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JUMPING THE GUN – WHY ANALYSIS OF SECTION 2(1) OF THE EUROPEAN COMMUNITIES ACT 1972 IS FUNDAMENTAL TO DETERMINING THE LIMITS OF THE EXERCISE OF PREROGATIVE POWERS

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The media has recently been sent into a whirlwind of Brexit speculation following the handing down of the judgment of the High Court of Justice on 3rd November 2016 ("the Judgment"). The Court ruled that it is not within the prerogative powers of the government to serve a notice under Article 50 of the Lisbon Treaty (a procedure which would commence the two-year withdrawal of the UK from the EU), and that Parliament must give its approval before such action is taken. To some, this is the death knell for Brexit that they have been hoping for. To others, it is an example of the judiciary stifling the stated will of the people.

In reality, it is a decision that should surprise nobody. Whichever way the Court decided, it was always going to be appealed by the "losing" side, and so the question was always ultimately going to be determined by the Supreme Court. Some are of the view that the question could then be appealed to the CJEU. However, Article 50(1) simply requires any notice to be served in accordance with a Member State's constitutional requirements. It is difficult to think of a more "domestic" issue than a question relating to the functioning of the constitution, and the relationship between the organs, of a state.

Nevertheless, the reason why this decision is unsurprising is that, if the decision was always going to be appealed, it is vital on a practical level that the status quo was maintained. Had the Court determined that notice could be served by exercise of the prerogative, and had the government served such notice before an appeal was determined, the political and legal implications of the Supreme Court overturning the High Court decision could have been disastrous.

The Judgment spans 36 pages (including the title page). By contrast, the recent decision of the Employment Tribunal regarding Uber ran to 40 pages.[1] The sense that one gets is that rigorous analysis of the limits of the prerogative, Parliamentary sovereignty, and the interplay between EU law and UK law was to be reserved for the inevitable appeal. One can sympathise with the Court if that is indeed the case, given the constitutional importance of the final decision, and the implications for the UK.

Nevertheless, this absence of rigour is no clearer than in the analysis of the European Communities Act 1972 ("the 1972 Act") at [37] – [54], which amount to (largely) a brief description of the history and provisions of the 1972 Act. In particular, given the focus in the Judgment on the impact of withdrawal on the rights of British citizens, and the subsequent repercussions that this has for the interpretation of the 1972 Act, it is surprising that the most relevant part of the 1972 Act, Section 2(1) (which provides that directly effective EU law can be relied upon by UK citizens in UK courts), is given a mere five and a half lines of analysis.

[1] *Aslam and Anors v Uber BV and Anors Case Nos: 2202550/2015*

In this article, it will be argued that Section 2(1) of the 1972 Act is, in fact, of fundamental importance to determining the limits of the exercise of prerogative power, and Parliamentary sovereignty. It is only once those limits have been determined that a genuine analysis of legislative intent can be undertaken.

SECTION 2(1) OF THE 1972 ACT

At [57] – [61] of the Judgment, the Court outlined three categories of rights arising under EU law. Briefly, the rights are as follows:

1. Rights capable of replication in the law of the UK. These include (a) the rights of workers under the Working Time Directive, and (b) the national court's obligation to refer questions of law to the CJEU.

2. Rights enjoyed in other member states of the EU. The main example given is the EU rights of free movement, and in particular the requirement that the authorities and courts of Member States to respect and give effect to those rights.

3. Rights that could not be replicated in UK law. These include (a) the right to stand for selection or election to the European Parliament, (b) the right to vote in such elections, and (c) the right to seek a reference to the CJEU.

The Court ultimately decided that (1) all of these rights would be lost if the UK withdrew from the EU, (2) withdrawal would result impact upon the rights enjoyed by British citizens, and therefore (3) withdrawal from the EU cannot be effected through the exercise of prerogative powers.

The Court's analysis is considered in more detail below. Nevertheless, the starting point is the contention that all of the above rights would be lost if the UK withdrew from the EU. The reason for that is alluded to at [50] of the Judgment, when the Court considered the effect of Section 2(1) of the 1972 Act, and which is repeated below for ease of reference:

> "[50] *Section 2(1) provides:*
>
> > *"All such 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, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this Section applies."*
>
> *By virtue of this provision, all directly applicable EU law is made part of the United Kingdom law and is enforceable as such.*

It was common ground that following the withdrawal of the UK from the EU, there would no longer be any enforceable EU rights in relation to which Section 2(1) would have application, and so Section 2(1) would be stripped of any practical effect. Therefore, the three classes of directly effective rights outlined above would be lost, and British citizens would no longer be entitled to rely upon or assert them.

Nevertheless, the Court's analysis of the effect of Section 2(1) is somewhat unclear. In particular, the statement that, by that Section:

> "*all directly applicable EU law is* ***made part of the United Kingdom law*** *and is enforceable as such.*

What does it mean to say that directly effective EU law is "made part" of the UK law? It is submitted that there are two possible interpretations:

1. Section 2(1) enacts EU law rights in English law, by transplanting and transfiguring international law rights into domestic law rights. In that regard, it is no different to any other primary legislation which explicitly incorporates enactments into English law, or even secondary legislation that does the same. Through this provision, Parliament has delegated some of its legislative functions to the EU, and therefore any enactments to which that Section applies, such Regulations or Directive are themselves primary legislation enacted by Parliament ("the Domestic Interpretation").

2. Section 2(1) enables UK citizens to rely directly on the EU treaties. In this regard, the Section gives statutory effect to the EU rights, as a necessary condition for them being relied upon in the UK. They are not rights based in UK legislation, but in the treaties as they have international effect from time to time ("the International Interpretation").

The key difference between the two is whether the rights form a part of English law. With the Domestic Interpretation, they do. The rights are enacted by Parliament and so may be relied upon by individuals in the same way as any other primary (or secondary) legislation enacted in the UK. With the International Interpretation, the rights are not enacted by Parliament and remain in the international sphere, in the same way as, for example, double taxation treaties. Indeed, it should be noted that the language of Section 2(1) of the 1972 Act, particularly in relation to the arrangements "having effect" in the UK, is substantially the same as, for example, Section 2 of the Taxation (International and Other Provisions) Act 2010.

The effect of this is stark. If the Domestic Interpretation were to be accepted, then the UK's withdrawal from the UK would not result in the removal of rights incorporated into English law through Section 2(1). Such rights would form as much a part of English statute law as the rights provided for by Directives, which have been implemented in the UK by primary or secondary legislation. On such an interpretation, it is not a question of whether the branch falls with the tree, but rather whether a second tree, planted at the same time as the first, falls with the first. The answer is surely that it does not.

Naturally, the Domestic Interpretation could lead to somewhat inexpedient outcomes. For example, in relation to the first and third class of rights, individuals would still have a right to appeal to the CJEU on a point of law (namely, the question of whether the UK has complied with its obligations under EU law), and would still have the right to stand for election to the EU parliament. However, neither of these rights could ever be exercised, for the simple reason that (1) there would be no breach by the UK of its EU obligations (there no longer being any EU obligations for the UK to breach), and (2) there would be no right for the UK to send, or obligation on the EU to accept, delegates from the UK to the European parliament (the result would be that individuals are entitled to be elected to represent the UK in a forum to which the UK no longer takes part).

If the Domestic Interpretation was adopted, it would then be for the Court to determine whether an exercise of the prerogative in these circumstances, which would result in a right being seldom used (as opposed to being formally withdrawn or substantively altered), strays beyond the boundaries of permitted exercise of the prerogative powers.

By contrast, if the International Interpretation were to be accepted, then withdrawal from the UK would deprive UK citizens of the aforementioned rights. However, such rights would never have formed a part of English statute law in the first place. Such rights could be removed, or altered, by the EU without any consultation of Parliament. Indeed, referring back to the example of double taxation treaties can be taken further, there is no reason why there should be any objection to such rights being removed, or altered, through the exercise of prerogative powers. Parliament is seldom heard to say that it must be consulted before such rights are affected by the use of the prerogative. There is no reason, at least at first glance, why EU rights ought to be treated any differently.

If the International Interpretation was adopted, it would then be for the Court to determine whether exercising the prerogative powers to serve a notice under Article 50 is distinguishable from, for example, withdrawing from a double taxation treaty, before determining whether such exercise is permitted. A failure to undertake such contextual analysis would have the potential to cause great uncertainty.

THE COURT'S ANALYSIS

In a somewhat sparse (only five paragraphs) analysis of the arguments of this point, the Court ultimately decided in respect of each of the classes of right that:

1. The first class of rights are given effect in domestic law through the 1972 Act, and it is not sufficient that some may be preserved by new legislation. The objection is that the exercise of prerogative powers would deprive citizens of these domestic rights of effect. This includes the right to seek authoritative rulings of the CJEU regarding the scope and interpretation of such rights.

2. The second class of rights were intentionally created by Parliament when it enacted the 1972 Act, and whilst they are not rights which are enforceable in the national courts of the UK, they are nevertheless rights of major importance created by Parliament.

3. The Secretary of State accepted that the third class of rights would be lost.

In so deciding, the Court appears to have adopted an uncomfortable interpretation of Section 2(1) which applies one of the above interpretations for some purposes, and the other for different purposes. This is made clear in [64] and [66] where the Court states:

> "[64] (in relation to the first class of rights) *The objection remains that the Crown, through exercise of its prerogative powers, would have deprived domestic law rights created by the ECA 1972 of effect.*"
>
> and
>
> "[66] (in relation to the second class of rights) *The reality is that Parliament knew and intended that enactment of the ECA 1972 would provide the foundation for the acquisition*

> *by British citizens of rights under EU law which they could enforce in the courts of other Member States.*"

It cannot be said that the first statement applies the International Interpretation of Section 2(1), for two reasons. The first is that the Court refers to the rights as being "*domestic law rights*". In the International Interpretation, such rights are not, and have never been, "domestic" – they have only ever existed at an international level. The second is that, on the International Interpretation, withdrawal from the EU would not merely deprive the rights of effect, but would remove them completely. Accordingly, the statement in [64] must apply the Domestic Interpretation of Section 2(1).

By contrast, it cannot be said that the second statement applies the Domestic Interpretation of Section 2(1). Parliament has no power to afford rights to individuals that can be asserted in other jurisdictions. For example, suppose that Parliament enacted legislation granting the right for British citizens to commit murder in Paris city centre. It would simply not be possible to assert such a right in a French court, unless either (1) there was some provision in French law which also granted such a right (in which case, one would be relying on French law rather than English law), or (2) the right was provided for by international (or EU) law, and such law had been permitted under French law to have effect in France (in which case, one would be relying on international law rather than English law). It is plainly a fiction to say that English law rights are relied upon to permit free movement of British citizens in other states. Accordingly, the statement in [66] must apply the International Interpretation of Section 2(1).

The Court therefore wants to have its cake and eat it. It wants to say both (1) that the rights imported through Section 2(1) are matters of domestic law, and (2) that those same rights are matters of international law. With respect, this option is simply not open to the Court.

WHICH INTERPRETATION?

The Court must, therefore, make a choice. With the greatest of respect, it is submitted that the choice is not a difficult one. To adopt the Domestic Interpretation would sound the death knell for the exercise of the prerogative in circumstances where it has unquestioningly been exercised since time immemorial, and also lead to inexpedient outcomes (individuals having rights to act in circumstances that would no longer exist). It would mean that every treaty which impacts on the rights of British citizens, such as double taxation treaties (for example), may only be withdrawn from by an Act of Parliament. This cannot be the case, at least not without clear analysis and justification on the part of the Court.

Further, it would make the approach taken by the Court to conflicts between directly effective EU Regulations, and UK statutory law, difficult to reconcile. Suppose that the UK enacted legislation that was 100% in opposition to a directly effective EU Regulation. How would the problem be approached in the UK courts?

If the Domestic Interpretation was adopted, then the approach would be the same as with any other conflicting domestic legislation. The first question would be whether the two could be interpreted so as to not be in conflict. That would plainly not be possible in the present example. The second question would then be whether the subsequent legislation had repealed the first

legislation (i.e. the Regulation). If so, then on normal principles, it is likely that the Regulation would be impliedly repealed as a matter of English law.

Note that this is a different question to the question of whether the 1972 Act would be impliedly repealed. It is not the 1972 Act that is at issue, but rather the Regulation, which, through the operation of Section 2(1) on the Domestic Interpretation, has been transposed into primary legislation enacted by Parliament. There is no reason why the Regulation, by contrast with other, "normal" primary legislation, would be afforded the status of a "constitutional statute", and so there is no reason why the regulation could not be impliedly repealed.

However, no such analysis has ever been adopted. Rather, the reverse approach is taken, in that the Regulation, irrespective of whether it was enacted before or after the relevant Act of Parliament, is supreme, and so the Act is disapplied.[2] The effect is that the doctrine of implied repeal has been abolished insofar as EU law is concerned.[3]

This can only be the case if the International Interpretation is adopted. In the Domestic Interpretation, EU rules are enacted as primary legislation in the UK. At that point, they are no longer *EU* rules, but are *domestic* rules, and so are indistinguishable from any other domestic rules which have been enacted by Parliament. With the International Interpretation, such rules are not, and have never been, "domestic" – they have only ever acted on an international level as EU rules, and so are distinguished from rules enacted by Parliament. Such rules can therefore be given a "supreme" status over Acts of Parliament.

The International Interpretation also means that there is no conflict between the exercise of the prerogative, and Parliamentary sovereignty, even on the Court's own reasoning set out at [20] – [31]. By way of summary, in the Judgment the Court said as follows (with emphasis added):

- Parliament is sovereign, and legislation that is **enacted by the Crown** with the consent of both Houses of Parliament is supreme. ([20])

- The Dicean account of sovereignty still holds true, that Parliament has:

  > "*the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law…as having a right to override or set aside* ***the legislation of Parliament***." ([22])

- That an important aspect of Parliamentary sovereignty is that **primary legislation** is not subject to displacement by the Crown through the exercise of its prerogative powers. ([25])

- That the Crown only has those prerogative powers recognised by the common law, and their exercise only produces legal effects within the boundaries so recognised. ([25])

- That the principles of the use of the prerogative are well settled as being (quoting *The Case of Proclamations* and *The Zamora*):

[2] *R v Secretary of State for Transport, ex p. Factortame Ltd [1990] 2 AC 85*
[3] P.P. Craig, G. de Búrca, EU law: text, cases and material, Oxford University Press, Oxford, 2015. p. 299-300

> "*The King by his proclamation or other ways cannot change any part of* ***the common law, or statute law, or the customs of the realm***." ([27])
>
> "*No one would contend that the prerogative involves any power to prescribe or alter the law administered in* ***Courts of Common Law or Equity***." ([29])

- The general rule is that the conduct of international relations and the making and unmaking of treaties on behalf of the UK are regarded as matters for the Crown in the exercise of its prerogative powers. ([30])

The highlighted points make clear that the principle of Parliamentary sovereignty prevents prerogative powers from being exercised where it would impact on rights which have been *enacted* by parliament, by way of primary legislation, and are therefore *domestic* rights.

This may well be the position if the Domestic Interpretation were to be (it is submitted, erroneously) adopted, although even that is debateable (as to which, see above).

However, this is patently not the case if the International Interpretation were to be adopted. Rights that fall within the ambit of Section 2(1) are not, and would never have been, rights which have been *enacted* by Parliament. They could be altered without Parliament's consent, by the EU. They do not form part of "domestic" law, as they only act at an international level. There is therefore no infringement of Parliamentary sovereignty if they are removed, whether by the exercise of the prerogative or otherwise.

It is therefore submitted that the International Interpretation is the correct one. On that basis, and considering the current boundaries in which the prerogative may be exercised, there is no reason why such rights could not be removed through the exercise of the prerogative.

CONCLUSION

Regrettably, as suggested above the Court's analysis of the effect of Section 2(1) of the 1972 Act is somewhat lacking. A determination of the way in which this Section makes directly effective EU law "part" of UK law is the foundation upon which any analysis must be based. One cannot answer the question of whether the exercise of the prerogative would impact upon Parliamentary sovereignty unless one can say what the effect in law of repealing Section 2(1) would be.

Nor can the question of legislative intent be considered until that point is determined. If the outcome of the above analysis is that the rights afforded to individuals by virtue of EU law, and the way in which they are afforded to British citizens, are no different to the rights afforded by other treaties, then it necessarily impacts upon whether the intention Parliament when approaching EU law, as compared with other treaty law.

It is not enough for the Court, as seems to be the case in [62] – [66], to simply rely on the vague assertion that withdrawal would affect "*rights of major importance*" afforded to individuals. There are many rights which are of major importance that are, and have always been, subject to the prerogative will. The most obvious examples, as suggested above, are the double taxation treaties.

Similarly, it is not enough for the Court to merely state that these are rights "*created by Parliament*", without any explanation as to what that means, or analysis of the process by which

such "creation" manifests itself. This is particularly important given the similarity of language used in (for example) the Taxation (International and Other Provisions) Act 2010. The consequences of the Court determining that Section 2(1) "creates" rights, which therefore cannot be withdrawn without an Act of Parliament, are so wide ranging that it cannot simply be stated without clear analysis, or without considering the implications in other areas where the use of the prerogative is not only longstanding, but has always been unquestioned.

As has been suggested above, there are two potential interpretations of Section 2(1). There is no middle ground. It is incumbent upon the Court to determine, with clear explanation and analysis, which of those interpretations is the correct one. Only once that process is complete, can the Court determine the question of whether the government may exercise its prerogative powers to serve a notice under Article 50.

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