Part I: Commentaries and Reflections

PREROGATIVE POWER AND ARTICLE 50 OF THE LISBON TREATY

The Rt Hon the Lord Millett PC QC

The UK Supreme Court Yearbook chiefly considers cases decided by the UK Supreme Court in the year just past. On this occasion, we have decided to include a short article by a retired Law Lord (and Remainer) on the recent decision of the Divisional Court in R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin) delivered on 3 November 2016. We do so because of the constitutional (as well as political) importance of the case, which has come to be known as ‘the Article 50 case’ or ‘the Brexit case’. The appeal from the judgment of the Divisional Court will ‘leapfrog’ the Court of Appeal and go directly before a panel of all 11 Justices of the UK Supreme Court on 5-8 December 2016. Herein, Lord Millett addresses what he believes to be the ‘real question’ in that appeal.

The Prime Minister has announced the Government’s intention to serve notice under art 50 of the Lisbon Treaty of the UK’s intention to leave the European Union (‘the EU’). Once served, then, after the expiry of two years, in the words of art 50, the Treaties which constitute the EU (‘the Treaties’) will ‘cease to apply’ to the UK and it will cease to be an EU member state.

The Government considers that it has power to serve the notice by exercising the Royal Prerogative. The Divisional Court has ruled that the rights created by the Treaties, having been given statutory force in domestic law, principally by s 2 of the European Communities Act 1972 (‘the 1972 Act’), cannot be revoked or ‘overridden’ except by an Act of Parliament.¹

The real question is whether the service of the Article 50 notice will in due course have that effect or simply cause the rights to expire automatically of their own accord.

¹ Non-Permanent Justice of the Court of Final Appeal of Hong Kong; retired Lord of Appeal in Ordinary, UK House of Lords.

It is clearly arguable that the rights in question are *expressly or inherently* and without any implication dependent on the UK continuing to be a member of the EU. If so, then, when the UK leaves the EU, such rights and obligations will not be revoked or overridden but will simply expire in accordance with their terms. This is because Parliament must be taken to have intended that rights granted in such terms will endure only so long as those terms are satisfied and thus have a potentially limited life. Whether the UK maintains or determines an existing relationship with a foreign state or institution has classically been regarded as falling within the scope of the Royal Prerogative.

Three fundamental constitutional principles are beyond dispute. First, the relationship between the UK and other states and international bodies is within the scope of the Royal Prerogative, or in modern parlance, the executive branch of Government.\(^2\) This includes the recognition of foreign states and Governments, the declaration and ending of war, and the entry into and withdrawal from international treaties.

Secondly, the Government cannot, by exercising the Royal Prerogative, alter or revoke statutory rights granted by Parliament; only Parliament can do so.\(^3\) But this is subject to the qualification that Parliament may grant rights on terms which cause them to expire automatically after a specified period (‘a sunset clause’) or in certain circumstances.

Thirdly, international treaties are not self-executing, that is to say they do not alter the domestic law of the UK until they have been implemented by an Act of Parliament.\(^4\) This follows from the first two principles.

In *R (Miller) v Secretary of State for Exiting the European Union*, the Divisional Court held that the Royal Prerogative cannot be exercised so as to affect or cause the loss of statutory or common law rights.\(^5\) The Court seems to have thought that the Government needs statutory authority to enter into or withdraw from such a treaty, but this is not the case. Statutory authority is only needed to give effect to the treaty change in domestic law, and not necessarily even then. By altering the relationship between the UK and other states, it may alter the circumstances in which a statute applies. In particular, it may automatically determine rights which depend on the continuation of a pre-existing relationship. Whether it does so depends on the terms in which those rights were granted. Where they are determined, they are not revoked or overridden by the exercise of the Royal Prerogative, but simply expire in accordance with the terms on which they were granted.

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1. ibid [30].
2. ibid [25]-[29].
4. Miller (n 1) [33] (Lord Thomas CJ, Sir Terence Etherton MR and Sales LJ).
Since Parliament has already provided for such a contingency, no further legislation is required.

A striking example of this is the case of William Joyce (Lord Haw Haw). He supported the Nazis and at the outbreak of war was living in Germany from where he broadcast pro-German propaganda to England. After the war he was convicted of treason and hanged for conduct which would not have been an offence at all had Britain not been at war with Germany. The service of an ultimatum on Germany and the subsequent declaration of war were, of course, the result of the exercise of the Royal Prerogative; no legislation was involved. This demonstrates an important fact: that where a provision of domestic law depends on the continuance of a particular relationship with another state, a change in that relationship may be effected by the exercise of the Royal Prerogative without the need for legislation.

The claimants in Miller relied on a number of rights created by the Treaties which have been implemented by legislation and will be lost when the UK leaves the EU.\(^6\) These included the right to freedom of movement which, it was argued, will be revoked or overridden when the UK leaves the EU and which it is inconceivable that Parliament should re-enact.

It is a strange right which Parliament can grant and revoke but which, once revoked, it cannot re-enact. It is not merely inconceivable that Parliament should re-enact the right; it lacks the competence to do so. Were another member state rather than the UK to leave the EU, the right of free movement between that country and the UK would lapse without any need for an Act of Parliament or an exercise of the Royal Prerogative. That is because the right is a right of free movement between two countries both of which are EU member states.

The Divisional Court dealt with this example by relying on the fact that by authorising the subsequent ratification of the accession treaty (presumably by enacting the 1972 Act), Parliament intended to bring the rights in question into effect.\(^7\) But: (i) the fact that the Government obtained the authority of Parliament to exercise the Royal Prerogative by ratifying the accession treaties does not mean that it was obliged to do so, and since the treaty was not self-executing it was not; (ii) the order in which ratification of the accession treaty and the enactment of the 1972 Act took place was surely to avoid the risk that the UK might ratify the treaty and then fail to pass the 1972 Act, bringing the UK into recurring breach of its international obligations; and (iii) the fact that by authorising the Government to ratify the accession treaty Parliament intended to bring treaty rights into effect in

\(^{6}\) ibid [57]-[61].

\(^{7}\) ibid [41]-[42], [92]-[94].
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domestic law, does not affect the rights themselves, or prevent them from being dependent on the UK remaining a member of the EU.

It is true that art 50 of the Lisbon Treaty was not in force in 1972 and there was then no provision for withdrawal. But there were only a handful of member states in 1972, and while unilateral withdrawal was not possible, Parliament will have known that the UK could withdraw with the consent of all the other member states embodied in a treaty between them. It would also have known that such a treaty could be made pursuant to an exercise of the Royal Prerogative, and must be treated to have authorised this also. It was only when the number of member states became too great to make this a practical course that art 50 was introduced to replace the unanimous consent previously required. It is difficult to see why an article contained in the Lisbon Treaty, also approved by Parliament, should have different requirements from the treaty which was previously necessary.

The rights referred to in s 2 of the 1972 Act are the rights 'from time to time created or arising by or under the Treaties'. Such rights were introduced into domestic law on the terms on which they were granted by the relevant treaty. The right of free movement of persons was granted by the Maastricht Treaty. It is a right for citizens of an EU member state to enter and reside in any other EU member state. The service of notice under art 50 will, in due course, cause the Treaties to 'cease to apply' to the UK and it will cease to be an EU member state. When this occurs, the right of free movement (in either direction), will lapse in accordance with its own terms. There is no need to revoke or override it; it was always of potentially limited duration, coterminous with the maintenance of the existing relationship between the UK and the EU.

The Divisional Court rejected the Secretary of State’s submission that s 2 of the 1972 Act is subject to an implied condition that the UK should remain a member of the EU. But there is no need to imply any such a condition, for the rights made part of domestic law by the section are expressly limited to the period while the UK is an EU member state and the Treaties continue to apply to it. Two other examples of rights on which the claimants relied and which will be lost on the UK ceasing to be a member of the EU is the right of British citizens to elect Members of the European Parliament and the power of domestic courts to refer questions of the meaning of European law to the European Court of Justice. Both rights are susceptible to the same analysis; they are expressly or inherently dependent on the maintenance of

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8 European Communities Act 1972, s 2(1).
10 Miller (n 1) [93(3)] (Lord Thomas CJ, Sir Terence Etherton MR and Sales LJ).
the existing relationship between the UK and the EU. The termination of that relationship is a classic example of an act which is within the scope of the Royal Prerogative as Parliament must be taken to have known when it imported the rights in question in terms which expressly made them of potentially limited duration. The European Parliament is a European institution composed of elected representatives of the member states and its functions are concerned with the development of EU law. The right of the UK to elect some of its members will automatically determine when the UK leaves the EU as no successful candidate will be eligible to be a Member of the European Parliament. There is no need to imply a condition that the UK remains a member state. It is inherent in the right itself. If you resign from the club, you lose the right to elect the committee.

A third example was the power to refer questions of the meaning and effect of a relevant provision of European law to the European Court of Justice. That too will be lost when the UK leaves the EU, for the jurisdiction of the European Court of Justice is limited to the interpretation of EU law. Once the Treaties cease to apply to the UK, any question of the meaning or effect of EU law on the UK will automatically become irrelevant and beyond the jurisdiction of the European Court of Justice to answer. It is inherent in the right to refer questions of law to the European Court of Justice that the UK should be a member of the EU. There is no need to imply a condition to that effect.

All the rights on which the claimants relied upon in Miller have been imported into domestic law in the terms in which they were granted by the Treaties, and all are inherently dependent on the maintenance of an existing relationship between the UK and the EU. Any change in that relationship is a classic example of something which may be effected by the exercise of the Royal Prerogative without the need for legislation, and as the case of William Joyce shows, that remains the case even if it affects the rights and duties of citizens of the UK. It would be an odd legal system which could hang a man, but could not deprive him of the right to reside in another country without the consent of the legislature.