Brexit Judgment: R Miller v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin)

The much awaited High Court judgment of 3 November 2016 was an historical decision which saw the Executive's use of prerogative powers delineated in the context of Treaty making, and unmaking, in a successful Judicial Review against the Government. Before considering the substantive decision we would like to make two preliminary observations. First, this is a monumental case for many reasons, but particularly because it demonstrates the independence of our judiciary, not just from the Executive, as even the first Claimant, Gina Miller, herself said outside the court after the judgment was handed down that she did not, in her heart of hearts expect to win, but also from the press, which, from some quarters has come out vehemently against the judges on a personal level. Second, contrary to the view of some of the aforementioned press, and indeed politicians, this case was not about challenging the referendum result. Apart from this being obvious from the legal decision made in the case, it is also evidenced by the motivation of the Claimants themselves. Many reports of the case have overlooked the fact that there were two Claimants who brought the legal challenge. The second Claimant, Deir Tozetti Dos Santos, is a self-confessed Leave voter, who explained that his motivation for bringing the case was because, for him, the referendum was about re-establishing the supreme authority of Parliament, not replacing influence from Brussels with the untrammelled power of the Executive.

In terms of the substance, there are two significant legal and constitutional points to come from the judgment: sovereignty and direct effect. These will be addressed in turn. Before doing so however, it is important to consider the actual decision in the case, which can be succinctly stated by reference to paragraphs 92 and 94 of the judgment, '[i]nterpreting the ECA 72 in the light of the constitutional background … we consider that it is clear that Parliament intended to legislate by that Act so as to introduce EU law into domestic law … in such a way that this could not be undone by exercise of Crown prerogative power. With the enactment of the ECA 1972, the Crown has no prerogative power to effect a withdrawal from the Community Treaties on whose continued existence the EU law rights introduced into domestic law depend … The Crown therefore has no prerogative power to effect a withdrawal from the relevant Treaties by giving notice under Article 50 of the TEU. … the clear and necessary implication … is that Parliament intended EU rights to have effect in domestic law and that this effect should not be capable of being undone or overridden by action taken by the Crown in exercise of its prerogative powers. …'. All the judgment has actually done therefore is clarified that the decision to start the Brexit process is not one for the PM alone exercising prerogative powers associated with Treaty making in international law, but rather for Parliament, presumably in the form of legislative enactment. The objection therefore, which has been markedly displayed by both politicians and the press, is actually with Parliamentary involvement in the Article 50 invocation decision, and should not have been phrased in terms of an attack on the judicial decision. This is because the judges have not adjudicated on the referendum result, just who takes the decision to start the process and effectively decide what 'Leave' means, as this was not defined by consensus between parties to the Leave campaign prior to the referendum vote. In terms of sovereignty, this is paradoxical.

One of the issues on which the referendum was fought by the Leave campaign was to reinstate Parliamentary Sovereignty by 'taking back control' from Brussels. It is particularly noteworthy that during the House of Commons debates on the EU Referendum Bill, an MP quoted a well-known constitutional historian and academic as saying that referendums are used where it is thought that the Parliamentary system cannot provide the required level of legitimacy. Paradoxically, both politicians and lawyers alike cited the preservation of Parliamentary Sovereignty as the reason for supporting Brexit, whilst at the same time backing the use of a referendum because of a lack of legitimacy in the Parliamentary system. It is therefore another paradox to now criticise the judges for deciding to uphold Parliamentary sovereignty (discussed in paragraphs 21 to 23 of the judgment) by interpreting Parliament's intention as expressed in the ECA 1972 as preventing the Executive from acting contrary to that intention through use of the prerogative. The judges' decision was actually a conservative view of the principle of Parliamentary sovereignty based on a logical application of UK constitutional law which was actually supported by some MPs, and indeed campaigned for, in the run up to the referendum.

The second issue relates to why the judges came to the decision they did about the interpretation of the provisions of the ECA 1972. This is because of direct effect. The ECA 1972 is not just an incorporation statute, rather, it provides for European 'rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties … are without further enactment to be given legal effect … and be enforced' in UK law. Directly effective provisions are enforceable in UK courts by UK citizens. The ECA 1972 also says that this enforceability applies to the rights and obligations etc. which arise from time to time, which is not a typical provision of a simple incorporation statute. Consequently, the judges opined, at paragraph 32, that as the prerogative cannot alter the domestic law of the UK by entering into Treaties, so it cannot do so by Treaty withdrawal. Furthermore, paragraph 64 of the judgment states that Article 50 notification would amount to a material change in the domestic law of the UK, a conclusion which was and still is openly advocated by Brexiteers. The High Court conclusively held, at paragraph 89, that the Secretary of State for Exiting the European Union was wrong in thinking that the Executive, through exercise of the prerogative, can bring about major changes in domestic UK law.

The referendum was of course advisory, as stated in paragraph 106 of the judgment, and even accepted by the most high profile Leave campaigner, Nigel Farage, speaking on speaking on the Andrew Marr show. However, the only aspect of the Court's decision that the Government accepts is that what is probably required by the High Court judgment is an Act of Parliament. It does not however accept the decision as a whole and, as David Davis commented in a statement in the House of Commons, is therefore appealing to the Supreme Court. Unfortunately, in that statement the Secretary of State for Exiting the European Union still appeared to equate the legal challenge as to which body makes the decision to withdraw and as attempt to reverse, deny or delay the outcome of the referendum. It is unfortunate because with no mandate as to the form that Brexit should take, the Government appear to be equating the decision in the referendum to leave the EU with their decision as to what they are prepared to ask the EU for upon leaving. It is our hope and expectation that the judges in the Supreme Court will maintain their

independence from political influence or the influence of unpleasant and unnecessary personal attacks in the press upon hearing the appeal.