



Neutral Citation Number: [2019] EWCA Civ 1761

Case No: C1/2019/2542

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)
The Honourable Mr Justice Supperstone
CO/3508/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2019

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON

THE MASTER OF THE ROLLS
THE RIGHT HONOURABLE SIR TERENCE EHERTON

and

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE RIGHT HONOURABLE DAME VICTORIA SHARP DBE

Between:

THE QUEEN (on the application of LIBERTY)

Applicant

- and -

THE PRIME MINISTER

Respondent

-and-

THE LORD CHANCELLOR

Richard Hermer QC, Zoe Leventhal and Edward Craven (instructed by Liberty) for the Applicant

Sir James Eadie QC, David Blundell, Christopher Knight and Richard Howell (instructed by Government Legal Department) for the Respondent

Hearing dates: 18 October 2019

Approved Judgment

The Lord Burnett of Maldon CJ, Sir Terence Etherton MR and Dame Victoria Sharp DBE PQBD:

1. This is an application for permission to appeal against a case management decision of Supperstone J made on Friday 11 October refusing an urgent hearing of Liberty's claim for judicial review against the Prime Minister based upon the claimant's contention that he may act unlawfully by reference to his obligations under the European Union (Withdrawal) (No 2) Act 2019 ["the 2019 Act"]. By that claim Liberty seek a declaration that the Prime Minister:

“... may not take any step which is intended, anticipated or likely to result in the European Council responding to a letter sent pursuant to section 1(4) of the European Union (Withdrawal)(No. 2) Act 2019 by declining or refusing to agree to an extension of the period under Article 50(3) of the Treaty on European Union”

2. Mr Hermer QC was pressed in oral argument to explain whether it was Liberty's case that the Prime Minister was prohibited by law from stating his honest belief that it is not in the best interests of either the United Kingdom or the European Union for the date on which the United Kingdom leaves the European Union to be extended beyond 31 October 2019. That is the current date mandated by statute and also by the law of the European Union. He submitted that “everything turns on intent” or “it turns on intent not substance”. Liberty recognise that the Prime Minister may articulate any arguments in Parliament free from interference by the courts, but its position is that he should be restrained from repeating them outside Parliament if he intends his remarks to influence the decision of the governments of the other member states of the European Union to decline an extension.
3. The ordinary course when seeking to reverse a decision made on paper in the Administrative Court is to seek an oral hearing, rather than to appeal to the Court of Appeal. No procedural issue was raised before us. There is no doubt that the Court of Appeal has jurisdiction to entertain the application without an oral hearing having taken place below. It is, however, an exceptional course that can be justified only by extreme urgency.
4. Supperstone J refused to order an early oral hearing because similar proceedings had been heard in Scotland at first instance and on appeal and a further hearing was imminent. The Inner House of the Court of Session will sit on Monday 21 October to hear any argument which might arise in the light of events since it delivered judgment on 9 October 2019 refusing relief.
5. We heard the argument on Friday 18 October. At the conclusion of the hearing we refused permission to appeal. We indicated that we were satisfied that Supperstone J had made no error of principle, nor did he act outside the proper limit of judicial discretion, in making the case management decision under challenge. These are our reasons for coming to that conclusion.
6. On 9 September Liberty issued proceedings in the Administrative Court against the Prime Minister. That was the date on which the 2019 Act received Royal Assent. The proceedings anticipated that the Prime Minister would fail to comply with the

statutory duty found in section 1(3) and 1(4) of the 2019 Act to seek from the European Union an extension of membership for the United Kingdom beyond 31 October. That duty would arise on 19 October 2019 if Parliament failed to approve a withdrawal agreement between Her Majesty's Government and the European Union or failed to pass a motion that the United Kingdom should leave without an agreement. The proceedings also raised the issue of what is known as "the frustration principle". For the purposes of this judgment it is unnecessary to explore the precise boundaries of that principle or its application to the 2019 Act. It is sufficient to note that, in broad terms, it prohibits ministers from frustrating the purpose of a statute or a statutory provision, which it is for the court to determine. An application for urgent consideration was refused on 9 September as totally without merit.

7. The main concerns underlying the proceedings were that the Prime Minister might not comply with the duty no later than 19 October "to seek to obtain from the European Council an extension of the period under Article 50(3) of the Treaty of the European Union ending at 11.00 pm on 31 October 2019 by sending a letter to the President of the European Council" as required by section 1(4) of the 2019 Act, or that he would work to secure the opposite outcome.
8. Proceedings had been commenced in Scotland in mid-August. A fresh petition was issued in the Court of Session on 1 October 2019 which raised the same two arguments.
9. On 7 October Lord Pentland, sitting in the Outer House of the Court of Session, dismissed the applications before him: *Vince and others v The Right Honourable Boris Johnson MP and Lord Keen of Elie QC* [2019] CSOH 77. On 9 October the First Division of the Inner House of the Court of Session delivered its opinion on a reclaiming motion (appeal) from his decision: [2019] CSIH 51. It upheld his order. In delivering the opinion of the Inner House, Lord Carloway at [11] observed that given the conclusion reached by the Inner House the normal course would be to refuse all relief or dismiss the petition. It would be inconvenient, however, were the Petitioners required to issue fresh proceedings in the event that the legal position changed, in particular over the weekend of 19 October. For these reasons the matters before the court would be given further consideration on 21 October [12].
10. Mr Hermer submitted that events might move so quickly over the weekend that it would be too late by Monday for effective relief to be granted. He also submitted that the proceedings in Scotland were not the same as those started by Liberty in England and that, as a fall-back position, the Scottish courts were wrong to decline the relief sought by the Petitioners to the Court of Session. In those circumstances he submitted that we should grant permission to appeal the order of Supperstone J, allow the appeal and then reconstitute ourselves as a Divisional Court of the Queen's Bench Division and determine the claim for judicial review immediately.
11. In *BPP Holdings v HMRC* [2017] 1 WLR 2945 at [33] Lord Neuberger stated that there was a "high hurdle" to overcome before an appellate court could interfere with a case management decision. The Supreme Court endorsed the approach of Lawrence Collins LJ in *Walbrook Trustees (Jersey) Limited v Fattal* [2008] EWCA Civ 427 at [33]:

“An appellate court should not interfere with a case management decision by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.”

The Scottish Proceedings

12. In his opinion at [5] and [6] Lord Pentland identified the orders being sought by the Petitioners:

“[5] Head (i) seeks an interdict [an injunction] against the [Prime Minister] and any minister of the Crown (and anybody acting on their behalf or at their request) from taking any action that would undermine or frustrate the will of the UK Parliament as enacted in the 2019 Act, particularly (but not restricted to) (a) sending any document, message or statement alongside the letter required to be issued under section 1(4) of the 2019 Act which suggests that the UK’s intention is anything other than that set out in the letter; (b) delaying or otherwise causing the letter sent under section 1(4) not to be received by the President of the European Council; and (c) encouraging (or causing to be encouraged) any other EU Member States either directly or indirectly to disagree with any proposed extension of the period under Article 50(3) of the Treaty of the European Union.

[6] Head (ii) seeks an order ... ordaining the [Prime Minister], in the event that neither of the conditions in subsections (1) or (2) of section 1 of the 2019 Act has been fulfilled by 11 pm on 18 October 2019, to sign and send the letter referred to in subsection (4) prior to 3.00 pm on 19 October, without any amendment, alteration or addition, either within the letter or in any separate letter, note, addendum or message, and to take all necessary steps to achieve the extension of the period under Article 50(3) of the Treaty of the European Union due to end at 11pm on 31 October 2019.”

13. The orders sought as set out in [5] and [6] include many features not found on the face of the 2019 Act. It was Lord Pentland’s opinion that “the obligations created by the 2019 Act do not extend beyond taking the particular steps set out in the legislation in the event that the conditions referred to are not satisfied” [21]. At [36] he summarised the Advocate General’s answers to the petition which included that the letter would be sent in the event that neither of the conditions found in the 2019 Act was satisfied and that the Prime Minister accepted that he “is subject to the public law principle that he cannot frustrate” the purpose of the 2019 Act or the purpose of its provisions. “Thus, he cannot act so as to prevent the letter requesting the specified extension in the Act from being sent.” Lord Pentland concluded that it would be neither necessary nor appropriate to grant the orders sought because the Prime Minister had confirmed that he was subject of the obligations found in the 2019 Act and he would not frustrate its

purpose [42]. The Petitioners had relied upon statements made by the Prime Minister and others which the judge explained “should be understood in the political context in which they were made; that is as expressions of the government’s political policy” [44]. He concluded his opinion by observing that the terms of the orders sought were not sufficiently precise and clear. They were too broad to be enforceable. Moreover, the timetable sought by the Petitioners for sending the letter (see quotation in [12] above) did not align with the statutory duty, nor was there a duty in the 2019 Act that the Prime Minister “take all steps that shall be required in order to obtain” an extension of the Article 50 period, [54] - [59].

14. The Inner House upheld Lord Pentland on all these points.

Discussion

15. The pleadings filed by the Prime Minister in both sets of proceedings were, in their material parts dealing with the frustration principle, identical. Paragraphs 17 and 18 of the Prime Minister’s Summary Grounds of Resistance state:

“17. The Prime Minister also accepts that he is subject to the frustration principle. Under this principle, Ministers cannot frustrate the purpose of the Act and its provisions, for example “*by preventing their effectual operation*”: Miller 1, at §51. The Prime Minister thus cannot act so as to prevent the letter requesting the specified extension in the Act from being sent.

18. There are limits to the frustration principle: it cannot create a fiction. Neither the Act nor the frustration principle prevent the Prime Minister from honestly stating his view to, or answering questions from, the EC (or anyone else) as to the Government’s position on the desirability or otherwise of any extension or on the impact of any decision by the EC on an extension on voting in Parliament. Nor do they purport to dictate what position can or should be taken by the Government in the delicate ongoing negotiations with the EC (including a position on whether any possible agreement should or should not be accompanied by any extension). As to that:

(1) The conduct by the government of negotiations with the EU with the view to reaching a withdrawal agreement is not justiciable in the Courts: see *R (Webster) v Secretary of State for Exiting the EU* [2019] 1 CMLR 8 at §20 per Gross LJ; *ReMcCord* (Northern Ireland Court of Appeal, unreported, 27 September 2019) at §127(iv) per Morgan LCJ.

(2) The obligations imposed by the Act, specifically those set out above, are clearly set out and will be complied with. They do not include taking or not taking steps beyond those specified.

(3) The fact that the Act was passed contrary to the wishes of the Government; the Government’s opposition to an

extension of the kind specified in the Act; and its desire to ensure the UK's withdrawal from the EU on 31 October 2019 are well known and have been repeatedly and publicly stated. That does not mean that the Prime Minister will not comply with the Act. It does mean that it would be absurd and untenable to seek to imply any greater controls or restraints into the Act than those which clearly appear on its face, or to impute an intention or purpose to Parliament of the kind identified at the outset of this paragraph.

(4) That Parliament intended that the Government be afforded the space to negotiate a deal is plain on the face of the Act (see, e.g., ss.1(1), 1(4), 1(5) and 2). It is also plain from the legislative background. The promoter of the Bill resulting in the 2019 Act, Rt Hon Hilary Benn MP, tweeted on 2 September 2019 that:

“The purpose of the Bill is to ensure that the UK does not leave the EU on 31 October without an agreement, unless parliament consents. The Bill gives the government time either to reach an agreement with the EU, at the European Council meeting next month or seek Parliament’s specific consent to leave the EU without a deal””

16. It is also clear that the same type of statements were relied upon by Liberty as in the Scottish proceedings in support of the proposition that the Prime Minister would not send the statutory letter, in the event that the 2019 Act required it to be sent, or might “frustrate” the purpose of the 2019 Act. This is regardless of a recent article in the Spectator, on which Liberty placed particular reliance, which purported to quote extensively from a message sent to a journalist from someone within 10 Downing Street. On instructions Sir James Eadie QC, who appeared for the Prime Minister, told us the article was produced before the Inner House of the Court of Session.
17. The point of difference between these and the Scottish proceedings upon which Mr Hermer focused was the answer given by the Prime Minister to a formal Part 18 request for further information:

“REQUEST

Is it the Defendant’s position that HM Government (or a person acting on its behalf) may lawfully request, procure or encourage the European Council (or one of its members) to refuse to agree to an extension of the period under Article 50(3) of the Treaty on European Union in response to a request for such an extension made by the Defendant pursuant to the obligations under section 1 of the European Union (Withdrawal) (No. 2) Act 2019 (“the Act”)?

Response

The Government's position is clearly set out in §§17-18 of the SGR which made clear that the frustration principle does not "prevent the Prime Minister from honestly stating his view to, or answering questions from, the EC (or anyone else) as to the Government's position on the desirability or otherwise of any extension". For the avoidance of doubt, those steps would be lawful whether or not their likely or anticipated or intended effect was or might be that the European Council refused to agree an extension. The Prime Minister further relies on *Vince v Johnson* [2019] CSOH 77 ("*Vince*") at §§21-23 and §§54-56 per Lord Pentland as to the nature of the obligations imposed by and the purpose of the Act. It remains inappropriate to engage in hypothetical speculation as to any particular step or statement for the reasons also set out in the SGR."

18. Liberty rely upon the passage we have underlined, but it is not freestanding. "Those steps" referred to in the underlined passage referred to the Prime Minister "honestly stating his view to, or answering questions from, the EC (or anyone else) as to the Government's position on the desirability or otherwise of any extension." The core substantive issue between the parties is that Liberty submit that the Prime Minister cannot state his honest views, and he should be restrained by the courts from doing so, if part of his intention in stating them is to encourage the European Council to refuse an extension. The Prime Minister suggests that creates a fiction. The ambition of the argument advanced by Liberty is obvious, but it is not that argument we are called upon to decide.
19. The fact that the same issues were before the Scottish Courts cannot be doubted.
20. One of the grounds of complaint of the Petitioners in the Scottish proceedings was that the Prime Minister intended to undermine and frustrate the will of Parliament by "encouraging (or causing to be encouraged) other member states to disagree and therefore veto any proposed extension to Exit Day". One of the many media statements relied upon in the Scottish proceedings was a report in the Guardian on 15 September 2019 suggesting that the Prime Minister told the President of the European Council that "he will... refuse to discuss or accept any offer to extend the UK's membership even if a Brexit deal cannot be agreed". The Petitioners also relied on a report of 25 September 2019 of Robert Peston (a television journalist) who stated that a spokesperson for the Prime Minister had said that the Government intended to send a second letter in addition to the letter required by the 2019 Act, indicating that the Government does not want the other Member States to agree to an extension. It was because of such statements of intent that the Petitioners in the two sets of Scottish proceedings were seeking orders of the court before 19 October.
21. In the proceedings in the Outer House the Note of Argument of the Advocate General stated the Prime Minister's view of what he thought he could do without infringing the frustration principle in identical terms to that in paragraph 18 of the Summary Grounds of Resistance in these proceedings. The Response to the Part 18 request was not needed to alert either Liberty in these proceedings or the Petitioners in the Scottish proceedings to the possibility that there were and are other things that the Prime Minister might do to discourage the European Council from granting an extension.

22. The application before Supperstone J was for an urgent rolled-up hearing of Liberty's application for permission to apply for judicial review. That was to enable it to be concluded before 19 October, when obligations under the 2019 Act might arise. As we now know, in the days that followed the refusal of Supperstone J on Friday 11 October the underlying political position has changed. The United Kingdom and the European Union agreed a revised withdrawal agreement at the meeting of the European Council on 17 October. Parliament sat on 19 October and approved a motion which deferred approval of the agreement until the legislation needed to support it has been enacted. The statutory letter was sent. A side letter was also sent. As we write (on Sunday 20 October) it appears that the necessary Bill will be introduced imminently.
23. Supperstone J refused the request because the Scottish courts were, for all intents and purposes, not only seized of the same matters but had decided them, with the caveat that a further hearing was arranged for 21 October to enable the Petitioners to develop any further arguments properly arising out of intervening events.
24. Liberty's argument devolves to the proposition that the Inner House was wrong in its conclusion (at [8]) that,

“At this stage, there is no basis for granting any of the orders sought by the petitioners ... Before coercive measures are granted, the court must be satisfied that they are necessary; ie that there are reasonable grounds for apprehending that a party will not comply with a relevant statutory or other legal obligation ... Until the time for sending the letter has arrived, the Prime Minister has not acted unlawfully, whatever he and his officials are reported to have said privately or in public. The existence of these statements, which are made in a political context, does not give ground for reasonable apprehension of future non-compliance for the reasons given by the Lord Ordinary”

and (at [10])

“The court may only interfere in that debate if there is demonstrable unlawfulness which it requires to address and correct. At present there has been no such unlawfulness”.

25. The decision of Supperstone J reflected the conclusions reached in the Scottish proceedings, mindful also that a further opportunity was being offered within those proceedings to mount arguments on fast-moving factual and political events. The answer to the Part 18 request did not change the landscape. In circumstances where the arguments had proceeded and were continuing to proceed in a court within the United Kingdom with powers to issue the declaratory (or mandatory) orders being sought in these proceedings, not only was it within the generous ambit of discretion afforded to Supperstone J to refuse the application for an urgent hearing, it would have been inappropriate for him to have done anything else.
26. The obligation imposed on the Prime Minister by the 2019 Act arises by virtue of his being Prime Minister of the United Kingdom of Great Britain and Northern Ireland.

The 2019 Act applies to all three legal jurisdictions within the United Kingdom. The courts of each jurisdiction (England and Wales, Scotland, Northern Ireland) have competence to hear and determine public law challenges, in substance the same albeit procedurally and technically with differences, which seek to enforce the 2019 Act and prevent action which frustrates it in the sense understood in public law. In theory, at least, the same is true of many decisions and actions of the government of the United Kingdom. This is the first occasion of which we are aware in which claims of an almost identical nature have been issued in all three jurisdictions. The proceedings in Northern Ireland were stayed by consent in the light of those already well underway in Scotland.

27. In each of the three jurisdictions there is scope for decisions to be made at first instance and then at an appellate level; and from each there may be an appeal to the final court of appeal of the United Kingdom, namely the Supreme Court. In our judgment it is wrong as a matter of principle for litigants to press for determination of issues which are already being litigated in another jurisdiction within the United Kingdom in public law cases such as this. If a litigant is concerned that an argument is not being advanced which should be (emphatically not the concern here), there are informal and formal steps which might be taken to ensure that the court in question is seized of it.
28. It would be wrong for the same matters to be litigated in parallel in England and Wales and at the same time in one of the other jurisdictions. The parties in the Northern Irish proceedings were right to agree to stay them.
29. It is inefficient to deploy court and judicial time to dealing with the same issues. More tellingly, it would give rise to the risk of conflicting decisions and, in the field of public law, to the potential grant of multiple discretionary orders which are not in identical terms. There is an analogy with the law relating to the grant of anti-suit injunctions designed to prevent conflicting judgments in different jurisdictions arising from the same issue.
30. Moreover, it is also not consistent with the principle of judicial comity for our courts to launch on an expedited and inevitably abbreviated review of precisely the same matters that were before the Scottish courts to investigate whether the Scottish courts were wrong in their decisions as to the substance of the claims prior to 19 October 2019 and to hold matters over until Monday 21 October. If it is suggested that the Scottish courts are wrong, the remedy is an application for leave to appeal to the Supreme Court. No such application was made after the Inner House delivered its opinion on 9 October.
31. As to comity, in the words of Lord Donaldson in *British Airways Board v Laker Airways* [1984] QB 142 (at 185-6): “Judicial comity is shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.” The Scottish courts are now the appropriate forum for all matters which arise in these proceedings to be litigated and respect must be paid to their decisions. If the Petitioners fail, they may seek the final ruling of the Supreme Court as the Prime Minister can if they succeed.

32. We direct, pursuant to paragraph 6.1 of Practice Direction (Citation of Authorities) [2001] 1 WLR 1001, that this judgment may be cited despite being given on an application for permission to appeal.