ALLEN & OVERY

Brexit Law – Article 50 litigation

Article 50 litigation – preview of the Supreme Court appeal hearing

5 December 2016

A landmark case

This morning, the UK Supreme Court is due to begin hearing the UK Government's appeal in the Article 50 proceedings. All 11 Supreme Court Justices will hear the appeal, which will consider whether the English High Court (the **Divisional Court**) was right when it decided on 3 November 2016 that the Government cannot trigger the process of leaving the European Union without Parliamentary approval.

The Supreme Court will also hear an appeal against a separate decision of the Northern Irish High Court as to whether the power to serve notice under Article 50 is restricted by the Northern Irish devolution legislation.

The hearing is scheduled to last for four days and the Supreme Court will hear submissions from the parties to English and Northern Irish proceedings and also from other parties who have been given permission to intervene, including both the Scottish and Welsh Governments.

At the heart of the case is an argument as to the correct interpretation of fundamental constitutional principles relating to the scope and nature of prerogative power exercisable by the UK Government. The submissions from the Scottish and Welsh Governments, and the Northern Irish appellants, broaden the case to include issues relating to the role of the UK's devolved legislatures in the decision to serve an Article 50 notice.

As we noted in our bulletin on the Divisional Court's decision (available here), if the Supreme Court upholds the Divisional Court's decision, it could have significant practical consequences for commercial parties. In particular, it may call into question the UK Prime Minister's plan to serve an Article 50 notice by the end of March 2017, which could have a material impact on the approach that commercial parties take to their contingency planning.

Our bulletin on the Divisional Court's decision detailed the arguments made by the claimants and the UK Government at first instance, and summarised the decision. In this bulletin, we discuss some of the key arguments made by the parties and some of the interveners in their written submissions to the Supreme Court and highlight some of the points to look out for during the hearing.

We will post regular updates on the progress of the hearing during the course of this week on our website, here.

In addition, as is usual in the English courts, the hearing will be open to the public. The proceedings will also be live streamed via the Supreme Court's website (here), and transcripts will be published on a daily basis. Those who wish to follow the proceedings in detail this week should therefore be able to do so.

Key submissions

The UK Government argues in its written submissions that the Divisonal Court erred in its conclusion that the consent of Parliament is required before an Article 50 notice can be served. In essence, the UK Government submits that exercise of the prerogative power on the international plane may properly make changes to domestic law and that Parliament has in this case placed no express limits on the use of this power. The

Government has refined the arguments it made before the Divisional Court, focusing on the fact that the UK has a dualist constitutional system, which means that individual rights and obligations created by treaties must be passed into domestic law by Parliament. The Government asserts that a consequence of this dualist system is that, where Parliament has chosen to implement a treaty through legislation, this carries no implicit restriction on how the Government should act in relation to that treaty on the international plane.

The claimants submit that the Divisional Court's decision was correct. They argue, among other things, that the Government fails to recognise in its submissions the exceptional nature of the European Communities Act 1972 (**ECA 1972**) and of the rights conferred by the EU Treaties. They refer to a series of constitutional law principles, including the principle of Parliamentary sovereignty and the limits it places on the exercise of prerogative power where action taken on the international plane will defeat statutory rights and the principle that if Parliament intended to legislate to defeat fundamental rights it would have made this clear. They argue that applying these principles, the contents of the ECA 1972 show that Parliament intended that the Government should not enjoy a prerogative power to defeat statutory rights and that, in any event, as a matter of common law the Government has no such power.

The Scottish and Welsh Governments, and the appellants in the Northern Irish case, echo the English claimants' case. The Scottish Government suggests that under the Claim of Right Act 1689 and the Acts of Union, Scots law may even place greater restriction on the prerogative than English law. These parties also assert that the use of the prerogative to serve an Article 50 notice would be unlawful given its effect on their respective devolution settlements. Further, they make a range of submissions based on the "Sewel convention", under which the UK Parliament will not normally legislate with regard to devolved matters without the consent of the relevant devolved legislature.

The Scottish Government invites the Supreme Court to find that the Sewel convention is "*engaged*" and argues that the "*constitutional requirements*" referred to in Article 50 include that convention even if it is not legally enforceable. This is cited as an additional reason why a notice cannot be served using the prerogative powers.

The appellants in the Northern Irish proceedings go further, saying that the UK Government is obliged to at least seek the consent of the Northern Ireland Assembly, even if Parliament is not necessarily bound by the response.

The UK and Northern Irish Governments reject these arguments and submit that there is no restriction on the prerogative imposed by the relevant devolution legislation or constitutional convention.

The parties, the various Governments and the other interveners (who include a group of expatriates, the Independent Workers Union of Great Britain and a group called Lawyers for Britain Ltd), make many further submissions on related points and with differing degrees of emphasis. For example, the Independent Workers Union of Great Britain submits (among other things) that a decision to withdraw from the EU has to be made with the consent of all four of the UK's democratically elected legislatures. Copies of all submissions are available on the Supreme Court's website, here.

What to look out for

The crux of the case is the proper scope and nature of the prerogative power. Arguments in this area will therefore be of particular interest.

It will also be interesting to see whether there are particular issues on which the Supreme Court asks questions. It is common for Supreme Court Justices to be relatively interventionist and to test the arguments raised by counsel or explore areas which they consider to be of particular significance (although given that all 11 Justices are sitting in this case and the timetable for oral submissions is tight, it may be that in practice any interventions will be relatively brief).

It will be particularly noteworthy if the parties are asked to make oral submissions on the question of whether an Article 50 notice is revocable. The Divisional Court did not consider this question, simply noting that it was common ground between the parties that an Article 50 notice cannot be revoked. The UK Government, the claimants and the Scottish and Welsh Governments have variously submitted that the Supreme Court should proceed on the same basis as the Divisional Court and that the question is of no practical significance in any event. Some of the Northern Irish appellants have submitted that the better construction is that service of an Article 50 notice is irrevocable, but acknowledges that other interpretations are "*at least arguable*".

One reason why this point is significant is that the question of whether an Article 50 notice is irrevocable is one of European law. As such, if the Supreme Court takes the view that it must answer the question, it may decide that it must refer it to the Court of Justice of the EU. This would almost certainly delay the date of service of an Article 50 noticebeyond March 2017.

Similarly, if the Supreme Court focuses on the question of whether the Sewel convention is engaged or the consent of the devolved legislatures is required that will also be of interest, as if the Court decides that the devolved legislatures must have a role, that could also make it more difficult for the Government to be in a position to serve an Article 50 notice by the end of March.

As indicated above, we will post regular updates on the progress of the hearing during the course of this week on our website, here. We will also report in detail on the Supreme Court's judgment when it is handed down, which is likely to be in January 2017.

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If you would like to discuss the issues raised in this paper in more detail, please contact Karen Birch, Sarah Garvey, Andrew Denny, Thomas Cusworth or your usual Allen & Overy contact.

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