim is non-justiciable in this court for a further distinct reason. The confidence and supply agreement is directed to securing support from the DUP for the government when voting in Parliament.*"

65. In *Re McCord* [2019] NIQB 78, a challenge *inter alia* to the conduct of the Government's negotiations with the EU under article 50 and to leaving the EU without a withdrawal agreement, McCloskey LJ explained at §116 why the application should be dismissed on the free-standing basis that it was non-justiciable:

> *"I consider the characterisation of the subject matter of these proceedings as inherently and unmistakeably political to be beyond plausible dispute. Virtually all of the assembled evidence belongs to the world of politics, both national and supra-national. Within the world of politics the well-recognised phenomena of claim and counterclaim, assertion and counter-assertion, allegation and denial, blow and counter-blow, alteration and modification of government policy, public statements, unpublished deliberations, posturing, strategy and tactics are the very essence of what is both countenanced and permitted in a democratic society. The briefest of reflections on this incomplete and rudimentary formulation serves to reinforce the twofold juridical truisms that the judicial function must respect certain boundaries…"*

66. In *Robinson v Secretary of State for Northern Ireland* [2002] NI 390, an appeal directed at the question whether the election by the Northern Ireland Assembly of a First Minister and Deputy First Minister was legally valid and raising issues linked to the dissolution of the Assembly under the provisions of the Northern Ireland Act 1998, at §12 Lord Bingham held (see also the observations of Lord Hoffmann at §33):

> "*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".

67. The recognition by the courts of a principle of non-justiciability in certain cases is entirely consistent with, and indeed supported by, the rule of law, contrary to what is asserted at §2(7) of the Appellant's written case. The principle of non-justiciability is itself a legal principle, of the boundaries of which the courts remain the sole judge. There is nothing about the rule of law which requires that every exercise of power, regardless of its subject matter, be subject to review by the courts. The recognition of and respect for the separation of powers is an important aspect of the rule of law.

Justiciability and the prorogation prerogative

68. Only Her Majesty may prorogue Parliament: no other person or body in the constitution has the power to do so. As already noted, no statute regulates prorogation or advice to Her Majesty in relation to prorogation. Parliament has made specific legislative provisions regulating its sittings (even if it stands prorogued) in particular contexts as referred to above. These claims seek to challenge prorogation, even where it conforms to such legislative control; and invite the courts to rule on advice relating to and decisions concerning prorogation. It is submitted that that is impermissible, non-justiciable territory.

69. There are no judicial or manageable standards by reference to which the Court could review or control an exercise of the prerogative of the present kind. That is because the prorogation of Parliament is inherently political in nature; and courts cannot weigh political judgements of this type against legal standards. Moreover, such decisions have been left by Parliament to the Executive subject to the specific legislative provisions controlling the sittings of Parliament already noted. It would be constitutionally inappropriate for the courts to enter the territory.

70. In giving advice on prorogation, the Prime Minister will necessarily take into account matters that are political. This is territory in which political decisions are being made about the sitting and business of Parliament, quite possibly, as here, in a fast moving, unpredictable and highly politically controversial area. Political considerations include

decisions about political advantage – both the Government and the Opposition will inevitably have their own political agendas and their own perceptions of political advantage and disadvantage. Those judgements form the basis on which politics and Parliamentary business are conducted daily. Any decision to advise the prorogation of Parliament is likely to involve considerations about how most efficiently and effectively to manage the conduct of the Government's legislative agenda in Parliament. It involves the termination or interruption of existing Parliamentary business. Not all Bills necessarily fall at the end of the session, however. In accordance with the rules of each House, some may be carried over into the next session, provided they have not already been sent to the other House. In deciding when to prorogue Parliament, a political judgement must be exercised about the extent to which prolonging the session would prevent existing Bills being carried over.

71. The history of the power to prorogue Parliament supports the fact that it has been used for political purposes, including for the purpose of restricting the time otherwise available to debate legislation, and for prolonged periods, including at moments of political importance and when the Government of the day lacked a majority in the House of Commons:

    (1) On 18 September 1914, shortly after the outbreak of the First World War, Parliament was prorogued until 27 October, with the King's Speech on prorogation noting that the circumstances "*call for action not speech.*" On 16 October 1914, Parliament was further prorogued by proclamation until 11 November 1914.[7] In total, Parliament was prorogued for a period of 53 calendar days during wartime.

    (2) On 1 August 1930, Parliament was prorogued until 28 October, a period of 87 days.[8] This was during the onset of the Great Depression following the 1929 Wall Street Crash and when the then government of James Ramsay MacDonald did not command a majority in the House of Commons.

    (3) Under s.2 of the Parliament Act 1911 as enacted, a non-money Bill could only be enacted without the consent of the Lords if it was passed in three successive sessions by the Commons. As noted below, each session of Parliament

[7] *Hansard*, 18 September 1914, vol. 66, col. 1018; *London Gazette*, 16 October 1914, Issue 28940, p.8241.
[8] *Lords Hansard*, 1 August 1930, vol. 78, col. 1216.

conventionally lasts for approximately a year. To facilitate the speedy passage of the Parliament Act 1949, 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 Commons, it was then prorogued again on 25 October 1948. The King's Speech which closed the Session expressly noted that "*The two Houses have again failed to agree on the Bill to amend the Parliament Act, 1911.*"[9]

72. Thus, advice about prorogation involves weighing up political considerations, including how most effectively to secure the government of the day's political and legislative objectives and agenda (with all of the aspects that that brings with it, including presentational); and whether a new Queen's Speech and a new, differently focused national, parliamentary and legislative agenda should be set. The law cannot and does not superimpose additional, legal standards on this political process.

73. Specifically, for the courts to uphold such a claim would require them to rule on how much time is "*sufficient*" for the undefined and indefinable potential intentions of individual Members of Parliament and Peers. That is not a task they are equipped to perform. In particular:

    (1) The Appellant and Petitioners do not identify why the time allowed by s.3 of NIEFA is insufficient, or by what judicial or manageable standards the courts are to answer that complaint.

    (2) Moreover, they do not confront the problem of how a judge could even determine whether Parliament would have wished or would wish to legislate. The expression of Parliament's will and intention in enacted legislation is absent. As the Board observed in *Adegbenro v Akintola* [1963] AC 614, at 630: "*Expressions of opinion, attitude or intention upon such a delicate matter may well prove to be delusive. He may judge the situation wrongly and so find himself to have taken a critical step in a direction which is proved to be contrary to the wishes of the majority of the House or of the electorate.*"

[9] See the House of Commons Briefing Paper, No 8589 of 11 June 2019, '*Prorogation of Parliament*', pp. 16-17; *Lords Hansard*, 14 September 1948, vol. 158, col. 1; *Lords Hansard*, 25 October 1948, vol. 158, col. 332.

74. It is no answer to this to say (as the Appellant suggests at §§23-24 of her written case) that the courts could and should afford a broad margin to the decision maker as would be done when applying, for example, a rationality standard. The nature and character of the decision precludes any weighing of the propriety, adequacy or relevance of particular factors in the decision as to the length of prorogation. It is moreover impossible to see how the courts could decide whether the ultimate decision on the length of prorogation was lawful (or indeed possible issues as to whether the decision would likely have been the same in any event) without considering sufficiency. The issue does not concern merely whether the courts could make an order specifying the precise length of a prorogation. They plainly could not and, even on the Appellant's case which allows for some margin of respect for prorogation decisions, could not. The issue here is more fundamental. It is how the courts could either fashion or apply any judicial or manageable standards for determining the lawfulness of, for example, a 5 week prorogation over a 4 week prorogation. Affording the Prime Minister a margin of discretion is no answer to that.

75. Nor, for essentially the same reasons, is it any answer to point to principles of public law (such as improper purpose, or rationality). Of course, those principles, as general principles, apply across and control a wide range of executive and (in some contexts, such as the Human Rights Act 1998 ("**HRA 1998**")) legislative decision making. However, as the case law cited earlier indicates, public law also recognises the principle of non-justiciability. The principled basis for it is not sidestepped by pointing to the existence of general public law principles. The questions remain: whether in relation to the prerogative power of prorogation there are manageable judicial standards by reference to which those general principles could operate and be adjudicated upon; and whether it would be constitutionally appropriate for the courts to do so.

76. The non-justiciable nature of the prorogation prerogative (even if used in circumstances far removed from the present) has long been recognised. The Appellant (at §16 of her written case) relies on Dicey. Yet in *The Law of the Constitution* (8th ed., 1915), Dicey gave, at pp.293 & 297, two stark examples of the distinction between unconstitutional and unlawful conduct, and the role of the courts being limited to scrutiny of the latter:

> "*Suppose that Parliament were for more than a year not summoned for the despatch of business. This would be a course of proceeding of the most unconstitutional*

> *character. Yet there is no court in the land before which one could go with the complaint that Parliament had not been assembled…*
>
> "*No rule is better established than that Parliament must assemble at least once a year. This maxim, as before pointed out, is certainly not derived from the common law, and is not based upon any statutory enactment. Now suppose that Parliament were prorogued once and again for more than a year, so that for two years no Parliament sat at Westminster. Here we have a distinct breach of a constitutional practice or understanding, but we have no violation of law.*"

77. There is no authority (domestic or decided in any country operating a Westminster system of government) which supports the proposition that the exercise of a power to prorogue the legislature is amenable to judicial review. On the contrary, "*the Court is obliged to take notice of the commencement of Parliaments, and also of prorogations and sessions*": *R v Wilde* (1669) 1 Lev. 296.

Constitutional convention

78. The advice provided by the Prime Minister to Her Majesty regarding the exercise of the prorogation prerogative, which determines in part for how long Parliament should sit. As noted above, that is a matter which is governed exclusively by constitutional convention, namely that there should be a session each year, which by its nature can be departed from (as in the case of the present session).

79. The courts have no jurisdiction to enforce political conventions. Although they can recognise the operation of a political convention in deciding a legal question, such as the extent of a duty of confidentiality, they cannot give legal rulings on its operation or scope, because those matters are determined within the political world. The sanction for non-observance of a convention is political, not legal: it may lead to political defeat, loss of office or other consequences, but it will not engage the attention of the courts: *Miller*, §§141-146.

80. The regulation by convention of the relationship between the Crown (in its Sovereign and Executive forms) and Parliament recognises the contextual and inevitably political balance that must be struck between a constitutional Monarchy, the Prime Minister as leader of Her Majesty's Government, and Parliament as the body empowered to pass legislation. There are very good constitutional and practical reasons why these matters are governed by convention and allocated to the political sphere, rather than by legal rules and allocated to the courts. Considerations of policy and propriety which by convention

must be taken into account are not legal restrictions which a court of law can enforce. Per Viscount Radcliffe in *Adegbenro v Akintola*, at 630:

> "*…while there may be formidable arguments in favour of the Governor confining his conclusion on such a point to the recorded voting in the House, if the impartiality of the constitutional sovereign is not to be in danger of compromise, the arguments are considerations of policy and propriety which it is for him to weigh on each particular occasion: they are not legal restrictions which a court of law, interpreting the relevant provisions of the Constitution, can import into the written document and make it his legal duty to observe.*"

81. The Appellant has disclaimed any reliance on constitutional convention as to the length of prorogation, because she recognises that it is unenforceable. She impugns this prorogation because she considers its length is not required for the purpose of bringing one session to an end and opening a new one. The Appellant is, in reality, inviting the court to identify a new constitutional convention as to the length of prorogation and to enforce it in precisely the circumstances in which this court in *Miller* indicated were impermissible.

The comparison with the old dissolution prerogative

82. A consistent theme in the case law on non-justiciability is the example of the dissolution of Parliament (before it was placed on a statutory basis by the FTPA), which was always regarded as non-justiciable. That strongly supports the conclusion that the exercise of the prerogative of prorogation is non-justiciable. There is no relevant distinction between dissolution and prorogation, as regards subject matter. Both prerogatives concern Parliament, both are characterised by highly political considerations best determined by politicians, and both are unsuitable for adjudication by the courts.

83. The Appellant seeks to distinguish the two prerogatives on the basis that dissolution was a "*personal*" prerogative, in respect of which the Sovereign could exercise a discretion, whereas prorogation was a prerogative exercisable only on the advice of Ministers. This provides no sound basis for any distinction. Whether or not a prerogative is "*personal*" to the Sovereign depends on constitutional convention and not on law[10]. For the reasons given above, it is not for the courts to seek to give rulings on the operation or scope of such conventions. In any event, in both contexts Her Majesty will act following receipt of the advice of the Prime Minister. The consistent statements concerning dissolution as a

[10] See in this respect Professor Twomey, *The Veiled Sceptre*, (CUP, 2018), ch. 8. She suggests that there may be scope for reserved decision making by Her Majesty and that there is a debate among constitutional experts as to what that scope (assuming it exists) may be.

paradigmatic example of a non-justiciable subject matter evidently rested on the fact that such a subject matter was political in the sense explained in *Shergill*; and prorogation shares precisely those features.

84. The Appellant also states that dissolution is now governed by the FTPA. So it is. However, that legislation did not have the effect of rendering the prorogation prerogative justiciable. As noted above, s.6(1) expressly did not affect, but merely recognised, the power of prorogation. The comparison is between dissolution whilst it continued to be a prerogative power (*i.e.* before the FTPA) and prorogation as a prerogative power.

85. Nor was dissolution more closely bound up with the choice and appointment of the Prime Minister than with prorogation, as is contended by the Appellant. Even if that were so, it would provide no point of principled distinction.

The Appellant's first attempt to create legal standards which the courts can apply

86. The Appellant contends that the purpose of prorogation is to close one session of Parliament and to open another: written case, §7. She contends that any prorogation cannot exceed what is reasonably necessary to achieve the power's supposed objective. In this way, says the Appellant, the courts have a standard to apply to control individual exercises of the prorogation power.

87. However, there is no such limited purpose. To limit it in this way fails to recognise the existence of the power both to prorogue a Parliament which has been summoned but has not yet met, and to prorogue Parliament when it is already prorogued. Section 1 of the 1867 Act expressly recognised that a Parliament which was already prorogued could be further prorogued by proclamation "*to any further day being not less than fourteen days from the date thereof*". The 1867 Act, recognising as it does the possibility of extending the length of any prorogation, including on more than one occasion, is plainly inconsistent with the supposed purpose which the Appellant suggests applies to the prerogative.

88. In any event, the implied restrictions which the Appellant attempts to rely on are vitiated by the same error of law identified by this court in *Sandiford*, when an attempt was made,

unsuccessfully, to apply the "*no fetter*" principle to prerogative powers.[11] Per Lord Carnwath and Lord Mance at §61:

> "*prerogative powers do not stem from any legislative source, nor therefore from any such legislative decision, and there is no external originator who could have imposed any obligation to exercise them in one sense, rather than another. They are intrinsic to the Crown and it is for the Crown to determine whether and how to exercise them in its discretion.*"

89. Per Lord Sumption at §83:

> "*There are no legal criteria analogous to those to be derived from an empowering Act, by which the decision whether to exercise a common law power or not can be assessed. It is up to ministers to decide whether to exercise them, and if so to what extent.*"

90. The Appellant's case therefore rests on the assertion that the advice was an "*abuse of power*". This, however, provides no assistance in ascertaining the standards which the court could apply to determine the legality of any particular prorogation. Per Laws LJ in *Nadarajah v the Secretary of State for the Home Department* [2005] EWCA Civ 1363 at §67:

> "*Principle is not in my judgment supplied by the call to arms of abuse of power. Abuse of power is a name for any act of a public authority that is not legally justified. It is a useful name, for it catches the moral impetus of the rule of law. It may be, as I ventured to put it in Begbie, 'the root concept which governs and conditions our general principles of public law'. But it goes no distance to tell you, case by case, what is lawful and what is not.*"

91. Similar answers apply to defeat any attempt to design a "*legitimate purpose*" principle by reference to some broad notion of "*responsible government*". That simply re-poses the same difficulties in different form. There are no manageable or judicial standards by reference to which legitimacy or responsibility could be set. It has always been left to the Executive, controlled as appropriate by legislation, to determine when and for how long Parliament sits. There is no convention that political advantage cannot be included in decisions on those issues. As already noted, both the Government and the Opposition operate according to political considerations. Would those concepts of legitimacy and responsibility be set by reference to a narrow set of circumstances such as whether the government is seeking to evade a motion of no confidence to prolong its life, or

[11] See also *R (El Gizouli) v Secretary of State for the Home Department* [2019] 1 WLR 3463, per Lord Burnett of Maldon CJ and Garnham J at §§54-57 (holding that the principle of legality, as a principle of statutory construction, has no application to prerogative powers).

something broader, and if so what? It is submitted that these questions, going directly to the question of legal standards and their design, are political and cannot be answered by the courts.

92. The Appellant's response to the fact that there are no such standards is to argue (see her written case at §41) that this would mean that Parliament could be prorogued for years at a time and that at some, undefined point the courts must be able to intervene to prevent such unconstitutional conduct. There are three answers to this point:

    (1) The Appellant's hypothetical scenario is not a realistic or proper basis for asserting or testing justiciability. Unconstitutional behaviour is not unlawful unless there are judicial and manageable standards by reference to which the courts can assess the legality of the action. The Appellant cannot identify any.

    (2) As noted above, prorogation for periods far in excess of this case have occurred in the past including at moments of acute political controversy. The Appellant identifies no basis on which this prorogation can be impugned on account of its length but those could not be.

    (3) There are, in any event, for the reasons given by Dicey (pp.297-299) real practical impediments to the Government proroguing Parliament in the extreme circumstances relied on by the Appellant. These include the fact that authorisation to appropriate money from the Consolidated Fund,[12] to charge income and corporation tax,[13] and to maintain discipline over the armed forces must be authorised by Parliament annually.[14] No Government could in practice continue in office without Parliament sitting regularly.

Parliamentary sovereignty: the Appellant's second attempt to create a legal standard

93. Parliamentary sovereignty rests upon three key principles:

    (1) 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 ECA 1972 and HRA 1998: *Jackson v Attorney General* [2006] 1 AC 262, per

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[12] This is done each year by the passage of the Supply and Appropriation (Anticipation and Adjustment) Bill followed by the Supply and Appropriation (Main Estimates) Bill.

[13] Income Tax Act 2007, s.4(1); Corporation Tax Act 2009, s.2(1).

[14] Armed Forces Act 2006, s.382.

Lord Bingham at §9 and Lady Hale at §159. The intention, or will, of Parliament is a convenient shorthand only for the meaning of words it uses in primary legislation: *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591, per Lord Reid at 613G.

(2) Respect for the principle of Parliamentary sovereignty entails that a distinction is made between the law duly enacted by the Queen in Parliament and resolutions of either or both Houses of Parliament. The latter, while undoubtedly politically significant, do not have legal effect in the absence of a statute giving them that status: *Miller*, §123.

(3) The other pillars of the state (the Executive and the courts) and individuals must act in conformity with the expressed will of Parliament as enacted in legislation. This entails that the executive cannot take steps that in effect undermine what Parliament has done by legislation (*e.g.* overriding or frustrating rights conferred by legislation), including by the exercise of prerogative powers: *c.f. Miller*, §81. However, the courts are likewise constrained: their function is to construe and apply the enactments passed by Parliament: *Pickin v British Railways Board* [1974] AC 765, per Lord Reid at 787G, per Lord Morris at 789A. This was the basis of the decision in *Jackson*, which concerned the interpretation and application of the Parliament Act 1911 (see per Lord Nicholls at §46).

94. The Appellant seeks to go further, and argues that there are *legal* limits on the power of the Executive to prevent Parliament from sitting. The reason such legal limits are said to exist is because the principle of Parliamentary sovereignty is engaged by the advice of the Prime Minister; and the appropriate standard of review is "*basic public law principles*".

95. Those submissions are wrong. The appeal is, in substance, an invitation to the Court to regulate the duration and frequency of Parliamentary sittings, as is clear from written case, §2(4). Merely reciting the phrase "*Parliamentary sovereignty*" does not establish a standard or principle of judicial control. It is necessary to examine what, precisely, is said to be the aspect of Parliamentary sovereignty engaged. Here, the challenge is to the length of the prorogation. It is contended that it should have been some unspecified shorter period, providing Parliament with some greater (again unspecified) opportunity to legislate in relation to the UK's withdrawal from the EU.

96. Parliament's will is to be discerned by the courts from enacted legislation. Legislation provides the only sure, and constitutionally appropriate, touchstone by which the courts can do so. The arena into which the Appellant suggests the courts should enter necessarily involves attempting to fashion some other set of rules or factors for doing so. It is not explained what they are. However, whatever they might be contended to be, they would necessarily be both highly uncertain and constitutionally inappropriate. They would moreover inevitably drag the courts into areas of the most acute political controversy in a sphere controlled, to the limited extent it is, by legislation and convention alone. As McCloskey LJ held in the present context, "*I consider the characterisation of the subject matter of these proceedings as inherently and unmistakably political to be beyond plausible dispute*": *Re McCord*. The Appellant's approach moves away from the sure and only proper guide to intention of Parliament that courts can take into account and into undesirable political and Parliamentary controversy. Per Lord Simon in *Pickin v British Railways Board* at 799D-E:

> "*It is well known that in the past there have been dangerous strains between the law courts and Parliament - dangerous because each institution has its own particular role to play in our constitution, and because collision between the two institutions is likely to impair their power to vouchsafe those constitutional rights for which citizens depend on them. So for many years Parliament and the courts have each been astute to respect the sphere of action and the privileges of the other.*"

97. Parliament has in fact expressed its will by enacting legislation to make provision for Parliamentary sittings in the relevant period. Parliament has further expressed its will, subject to the specific limitations it has imposed in relation to Parliamentary sittings, to preserve the prorogation prerogative. All of these specific statutory provisions requiring Parliament to meet assume the existence of an otherwise uncontrolled prerogative power of prorogation. Parliament could in s.3 of NIEFA have provided for daily reporting by the Secretary of State to Parliament, precluding any prorogation. Alternatively, it could have legislated in the first two weeks of September, in the full knowledge this prorogation was to occur, to cancel or abridge this prorogation. It chose, as was its sovereign right, not to do either of those things. It did, however, legislate to pass the new Act in that time.

98. It is a notable feature that Parliament in this context has consistently treated prorogation and adjournment on the same footing. There could be no question of impugning the adjournment of either House in the courts.

99. It could not realistically be said (and the Appellant does not suggest) that it would be unlawful (or contrary to Parliamentary sovereignty) for Parliament to be prorogued for any period at all between 3 September and 31 October for the purposes, for example, of holding a Queen's Speech. Parliament is not required to sit in permanent session; and it is not what Parliament decided should happen when it enacted s.3 NIEFA. Parliament is regularly prorogued, for varying periods of time and for various reasons.

100. In the absence of statute, the question of how long either House of Parliament requires to consider any particular matter, or the sufficiency of their consideration of that matter, is exclusively reserved to them. The lack of judicial or manageable standards enabling the court to review decisions as to the sufficiency of any particular period of prorogation so as to avoid impeding legislation ("*seriously*", "*unjustifiably*" or by reference to any other adverb) has already been dealt with above. Reliance on the principle of Parliamentary sovereignty and "*basic public law principles*" takes the matter no further.

101. For the same reason, it is for each House to decide, in accordance with its own procedure, what it chooses to debate. That is the effect of the principle of parliamentary privilege, enshrined in Article 9 of the Bill of Rights, and the broader principle of exclusive cognisance. The manageable standards problem is even more acute in the case of each House of Parliament's function of scrutinising the Executive (*i.e.* not just legislating). No doubt some MPs and Peers will always want to ask further questions of the Government and some parliamentary committees will always want to continue to sit and conduct inquiries. There is simply no way for the courts to identify at what point prorogation, which would temporarily prevent the exercise these functions, would be unlawful.

102. There is no proper comparison with *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, on which the Appellant relies. That case involved the Secretary of State abrogating his statutory duty to consider whether to bring into force legislation by the creation of a parallel and inconsistent scheme under the prerogative: per Lord Nicholls at 578D-F. When Lord Browne-Wilkinson referred at 552D to the prerogative being used illegitimately "*to pre-empt the decision of Parliament*", that was because Secretary of State had renounced his statutory duty, which could be clearly identified from enacted legislation, without obtaining Parliamentary approval for the repeal of that legislation. The case is no authority for the proposition that

the prorogation prerogative is constrained by the possibility of Parliament enacting legislation in the future.

103. On various occasions below, the Appellant suggested it was for the court to determine whether the advice was "*unconstitutional*" and whether prorogation would be contrary to "*constitutional principle*". The courts' function is, and is only, to enforce the law. Some matters which may be described as raising "*constitutional*" issues are neither regulated by law nor legally enforceable. The limits of the court's jurisdiction are themselves constitutional in nature - based as they are on the principle of the separation of powers and notions of respect for the different constitutional areas of responsibility of the courts, the executive and Parliament. Accordingly, the question at all stages is simply whether there is a proper legal basis for the challenge; and that is not answered by assertions that something is "*unconstitutional*". Ultimately, appeals to general notions of democratic and constitutional principle cannot require Parliament to sit for seven weeks instead of five between 9 September and 31 October 2019. As Lord Hoffmann observed in *Matadeen v Pointu* [1999] 1 AC 98, at 109F-G: "*In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied.*"

Bill of Rights and Claim of Right

104. The different wording of article XIII of the English Bill of Rights and the equivalent provision in the Scottish Claim of Right do not assist to create a legal standard by reference to which the legality of a prorogation of any particular length could be adjudicated upon.

(1) **First**, the references to the frequent holding or calling of Parliaments in both documents is to the interval between the dissolution of one Parliament and the summoning of another (now done pursuant to s.3(4) of FTPA). It has nothing to do with the interval between sessions of the same Parliament.

(2) **Secondly,** the word "*frequently*" in both the Bill of Rights and the Claim of Right does not establish any justiciable standard as to how often a new Parliament must be summoned. That is clear from the fact that legislation, in the form of the 1694 Act, was needed to establish what frequently meant, *i.e.* once in every three years.

(3) **Thirdly**, the reference in the Claim of Right to Parliaments being "*allowed to sit*" similarly establishes no justiciable standard against which the prerogative power to prorogue Parliament can be reviewed: per Lord Brodie in the Inner House at §85, per the Lord Ordinary's Opinion at §30. No maximum length of prorogation was prescribed and Parliament has not generally legislated with respect to its sittings. Indeed, as noted above, it repealed legislation which did make such provision on the basis it derogated from the prerogative. As this court held in *Miller* at §148 in relation to the statutory codification of the Sewel Convention, not every enactment, even those of constitutional significance, amounts to "*a rule which can be interpreted, let alone enforced, by the courts*": see also *Gibson*, at 144 per Lord Keith in relation to article XVII of the Acts of Union between England and Scotland.

(4) **Fourthly**, the Claim of Right does not in any event require Parliament to be in permanent session and imposes no obligation on Parliament to sit in the present context over and above the express provision made in s.3 of NIEFA.

The Scottish Judgment

105. The majority of the Inner House correctly accepted that a principle of non-justiciability existed in public law: *per* the Lord President at §50; Lord Brodie at §§83-85. Lord Drummond Young, dissenting, held at §§102-103 that the courts had jurisdiction to review whether any power had been lawfully exercised and that a principle of non-justiciability was "*incompatible with the rule of law and contrary to the fundamental features of the constitution of the United Kingdom.*" For the reasons given above, the existence of a principle of non-justiciability is supported by a series of authorities of this court and the House of Lords. As a principle developed and policed by the courts, it is compatible with the rule of law and upholds the fundamental principle of the separation of the powers.

106. The majority defined the test of non-justiciability in different ways:

(1) The Lord President held at §50 that a subject matter test was applicable and that "*[a]s a generality, decisions which are made on the basis of legitimate political considerations alone are not justiciable*". Such decisions could not be impugned on the basis of irrationality, want of impartiality, or fettering of discretion. Had the

Scottish proceedings been based upon these or similar grounds of review, it would not be justiciable. He held that "*legitimate political considerations, including a desire to see that Brexit occurs… would not be challengeable*". However, his application of those principles at §57 involved the court determining for itself the propriety of the Executive's purpose, or intention.

(2) Lord Brodie held at §83 that a question was justiciable "*if it is capable of practical determination by reference to legal principles in a court of law*". Hence "*sufficiently precise and applicable legal principles by reference to which the lawfulness of making the Order [in Council] can be judged*" had to be identified. He found at §84 that the subject matter test meant that the exercise of some prerogative powers would be justiciable in some instances but not others, depending on the circumstances, grounds of challenge or legitimate expectation.

(3) Although Lord Drummond Young denied the existence of a principle of non-justiciability, he expressly recognised at §104 that "*the court should not interfere with the substantive political grounds for the exercise of prerogative power provided that the power is used for a proper purpose*".

107. In so holding, the Inner House erred in law:

(1) *Pace* the Lord President and Lord Brodie, the subject matter test must be applied by reference to the nature of the power, and not the facts of a case. If the power operates in the realm of high politics, it cannot be challenged on some grounds but not others. Decisions of high policy, such as reneging on a promise to hold a referendum (*Wheeler*), the signing of a confidence and supply agreement (*McLean*) or the dissolution of Parliament lie so deeply in the macro-political field that they cannot be challenged on any grounds, whether for improper purpose, breach of legitimate expectation or irrationality. Prorogation is one such power.

(2) Contrary to what the Lord President asserts, the exercise of a power is not only non-justiciable if based upon "*legitimate political considerations*". That would involve the courts determining the legitimacy and propriety of political reasons, which, for the reasons given above and by the Divisional Court, they are simply not equipped to do. The Lord President offered no guidance as to how the

legitimacy of political considerations is to be determined by a court and that is because there can be none.

(3) Nor as Lord Drummond Young suggests, is it possible for the courts to respect "*the substantive political grounds for the exercise of prerogative power*" while determining the propriety of the Executive's purpose. That necessarily leads the court into considering the legitimacy of those grounds, notwithstanding his recognition at §105 that the "*court must not stray into the political aspects of any executive decision, especially one in the exercise of the prerogative*".

108. The Inner House's reasons for why a decision to prorogue Parliament could be amenable to judicial review were as follows:

(1) The Lord President held at §52 that because prorogation affected Parliament's ability to sit, the courts must have "*concurrent jurisdiction*" with Parliament to prevent this occurring. Thus, it appears that he held that a prorogation intended to restrict sitting time was unlawful: §58. Intending to restrict Parliamentary sitting time, given its impact on the "*good governance principle*", could not be regarded as a matter of high policy and politics: §50.

(2) Lord Brodie held at §91 that while "*[p]rocedural manoeuvres are the stuff of politics*", a manoeuvre "*designed 'to frustrate Parliament' at such a critical juncture in the history of the United Kingdom*" could be found to be unlawful in an "*extreme*" or "*egregious*" case. Parliament had "*a right to sit*" which the Petitioners had the right to protect in a court of law.

(3) Lord Drummond Young held at §104 the court could determine whether prorogation could be used "*for a purpose that is objectively outwith its intended scope*". The courts had a duty "*to ensure*" Parliament was able to sit: §106. It was for the Government to advance a "*valid reason*" for any prorogation: §115.

109. In so holding the Inner House erred in law:

(1) All of the Lords of Session assumed what had to be proven, namely that there was an objectively and legally ascertainable purpose for which the prerogative power to prorogue Parliament was conferred. The implication running throughout all of the opinions, although nowhere expressly stated, is that prorogation is a power

which exists for the purpose of terminating a Parliamentary session and introducing a new Queen's Speech as quickly as possible. That is presumably what Lord Drummond Young meant when he referred at §108 to "*formal purposes*".

(2) The true position is that there is no such purpose for which the power to prorogue Parliament was conferred. As the Divisional Court held at §55 of the English Judgment, Parliament may be prorogued for various reasons and "*[t]he purpose of prorogation is not limited to preparing for the Queen's Speech*", as shown by the terms of the 1867 Act. Parliament may be prorogued "*to gain a legislative and so political advantage*", as the example of prorogation in 1948 to enable the passage of the Parliament Act 1949 shows. On that occasion, the express purpose of the prorogation was to curtail the time for debate otherwise available in the House of Lords. Only Lord Drummond Young addressed this example, stating at §107 merely that it could not "*serve as a precedent*", without explaining why that should be the case.

(3) If the Lord President were correct that any power which affected Parliament sitting could be subject to judicial review, it would follow that, before the passage of the FTPA, the dissolution of Parliament, the archetypal non-justiciable matter, could be similarly impugned. Nor (since an adjournment of one House prevents Parliament from legislating) could the court's "*concurrent jurisdiction*" be denied in respect of a long adjournment by one House. The Lord President's opinion provides no answer to the principled reason as to why the courts should not intervene when Parliament has legislated to govern its sittings in specific contexts but not others and generally preserved the prorogation prerogative.

(4) The Lord President appears to have held that an (undefined and vague) "*good governance*" principle was enforceable in the courts and that if any executive action contravened that principle, it ceased to be a matter of high policy and politics. The courts cannot determine what "*good governance*" requires in this context: that is the stuff of politics. If decisions as to the sittings of the legislature do not fall within the realm of high policy and politics, it is difficult to conceive of what could. The application of any such good governance principle to

legal questions will inevitably lead to the courts substituting their view as to what the public interest requires for those of the executive.

(5) Lord Brodie's view was that the issue was justiciable in an extreme or egregious case. As the Divisional Court pointed out at §66 of the English Judgment, it is not "*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*". Whether a case is extreme or egregious provides no judicial or manageable standard against which to test the legality of prorogation.

(6) Lord Brodie's view that Parliament had "*a right to sit*" enforceable in the courts is inconsistent with the existence of the prorogation prerogative, which Parliament has expressly recognised.

(7) The purpose test would be capricious in its operation. It would not affect the legality of prorogations of many months (far in excess of the present prorogation) provided they were not motivated by a desire to prevent Parliament from sitting: see para. 24 above and the English Judgment, at §54. Conversely, a prorogation of a day could be impugned if intended to prevent Parliament sitting. The operation of any such test would do nothing to facilitate Parliament sitting or scrutiny of the executive.

THE UNDERLYING CLAIMS ARE ACADEMIC

110. The underlying issues in these appeals are academic for three reasons:

(1) The effect of s.3 of NIEFA is that Parliament met in the first and second weeks of September 2019 and will meet regularly in the run up to the UK's exit from the EU on 31 October 2019.

(2) Under the terms of the Order in Council, Parliament was prorogued on 9 September 2019 to 14 October 2019. That means that Parliament was able to sit after the end of the summer recess on 3 September 2019 until 9 September 2019 and will be able to sit after 14 October 2019 when the new session of Parliament will be opened by Her Majesty.

(3) Parliament in fact used the period in which it sat in the first two weeks of September to legislate on the UK's exit from the EU. As noted above, on 9 September 2019, the new Act was enacted.

The Scottish Judgment

111. The majority of the Inner House erred in law as to the effect of s. 3 of NIEFA. The Lord President held at §56 that "*presumably*" the sittings it required "*are primarily designed to deal with issues relating to that subject matter and not for scrutiny of other matters*". Lord Drummond Young held at §114 that the statutory sittings "*are limited in number and are in any event related to the formation of an executive in Northern Ireland*". However, as Lord Brodie correctly held at §72, the business which each House of Parliament chooses to consider on the required sitting days "*will be for Parliament to determine.*" It is not for the courts, for reasons of Parliamentary privilege and the separation of powers, to determine what business each House considers when it is sitting.

NO UNLAWFULNESS IN ANY EVENT

112. For all the reasons set out above, this is not an issue that the Court can or should consider.

113. In any event, however, the reasons for which the Prime Minister gave the advice, which appear from the documents disclosed pursuant to the duty of candour in proceedings before the Divisional Court[15] and the Court of Session, were lawful and, specifically, neither irrelevant nor illegitimate. It is for the Prime Minister to judge (subject to the existing legislative constraint) whether and for what periods to advise Her Majesty to prorogue on any basis he considers appropriate. The decision to do so was taken in the context described above, including in particular:

(a) the fact that Parliament will sit extensively and will be able to decide what matters it wishes to consider and/or legislate for in the period leading up to 31 October 2019;

[15] These documents were disclosed and the witness statement of the Treasury Solicitor, Jonathan Jones, made given the timings involved and the Divisional Court's directions. This was without prejudice to the Prime Minister's arguments on justiciability and academic nature of the claim.

(b) the fact that Parliament has already made extensive legislative provision in relation to a variety of matters bearing on the subject matter of this claim – including preserving the prorogation power, enacting s.3 NIEFA, and authorising the UK's withdrawal from the EU and making provision for its effects (see, *e.g.*, the 2017 Act, the EUWA and the Taxation (Cross-border Trade) Act 2018).

114. There is nothing unlawful in the Prime Minister advising Her Majesty to prorogue Parliament in brief summary on the following basis:

(a) to enable the new Government to set out its new legislative agenda in a Queen's Speech, and to have the time judged necessary to enable that to be done effectively;

(b) to end the extraordinarily long previous Parliamentary session in a practical way leaving enough time for the completion of the passage of (the few remaining) bills already close to Royal Assent (the House of Commons had not sat in late September and the first week of October for eighty years); and having regard to the traditional conference recess period of around 3 weeks;

(c) having regard to the specific political considerations of the kind referred to in the documents (see *e.g.* §§14-18 of the Submission of 15 August 2019); and

(d) to reflect the fact that the Parliamentary timetable (including the sittings required by s.3 of NIEFA) will afford time both before and after the Queen's Speech to debate matters relating to the UK's withdrawal from the EU, having regard to the fact of the European Council on 17-18 October 2019, to vote against the Government's approach and to pass amendments.

115. The Appellant relies on three matters as supporting her contention that the reasons for the advice was unlawful:

(1) **First**, she says that the Prime Minister's hand-written comments on the 15 August memorandum displayed a derogatory view of Parliament which was an irrelevant consideration. That is not a fair reading of the submission as a whole. The Prime Minister was anxious to ensure that Parliament was able to sit in the run up to and after the European Council so as to scrutinise the Government's policy on the EU, and on other matters. It was entirely plain throughout that Parliament would sit in

the period immediately running up to the start of prorogation and would have the opportunity to address any matters it wished. The events as they have turned out graphically illustrate the nature of that opportunity.

(2) **Secondly**, she says it was unlawful for the Prime Minister to have regard to the fact that during the proposed period of period of prorogation, each House would customarily rise for the party conference recess. The timing of traditional recesses is plainly a relevant consideration. That much is confirmed by §17 of the witness statement of the former Prime Minister, Sir John Major (who intervened in proceedings before the Divisional Court), where it is explained that he advised prorogation in 1997 over the Easter Period because "*Parliament would not have been sitting over that period anyway*". The Appellant also accepted before the Divisional Court that the longer period of prorogation in 2014 was in part due to the Whitsun Recess which would have otherwise occurred, and made no criticism of that[16].

(3) **Thirdly**, she says that it was improper for the Prime Minister to proceed on the basis that Parliament continuing to sit would damage the Government's negotiating position with the EU. If that was a reason for the decision, it would plainly have been a lawful one, especially in circumstances where there was no question of Parliament being denied the ability to legislate on the UK's withdrawal from the EU before 31 October 2019.

The Scottish Judgment

116. The Inner House inferred that the real reason for the advice was to prevent Parliament from sitting and holding the Government to account in the run up to the UK's exit from the EU on 31 October: *per* the Lord President at §53, Lord Brodie at §89, Lord Drummond Young at §123. This was an inference which no reasonable court could have drawn on the evidence before it.

117. The Inner House accepted that it was entirely proper that the Advocate General did not adduce affidavit evidence from a Minister or senior official setting out the reasons for the prorogation: *per* the Lord President at §55, Lord Brodie at §88. The Lord President

[16] The Whitsun recess is traditionally a single week; the 2014 prorogation was for a further two weeks in addition to the one week of recess.

criticised the fact (at §55) that little was said in the Advocate General's pleadings about the matter. However, the proceedings below were conducted at great speed. This was not ordinary litigation. This was a point of form, not substance.

118. The Inner House's inference was drawn in the face of all of the contemporaneous, documentary evidence, including the 15 August submission to the Prime Minister, the Prime Minister's comments on it, the 23 August submission and the minutes of the Cabinet conference call on 28 August. In none of these documents, which represent the best evidence of the reasons for the decision, is it suggested that the prorogation was intended to prevent Parliamentary scrutiny of EU withdrawal. On the contrary, all of the documents are consistent with a desire to facilitate such scrutiny and to respect Parliament's role.

119. The Inner House criticised the process leading up to prorogation as having been conducted in a "*clandestine manner*" (per the Lord President at §54) and in conditions of "*some secrecy*" (per Lord Brodie at §90). This criticism is without foundation. Plainly on a matter such as this, the Government is entitled to take decisions and to receive advice under conditions of confidentiality. The Government was not obliged to give the Petitioners a rolling commentary about its decision-making process before a final decision to prorogue had been taken on 28 August 2019, especially in circumstances where the Petitioners would have sufficient time (as they in fact did) to challenge the decision in the courts before it took effect. Parliament will, and was at all material times going to be able to sit and legislate in the run up to the UK's exit from the EU on 31 October 2019.

120. The Inner House placed great weight on the length of prorogation, describing it as "*extraordinary*" (*per* the Lord President at §56) and "*lengthy*" (*per* Lord Brodie at §90). While the period of 34 calendar days was in excess of other recent examples, it is not extraordinary. As noted above, Parliament has in modern times been prorogued for considerably longer periods. Furthermore, a clear explanation is provided by the 15 August submission for the length of prorogation. It was taken against the background of the customary party conferences and a desire to avoid votes on the Queen's Speech occurring during the Scottish National Party conference. Given those clear reasons for the length of prorogation, it was not reasonably open to Lord Drummond Young to find (at §122) that no "*rational explanation*" had been provided for the length of the prorogation,

and so the inference could be drawn. A rational explanation had been provided, it was simply one with which his Lordship disagreed.

121. The Inner House, in determining that the length of the prorogation was unlawful, asserted that "*there is an important distinction between prorogation and Parliament's going into recess*": *per* Lord Drummond Young at §96. According to Lord Drummond Young, "*During a recess, Parliament may reconvene itself at any time*": at §96 and again at §118, and the Lord President at §56. This is a fundamental factual misunderstanding. House of Commons Standing Order 13 provides that a recall of the Commons during recess can take place if "*it is represented to the Speaker by Her Majesty's Ministers that the public interest requires that the House should meet at a time earlier than that to which the House stands adjourned.*" In addition if there are more than 14 days of recess remaining, Her Majesty in Council has the power to recall Parliament by proclamation: see the Meeting of Parliament Act 1799, s.1. Parliament cannot, then, "*reconvene itself at any time*". It is evident that the Inner House misunderstood the procedure for recalling Parliament during recess. This clearly led them into error when determining that the length of the prorogation was unlawful. For the reasons given above, it was plainly legitimate and proper to take into account the customary recess when determining the length of prorogation.

122. The Inner House held that the Cabinet discussions "*point to the various factors being used publicly to deflect from the real reason for the prorogation*": per the Lord President at §57, citing *Porter v Magill* [2002] 2 AC 357, at §144 per Lord Scott, see also at §89 per Lord Brodie. There are three points to be made about this finding:

(1) The Prime Minister alone advised prorogation.

(2) The presentational consequences of any Government decision are the stuff of politics, and the business of the Cabinet. It was unreal for the Inner House to expect that experienced politicians should not be alive to how their political opponents would react to the prorogation. Discussion of presentational aspects provides no basis for inferring that the stated reasons of the Prime Minister were not the true ones.

(3) As the citation from *Porter v Magill* makes clear, it was admitted in that case that the policy had been adopted for a spurious reason. It is no authority for the Inner House's approach to inference in this case.

123. Lastly, the Inner House appears to have placed weight on various comments outside the documents. The Lord President stated that §54 the prorogation occurred against "*discussions*" in which it was suggested that Parliament would be unable to prevent a withdrawal from the EU without an agreement. He did not particularise these discussions, but was presumably referring to the matters he set out in §7 of his opinion, none of which provides any evidence as to the Prime Minister's reasons for the decision. Lord Brodie (at §89) took into account the Prime Minister's stated aim of leaving the EU on 31 October 2019. That was never in dispute but it is a wholly insufficient basis for inferring that the reasons stated in the documents were not the true reasons for the decision.

124. The Inner House was wrong to make the inference that it did.

RELIEF

125. The Inner House further erred in law by pronouncing an interlocutor finding and declaring "*that the advice to prorogue Parliament…. and hence any prorogation which followed thereon, is unlawful and thus null and void and of no effect, and decern*". It is accepted that if (which is denied) the advice was unlawful, the courts have jurisdiction so to declare. However, the prorogation itself was effected by the Lords Commissioner by reading the commission to both Houses of Parliament, and was a proceeding in Parliament (just as prorogation by the sovereign in person would be). Consistently with the law of parliamentary privilege and article IX of the Bill of Rights, "*Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.*" The Inner House accordingly had no jurisdiction to pronounce the interlocutor in the form that it did, which should be recalled in any event by this court.

CONCLUSION

126. The Prime Minister and Advocate General for Scotland invite the Court to dismiss the English appeal and to affirm the order of the Divisional Court and to allow the Scottish appeal, recall the interlocutor of the Inner House and restore the interlocutor of the Lord Ordinary for the following among other:

REASONS

(1) The issues in the appeals are non-justiciable. There are no judicial and manageable standards against which the Prime Minister's advice to Her Majesty to prorogue Parliament can be assessed. The exercise of this prerogative power is intrinsically one of high policy and politics, not law, which for reasons of constitutional propriety is assigned to politicians in the executive and not the courts. The appeals would also involve the courts identifying and enforcing a new constitutional convention as to the length of prorogation, which the courts have no jurisdiction to do.

(2) The advice was compatible with the principle of Parliamentary sovereignty, which requires compliance with law duly enacted by the Queen in Parliament. In circumstances where Parliament has legislated to sit in particular cases, but not generally and otherwise preserved the prorogation prerogative, it would be positively inconsistent with Parliamentary sovereignty and the separation of powers for the courts to devise further constraints on the sittings of Parliament.

(3) The appeals are academic. Under the terms of s.3 of NIEFA and the Order in Council, Parliament was able to sit in the first two weeks of September 2019 and will be able to do so on and after 14 October 2019. Indeed, Parliament used that time to pass the new Act, which further expresses its will about the terms and process of the UK's exit from the EU.

(4) The advice was in any event lawful and in particular not vitiated by an impermissible purpose or regard to irrelevant considerations.

(5) The reading of a commission for the prorogation of Parliament to both Houses by Lords Commissioner is a proceeding in Parliament for the purposes of article IX of the Bill of Rights which the courts have no jurisdiction to impeach or question.

THE RT HON LORD KEEN OF ELIE QC

DAVID JOHNSTON QC

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For the Advocate General for Scotland

SIR JAMES EADIE QC

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For the Prime Minister

13 September 2019