OUTER HOUSE, COURT OF SESSION

[2019] CSOH 70

P680/19

OPINION OF LORD DOHERTY

In the petition

(FIRST) JOANNA CHERRY QC MP, (SECOND) JOLYON MAUGHAM QC, (THIRD) JOANNE SWINSON MP, (FOURTH) IAN MURRAY MP, (FIFTH) GERAINT DAVIES MP, (SIXTH) HYWEL WILLIAMS MP, (SEVENTH) HEIDI ALLEN MP, (EIGHTH) ANGELA SMITH MP, (NINTH) THE RT HON PETER HAIN, THE LORD HAIN OF NEATH, (TENTH) JENNIFER JONES, THE BARONESS JONES OF MOULESCOOMB, (ELEVENTH) THE RT HON JANET ROYALL, THE BARONESS ROYALL OF BLAISDON, (TWELFTH) ROBERT WINSTON, THE LORD WINSTON OF HAMMERSMITH, (THIRTEENTH) STEWART WOOD, THE LORD WOOD OF ANFIELD, (FOURTEENTH) DEBBIE ABRAHAMS MP, (FIFTEENTH) RUSHANARA ALI MP, (SIXTEENTH) TONIA ANTONIAZZI MP, (SEVENTEENTH) HANNAH BARDELL MP, (EIGHTEENTH) DR ROBERTA BLACKMAN-WOODS MP, (NINETEENTH) BEN BRADSHAW MP, (TWENTIETH) THE RT HON TOM BRAKE MP, (TWENTY-FIRST) KAREN BUCK MP, (TWENTY-SECOND) RUTH CADBURY MP,(TWENTY-THIRD) MARSHA DE CORDOVA MP, (TWENTY-FOURTH) RONNIE COWAN MP, (TWENTY-FIFTH) NEIL COYLE MP, (TWENTY-SIXTH) STELLA CREASY MP, (TWENTY-SEVENTH) WAYNE DAVID MP, (TWENTY-EIGHTH) EMMA DENT COAD MP, (TWENTY-NINTH) STEPHEN DOUGHTY MP, (THIRTIETH) ROSIE DUFFIELD MP, (THIRTY-FIRST) JONATHAN EDWARDS MP, (THIRTY-SECOND) PAUL FARRELLY MP, (THIRTY-THIRD) JAMES FRITH MP, (THIRTY-FOURTH) RUTH GEORGE MP, (THIRTY-FIFTH) STEPHEN GETHINS MP, (THIRTY-SIXTH) PREET KAUR GILL MP, (THIRTY-SEVENTH) PATRICK GRADY MP, (THIRTY-EIGHTH) KATE GREEN MP, (THIRTY-NINTH) LILIAN GREENWOOD MP, (FORTIETH) JOHN GROGAN MP, (FORTY-FIRST) HELEN HAYES MP, (FORTY-SECOND) WERA HOBHOUSE MP, (FORTY-THIRD) THE RT HON DAME MARGARET HODGE MP, (FORTY-FOURTH) DR RUPA HUQ MP, (FORTY-FIFTH) RUTH JONES MP, (FORTY-SIXTH) GED KILLEN MP, (FORTY-SEVENTH) PETER KYLE MP, (FORTY-EIGHTH) BEN LAKE MP, (FORTY-NINTH) THE RT HON DAVID LAMMY MP, (FIFTIETH) CLIVE LEWIS MP, (FIFTY-FIRST) KERRY MCCARTHY MP, (FIFTY-SECOND) STUART C MCDONALD MP, (FIFTY-THIRD) ANNA MCMORRIN MP, (FIFTY-FOURTH)

CAROL MONAGHAN MP, (FIFTY-FIFTH) MADELEINE MOON MP, (FIFTY-SIXTH) LAYLA MORAN MP, (FIFTY-SEVENTH) JESS PHILLIPS MP, (FIFTY-EIGHTH) LLOYD RUSSELL-MOYLE MP, (FIFTY-NINTH) THE RT HON LIZ SAVILLE ROBERTS MP, (SIXTIETH) TOMMY SHEPPARD MP, (SIXTY-FIRST) ANDY SLAUGHTER MP, (SIXTY-SECOND) OWEN SMITH MP, (SIXTY-THIRD) CHRIS STEPHENS MP, (SIXTY-FOURTH) JO STEVENS MP, (SIXTY-FIFTH) WES STREETING MP, (SIXTY-SIXTH) PAUL SWEENEY MP, (SIXTY-SEVENTH) GARETH THOMAS MP, (SIXTY-EIGHTH) ALISON THEWLISS MP, (SIXTY-NINTH) THE RT HON STEPHEN TIMMS MP, (SEVENTIETH) ANNA TURLEY MP, (SEVENTY-FIRST) CATHERINE WEST MP, (SEVENTY-SECOND) MATT WESTERN MP, (SEVENTY-THIRD) MARTIN WHITFIELD MP, (SEVENTY-FOURTH) DR PHILIPPA WHITFORD MP, (SEVENTY-FIFTH) DR PAUL WILLIAMS MP, (SEVENTY-SIXTH) DANIEL ZEICHNER MP, (SEVENTY-SEVENTH) CAROLINE LUCAS MP, (SEVENTY-EIGHTH) ROSENA ALLIN-KHAN, (SEVENTY-NINTH) LUCIANA BERGER

Petitioners

for

JUDICIAL REVIEW

Petitioners: O'Neill QC, Welsh; Balfour and Manson LLP
Respondent: Johnston QC, Webster QC, N Taylor, Solicitor to HM Advocate General for Scotland
Lord Advocate (intervening party, written submissions only): Mure QC; Scottish Government Legal Directorate

4 September 2019

Introduction

[1] By an Order in Council made on 28 August 2019 at the Court at Balmoral Her Majesty the Queen ordered that Parliament be prorogued on a day no earlier than Monday 9 September 2019 and no later than 12 September 2019, until Monday 14 October 2019. This petition for judicial review challenges (i) the lawfulness of the Order; and (ii) the lawfulness of the advice to prorogue which was given to Her Majesty by the Prime Minister. It is common ground that in making the Order Her Majesty accepted that advice.

[2] I shall not rehearse the earlier history of the proceedings. For that, reference can be made to my Opinion of 30 August 2019 (*Petition of Cherry & Others for Judicial Review* [2019] CSOH 68).

[3] On 2 September 2019 two applications for leave to intervene were lodged, the first by the Lord Advocate and the second by Mr Graham Senior-Milne. At the outset of the substantive hearing on 3 September 2019 I invited observations from the parties on each of the applications. Mr O'Neill supported the proposed intervention by the Lord Advocate, but he resisted the application by Mr Senior-Milne. Mr Johnston adopted a neutral position in relation to both applications. Having considered the terms of both applications I was satisfied that the Lord Advocate's application was relevant and was likely to assist the court, and that the other requirements of rule of court 58.19 (4) were met. I granted the application. However, I was not satisfied that the propositions to be advanced in Mr Senior-Milne's application were relevant to the proceedings or that they were likely to assist the court. I refused that application.

The arguments

[4] Given the desirability of the court reaching a speedy decision, I do not propose to rehearse the arguments at length, nor do I propose to mention all of the authorities which were referred to. I shall confine myself to setting out the gist of the parties' positions.

The Lord Advocate's written submissions

[5] The executive is accountable to Parliament. The effect of the prorogation is to insulate it entirely from accountability during the period of prorogation. The relevant context is (i) that the United Kingdom's membership of the European Union will end (unless

the period is extended by agreement between the Government and the EU) some eight weeks after the date on which prorogation takes effect and less than three weeks after the prorogation ends; (ii) the Government continues to negotiate with the European Union in connection with a proposed withdrawal agreement to take effect immediately after exit day; (iii) the Prime Minister has declared himself content to see the United Kingdom leave the European Union without having concluded such a withdrawal agreement; (iv) the Prime Minister's policy approach to withdrawal from the EU without a withdrawal agreement being in place is markedly different from that of his predecessor; (v) a majority of members of the House of Commons has expressed its opposition to that course; (vi) preparations are being made and will continue to require to be made in anticipation of the withdrawal of the UK from the EU on 31 October 2019; (vii) those preparations include both administrative arrangements in anticipation of withdrawal without a withdrawal agreement being in place, and legislative measures to prepare the statute book for the UK's withdrawal from the EU; (viii) Parliament has been engaged in ongoing scrutiny of the arrangements being made by the Government in anticipation of withdrawal from the EU; (ix) elected representatives in both the Scottish and UK Parliaments require to participate in the preparation of the statute book for exit day; and (x) the present administration is a minority Government whose ability to command the confidence of the House of Commons has not yet been tested. In the particular context, for the Prime Minister to advise and procure the prorogation of Parliament for five weeks may properly be characterised as an unlawful abuse of executive power which calls for the intervention of the Court. The abuse of power lies in the timing and duration of the prorogation; its effect on accountable government; and the marked absence of any compelling justification offered in that regard by the Prime Minister for that timing and length. It may be inferred that a purpose of the decision under review is to

insulate the executive from Parliamentary scrutiny, for what (in the context of the anticipated withdrawal of the UK from the EU on 31 October 2019) is a significant period of time. In any event, the decision under review has a disproportionate impact on the principle of responsible government, where there is no compelling justification for that impact. A prorogation of five weeks is disproportionate to a purpose of bringing the current session of Parliament to an end and paving the way for a Queen's speech at the opening of the new session. There is a significant distinction between such a recess (which is voted upon by each House and is no more than a periodic adjournment) and prorogation. During such a recess: (a) either House may be recalled; (b) ongoing Parliamentary business does not fall; (c) Parliamentary committees may continue to sit and to scrutinise the executive; and (d) Members of Parliament may continue to table questions to the executive. None of these is possible during prorogation. In all the circumstances, and in the absence of any other explanation for the duration of the prorogation, the court may infer that a purpose of the decision under review is to curtail significantly the opportunity for Parliament to scrutinise the policies and actions of the executive at this time, and to insulate it entirely from Parliamentary scrutiny throughout the period of the prorogation. That would not be a proper purpose of prorogation. The effect which prorogation will have on the principle of responsible government for five weeks at this time calls for close scrutiny of the justification which is advanced. Given the particular context, there is a burden on the executive to provide a clear and compelling justification for a decision to deprive the sovereign UK Parliament of the ability to sit for a period of five weeks. No such compelling justification has been advanced. The impact on the principle of representative government is wholly disproportionate to such justification as has been advanced by the executive. In all these

circumstances the intervener considers that the Court should reduce the Order in Council dated 28 August 2019.

The petitioners' submissions

[6] Mr O'Neill moved the court:

(1) to pronounce a declarator that it is *ultra vires et separatim* unconstitutional for any Minister of the Crown, including the Prime Minister, with the intention and aim of denying before exit day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union, to purport to advise the Queen to prorogue the Union Parliament;

(2) to order reduction of the Order in Council of 28 August 2019:

(3) to interdict Ministers of the Crown in right of the United Kingdom from acting upon the Order in Council of 28 August 2019 proroguing the Union Parliament.

He submitted that Parliamentary sovereignty is a fundamental principle of the UK constitution. The executive must act within the powers permitted it by Parliament, and must exercise those powers for the purposes for which they were left with it by Parliament. The prerogative is a source of power which is only available for a case not covered by statute. The executive's prerogative power cannot be used to defeat or frustrate domestic rights which have been created by Parliament. This includes rights under EU law (*R (Miller)* v *Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61, at paras 44-5). The executive is politically accountable to Parliament for its exercise of its powers. If and insofar as the executive would use the power of prorogation of Parliament to avoid its political accountability to Parliament, or to impede Parliament from exercising its control

over the executive, the executive is acting unlawfully. Reference was made to *Moohan* v *Lord Advocate* [2014] UKSC 67, 2015 SC (UKSC) 1, per Lord Hodge at para 35. The executive's political accountability to Parliament and its legal accountability to the courts are not mutually exclusive, but complementary constitutional checks on the power of the executive. They may overlap (*R (Barclay)* v *Lord Chancellor (No 2)* [2014] UKSC 41 [2015] AC 276, per Baroness Hale at para 57). It is for the court to ensure the rule of law by providing an effective remedy against any constitutional violations (*Teh Cheng Poh* v *Public Prosecutor* [1980] AC 458, per Lord Diplock at p 473).

[7] The Claim of Right Act 1689 regulates and constrains the executive's power to prorogue Parliament. It outlaws any abusive use by the executive of the power of prorogation to avoid, impede or restrain Parliament from carrying out its constitutional function of addressing and redressing grievances and amending, strengthening and preserving the law. Therefore the exercise of the executive's power to prorogue Parliament is a matter which is justiciable before the courts and is reviewable on the grounds of irrationality or breach of other judicial review principles (Cf *R (Sandiford)* v *Foreign Secretary* [2014] UKSC 44, [2014] 1 WLR 2697, per the joint judgment of Lord Carnwath and Lord Mance JJSC at paras 50, 52, 65).

[8] The executive's exercise of the power of prorogation of Parliament can only be exercised for a proper purpose. The exercise of the power, even for a proper purpose, is subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action (*R (Bancoult)* v *Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 [2009] 1 AC 453, per Lord Hoffmann at para 35, Lord Rodger at para 105).

[9] The executive is subject in the present case to the obligation owed to the court by a public authority facing a challenge to its decision "to co-operate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings" (*Belize Alliance of Conservation* v *Department of Environment* [2004] UKPC 6, [2004] Env LR 38, per Lord Walker of Gestingthorpe at para 86). The Prime Minister has declined to lodge an affidavit. Accordingly, the court should subject the reasons given to anxious scrutiny. The executive ought to be required to demonstrate that the most compelling of justifications exist for the exercise of the prorogation power in this way and at this time because the manner in which the power is being exercised affects individuals' fundamental rights and has profoundly intrusive and distortive effects on the constitution (*R* v *Ministry of Defence, Ex p Smith* [1996] QB 517, per Sir Thomas Bingham MR at 554E-G).

[10] It is clear that the executive's exercise of the power of prorogation in the present case involves the improper exercise of this power ''for an alien purpose or in a wholly unreasonable manner'', namely: to prevent or impede Parliament from holding the executive politically to account in the run up to Exit Day; to prevent or impede Parliament from legislating on the United Kingdom's exit from the European Union; to allow the executive, notwithstanding that it has no Parliamentary mandate to do so, to pursue a policy of a no deal Brexit without further Parliamentary interference. The executive has purported to use the power of prorogation as a pre-emptive strike intending to silence and disempower Parliament for the crucial period in the immediate run up to Exit Day.

[11] Further, the executive's exercise of the power of prorogation in the present case is unlawful because it runs contrary to the intention of Parliament by rendering futile, *inter*

alia, the provisions of Sections 9 and 13 of the European Union (Withdrawal) Act 2018 which clearly provide that Parliament should have proper time and opportunity to give full consideration to and, if approved, legislate to give full effect to the terms of any withdrawal of the United Kingdom from the European Union, with or without a deal. When and if Parliament passes the necessary statute, then and only then does the executive have authority to effect the withdrawal of the United Kingdom from the EU in accordance with whatever terms Parliament has stipulated in primary legislation.

[12] The executive's exercise of the power of prorogation in the present case is vitiated by error in law, because it is wrongly predicated on the idea that it has the authority to cause or allow the United Kingdom to leave the EU on the basis of no deal. Primary legislation is required from Parliament to conclude the Article 50 TEU process by authorising the executive to end the United Kingdom's membership of the EU, whether on the basis of the terms of a concluded deal or on the basis that no agreement on the terms of withdrawal could ultimately be reached. The executive has not been given the necessary express statutory authority by Parliament to allow it to pursue a policy of no deal Brexit. Given that the exercise of the power of prorogation at issue is aimed, at least in part, to facilitate the achievement, if so advised, of an executive policy ("no deal Brexit") which is unlawful in the absence of express statutory authorisation, the exercise of prorogation in this way is itself unlawful.

The respondent's submissions

[13] Mr Johnston submitted that there are important differences between statutory and prerogative powers. The exercise of some prerogative powers is justiciable, but the exercise of others is not. The court's role in relation to prerogative powers is dependent on the

nature and the subject matter of the power or its exercise, particularly on whether the subject matter is justiciable (*R (Sandiford)* v *Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697, per the joint judgement of Lord Carnwath and Lord Mance at paras 52, 60 and 61). Whether the exercise of a prerogative power is reviewable depends on the subject-matter and the context of the power and of the challenge. Some functions exercised or decisions taken are non-justiciable. Among them are matters of high policy. The courts will not seek to impose legal controls on such matters. Here the claim is non-justiciable. There is no statute or source of law that regulates prorogation or the advice given to the Queen in relation to prorogation. The advice involved high policy and political judgement, not law. The court does not have the tools or standards to assess the legality of political advice. This is political territory and decision-making which cannot be measured against legal standards, but rather only by political judgments. The law does not superimpose on political considerations additional legal standards. That would make the political process unworkable. Reference was made to *Shergill* v *Kaira* [2015] AC 359, per the joint judgment of Lords Neuberger, Sumption and Hodge at para 40; *Council of the Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374, per Lord Roskill at p 411D-F; *A* v *Secretary of State for the Home Department* [2005] 2 AC 68, per Lord Bingham at para 29; *Wheeler* v *Secretary of State for the Home Department* [2008] EWHC 1409 (Admin), at para 34; *McClean* v *First Secretary of State* [2017] EWHC 3174 (Admin)(DC), per Sales LJ at paras 21-22; and *Robinson* v *Secretary of State for Northern Ireland* [2002] UKHL 32, per Lord Bingham at para 12 and Lord Hoffmann at para 33. The petitioners seek to rely on a denial of "sufficient" time for "proper" consideration of the withdrawal of the UK from the EU. There are no judicial or manageable standards by reference to which the court could determine that claim. The courts are not the right place for matters of high policy and political judgement to be sorted

out. Accountability for such matters is to Parliament and the electorate. The very fact that the court is faced with trying to weigh political judgments and the reasons for which they were reached suggests that the claim here is outside the territory where legal standards can helpfully be deployed.

[14] A more specific point which follows on from that is that Parliament has recently, in the Northern Ireland (Executive Formation etc) Act 2019, s 3, made its own clear and express provision about when it wishes to sit. It provides in the period covered by that Act (which goes to the end of this calendar year) that Parliament may be prorogued at some point; and it makes provision for it to be recalled if that is necessary for a report to be laid about progress in formation of the Northern Ireland Executive. Where Parliament wishes to lay down the law about when it should be in session and not prorogued, it has a means of doing that, and it has recently used that means. Parliament has occupied this area for itself.

[15] Wider constitutional considerations also confirm that decisions about prorogation or advice about prorogation are not matters for the courts.

[16] Parliament is the master of its own proceedings, rules and privileges and has exclusive control over its own affairs. The separation of powers entails that the courts will not interfere. It is for Parliament to decide when it will sit and it routinely does so. It is not for the courts to devise further restraints on prorogation which go beyond the limits which Parliament has chosen to provide.

[17] The exercise by the Sovereign of the power to prorogue upon receipt of advice from the prime Minister is governed by constitutional convention alone. The courts cannot enforce a political convention. The sanction for non-observance of a convention is political, not legal.

[18] There is no material difference between Scots law and English law as regards any of the issues in the case. The petitioners do not actually identify anything that points to a difference in result or approach between Scots law and English law.

[19] Second, the claim is academic. The complaint is that Parliament is going to be denied the opportunity to sit and to call the executive to account. However, provision has already been made to enable Parliament to sit for certain periods up to the end of October - in the Northern Ireland (Executive Formation etc) Act 2019, s 3 and in the Order in Council. That being so, Parliament will be sitting. That renders the claim an academic one.

[20] Third, the claim that the Claim of Right Act 1689 is breached by the Order in Council is non-justiciable. The words "Parliaments be frequently called and allowed to sit" provides no legal limit or standard by which the court can judge the legality of any prorogation. Even if there were some legal standard, there is nothing to support any breach of this provision, because the words "Parliaments be frequently called and allowed to sit" contemplate Parliament being adjourned, prorogued, dissolved - certainly not sitting in permanent session. Any prorogation before the end of October must comply with section 3 of the Northern Ireland (Executive Formation etc) Act 2019. Any prorogation that cut across the dates set out there would need to be interrupted.

[21] Prorogation does not frustrate the will of Parliament as expressed in the primary legislation relied upon by the petitioners. It is not the purpose of prorogation to frustrate s 13 of the European Union (Withdrawal) Act 2018. In any case, s 13 doesn't apply to exit without a deal. Neither does prorogation cut across s 20, or the provisions of s 3 of the Northern Ireland (Executive Formation etc) Act 2019.

[22] The application is not concerned with the legal requirements of exiting the EU under Art 50 of the Treaty on European Union. It is concerned with prorogation of Parliament.

The fact Parliament may not be sitting for five weeks does not of itself have any direct effect on individuals' EU law rights. It is not correct to say that it is unlawful for the United Kingdom to leave the EU with no deal unless there is further legislation. Section 1(1) of the European Union (Notification of Withdrawal) Act 2017 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). On 29 March 2017 the Prime Minister formally notified the EU of the UK's intention to withdraw under Article 50(2), and the European Council accepted that notification. Withdrawal from the EU has therefore been approved by Parliament in the unconditional form of the 2017 Act, enacted in the knowledge and understanding of the meaning and effect of Article 50 TEU, that with or without an agreement the UK would exit the EU upon the expiry of the Article 50 period. Withdrawal from the EU without an agreement would not, in those circumstances, be contrary to *Miller* and would not, as the petitioners maintain, require further primary legislation.

[23] While in accordance with the duty of candour the respondent had disclosed the documents showing reasons for the advice, the respondent's position is that the advice is non-justiciable and the courts should not enquire into the reasons or scrutinise their adequacy. However, the reasons are lawful, relevant and legitimate.

Decision and reasons

Introduction

[24] This part of my opinion is shorter than it would have been had I had the advantage of greater time to prepare it. Nevertheless, I have endeavored to outline briefly my views on the material issues. I have sought to explain why it is that the parties have won or lost. Once again, I am grateful to counsel and those instructing them for all that they have done

to facilitate the presentation of arguments at the hearing yesterday. That has been of considerable assistance to me.

Is the issue raised justiciable?

[25] In my opinion the authorities discussed during the submissions vouch the following propositions. The exercise of some prerogative powers in some circumstances is justiciable, in other cases it is not. The court's role in relation to prerogative powers is dependent on the nature and the subject matter of the power or its exercise, particularly on whether the subject matter is justiciable. Whether the exercise of a prerogative power is reviewable depends on the subject-matter and the context of the power and of the challenge. Some functions exercised or decisions taken are non-justiciable. Among them are matters of high policy and political judgement. The court does not have the tools or standards to assess the legality of such matters. That is political territory and decision-making which cannot be measured against legal standards, but rather only by political judgments. The courts will not seek to superimpose legal controls on such matters. Rather, the accountability for them is to Parliament and the electorate.

[26] I am not persuaded that any of the matters relied upon by the petitioners or the Lord Advocate result in the claim being justiciable. In my view the advice given in relation to the prorogation decision is a matter involving high policy and political judgement. This is political territory and decision-making which cannot be measured against legal standards, but only by political judgements. Accountability for the advice is to Parliament and, ultimately, the electorate, and not to the courts.

[27] I do not accept the submission that the prorogation contravenes the rule of law, and that the claim is justiciable because of that. In my opinion there has been no contravention

of the rule of law. The power to prorogue is a prerogative power and the Prime Minister had the *vires* to advise the sovereign as to its exercise. The executive is accountable to Parliament and the electorate for the advice to prorogue.

[28] Parliament is the master of its own proceedings, rules and privileges and has exclusive control over its own affairs. The separation of powers entails that the courts will not interfere. It is for Parliament to decide when it will sit and it routinely does so. It is not for the courts to devise further restraints on prorogation which go beyond the limits which Parliament has chosen to provide. Parliament can sit before and after the prorogation. It has recently, in the Northern Ireland (Executive Formation etc) Act 2019, s 3, exercised its legislative power to make provision about periods when it should sit.

[29] That is sufficient to dispose of the petition. However, since the matter may go further I shall also provide my views on other issues which were raised.

Breach of the Claim of Right Act 1689?

[30] I see some force in Mr Johnston's submission that the claim that the Claim of Right Act 1689 is breached by the Order in Council is non-justiciable. However, I prefer to decide this issue on the more straightforward ground that there is nothing to support any breach of the provisions of the Act. I accept Mr Johnston's submissions on that point.

Does prorogation frustrate the will of Parliament by rendering existing legislation futile?

[31] In my opinion Mr Johnston's legal analysis of the legislative provisions upon which Mr O'Neill relied is also correct. Prorogation does not render those provisions futile.

The other matters discussed

[32] Given that the two bulwarks of the petitioners' argument that prorogation is unlawful are not made out (ie because it was said to be in breach of the Claim of Right Act 1689 and that it rendered some existing legislation futile), I do not think it necessary to say much about any of the other matters which were discussed. None of the matters founded upon by the petitioners or the Lord Advocate cause me to conclude that prorogation is unlawful if, contrary to my view, the claim is justiciable.

[33] I am not much attracted to Mr Johnston's submission that the petitioners' claim is academic. However, I am inclined to agree with him that the application is concerned with prorogation, not with the legal requirements of exiting the EU under Art 50 of the Treaty on European Union; and that the fact Parliament may not be sitting for five weeks does not of itself have any direct effect on individuals' EU law rights. I am also inclined to agree with his analysis of *Miller* and the consequences of the subsequent legislation.

[34] Finally, I should say something about the reasons for the prorogation given by the respondent. Even if, contrary to my view, the claim is justiciable, in my opinion the context in which those reasons would fall to be assessed would be that political judgements may be relevant and legitimate considerations. On the basis of the material which I have seen I am not persuaded that the reasons for the advice were unlawful.

Disposal

[35] I shall refuse the petition.