

IN THE SUPREME COURT

Case No. CO/3385/2019

B E T W E E N

R (on the application of GINA MILLER)

Appellant

- v -

THE PRIME MINISTER

Respondent

**SIR JOHN MAJOR
THE COUNSEL GENERAL FOR WALES
THE LORD ADVOCATE, ON BEHALF OF THE SCOTTISH GOVERNMENT
BARONESS SHAMI CHAKRABARTI
THE PUBLIC LAW PROJECT**

Proposed Interveners

SECOND WITNESS STATEMENT OF JOE TOMLINSON

I, Dr Joe Tomlinson, of the Public Law Project, 150 Caledonian Road, London N1 9RD, do say as follows:

1. I make this second short statement in support of the Public Law Project's ('**PLP**'s) intervention in these proceedings, in order briefly to update the evidence in my first statement of 4 September 2019 in light of developments that have occurred since then. I am duly authorised to make this statement on PLP's behalf.
2. This statement is made on the basis of my own knowledge, and on information provided to me by my colleagues and from information gathered by PLP in the course of our work. Where the information is not within my own knowledge, I have made clear the source of that information and any limitations on my knowledge or understanding of it.
3. Alexandra Sinclair and I published our concerns about the consequences of prorogation on secondary legislation in a blog post for the UK Constitutional Law Association Blog (*Eliminating Effective Scrutiny*, 4 September 2019). Those observations were adopted by Professor Paul Craig (see Craig, *Prorogation: Three Assumptions*, UK Constitutional Law Association, 10 September 2019).

The effect of prorogation on Brexit Bills

4. I referred at paragraph 37 of my first statement to the five outstanding Brexit Bills in the last Parliamentary session. Two of these, the Trade Bill and Financial Services Bill, were ineligible to be carried over to the next session because they had progressed too far. The other three Brexit Bills – the Immigration and Social Security Coordination Bill, the Agriculture Bill and the Fisheries Bill – were eligible to be carried over to the next Parliament. However, no carry-over motions for any outstanding Brexit Bills were tabled in Parliament on 9 September 2019.
5. This means all Brexit Bills from the last Parliamentary session have fallen. So their content, which is undoubtedly pivotal to an orderly No Deal Brexit, will either have been adopted in the two weeks of Parliamentary time available when the new session starts (a huge task) or repackaged in substantial part as s.8 statutory instruments. Therefore, there is an increased likelihood that Parliament will need to rely on yet further secondary legislation between now and exit day. It seems very likely that the content of any such SIs would ordinarily merit Parliamentary debate. There is also an increased likelihood that matters of policy will be implemented via SI.

The effect of prorogation on statutory instruments

6. According to the Statutory Instrument ('SI') Tracker (described at paragraph 24 of my first witness statement) there have been 589 Brexit Statutory Instruments (i.e. Statutory Instruments made under s.8 of the 2018 Act) laid as at 13 September 2019.
7. Of those 589 Brexit SIs, there were 42 SIs that had been laid before 4 September 2019 that had yet to finish their Parliamentary scrutiny at the time that Parliament was prorogued. 25 of the 42 SIs, including the Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019 and the Human Medicines and Medical Devices (Amendment etc.) (EU Exit) Regulations 2019, were awaiting debates in both Houses of Parliament, either because they were draft affirmative measures or because they had been singled out for debate by the sifting process. 11 of the 42 outstanding SIs had 40-day scrutiny periods that were due to end in September or October that have now been suspended while Parliament is prorogued.
8. 80 of the 589 Brexit SIs laid in total have amended existing Brexit SIs; these are known as "wash-up" SIs (i.e. SIs used to correct earlier errors, as described at paragraph 30 of my first statement). 14 of the 21 laid since 4 September 2019 are wash-up SIs which have in part amended existing SIs already laid.

9. As of today, 60 of the 589 Brexit SIs laid have been withdrawn and subsequently re-laid. For example, the Trade in Animals and Animal Products (Legislative Functions) and Veterinary Surgeons (Amendment) (EU Exit) Regulations 2019 were laid as a draft affirmative SI on 26 June 2019. On 5 September 2019, when the SI was still awaiting debate in both houses of Parliament, it was withdrawn by the Government and re-laid as a 'made affirmative' under the urgent case procedure under EUWA.

Statutory Instruments laid since 4 September 2019

10. In the last 9 days, since 4 September 2019, the Government has laid 21 Brexit SIs.

EUWA Urgent Case procedure

11. Over half of these 21 new SIs were laid as 'made affirmatives' using the urgent case procedure under EUWA (the procedure is described in paragraph 25 of my first statement).
12. At the time of writing, there have been 16 SIs laid as 'made affirmatives' rather than draft and subject to the urgent case procedure under EUWA in total:
- The first 5 of these were laid between the "first exit day" (29 March 2019) and the "second exit day" (12 April 2019).
 - The remaining 11 of these were laid between 4 and 12 September 2019 i.e. after the Government announced its intention to prorogue Parliament and prorogation.
13. The 11 SIs recently laid using the urgent case procedure were as follows:
- Capital Requirements (Amendment) (EU Exit) Regulations 2019
 - Risk Transformation and Solvency 2 (Amendment) (EU Exit) Regulations 2019
 - Animal Health and Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019
 - Air Services (Competition) (Amendment and Revocation) (EU Exit) Regulations 2019
 - Customs Safety and Security Procedures (EU Exit) (No. 2) Regulations 2019
 - Prospectus (Amendment etc.) (EU Exit) Regulations 2019
 - Financial Services (Electronic Money, Payment Services and Miscellaneous Amendments) (EU Exit) Regulations 2019
 - The Trade in Animals and Animal Products (Legislative Functions) and Veterinary Surgeons (Amendment) (EU Exit) Regulations 2019
 - Specific Food Hygiene (Regulation (EC) No. 853/2004) (Amendment) (EU Exit) Regulations 2019

- Product Safety, Metrology and Mutual Recognition Agreement (Amendment) (EU Exit) Regulations 2019
- Competition (Amendment etc.) (EU Exit) (No. 2) Regulations 2019

14. Only one of the 11 SIs laid using the urgent case procedure under EUWA explicitly cites the prorogation of Parliament as being the reason for the urgent procedure being followed, whether in the Ministerial statement justifying urgency or otherwise. See the following excerpt of paragraph 5.2 to the Specific Food Hygiene (Regulation (EC) No. 853/2004) (Amendment) (EU Exit) Regulations 2019, laid on 9 September 2019, where the Minister said (**emphasis added**):

*“The urgency procedure is required for this instrument to ensure that these changes can be made to Regulation (EC) No. 853/2004 before exit day and by the 11 October 2019. **Due to the prorogation of Parliament, we are required to use the urgent, made affirmative procedure for this SI to ensure that is made by 11 October, which is when we understand the EU Commission will take a vote on whether the UK can be listed as a Third Country for exporting products of Animal Origin.** This export market is worth approx. £5 billion per year to the UK, and the EU have stated that all necessary legislation implementing current regulations must be made by the date of the vote.”*

Although it is not expressly stated, the indication is that the other SIs will have similarly adopted the urgency procedure due to the prorogation of Parliament.

15. A number of further SIs will in all probability be adopted in the same way, using the urgency procedures, in the days and weeks ahead. For example, the State Aid (EU Exit) Regulations 2019 have still not been made but are necessary in order to ensure there is a regime in place for State Aid upon a no-deal exit. They were laid under the ‘draft affirmative’ procedure, and were drawn to special attention by the Secondary Legislation Scrutiny Committee. When debated by the first Delegated Legislation Committee in the House of Commons on 10 April 2019, it was decided that further debate was required, and so no House of Commons Approval motion was granted.

Non-EUWA procedure

16. Of the 21 SIs laid since 4 September 2019, 8 were laid as made using non-EUWA powers and 3 of those 8 will come into force before the 21-day period that is convention before a statutory instrument can come into force.

17. One of the three that will come into force imminently – the Town and Country Planning (North Weald Airfield) (EU Exit) Special Development Order 2019 – has the following in the explanatory memorandum:

“The Ministry regrets that it has not been possible to comply with the normal procedure for negative statutory instruments, whereby the instrument would not come into force earlier than 21 days after it is laid. This reflects, however, the rapidly moving work on the ‘no deal’ EU Exit preparations.”

Developments in the Procedure Committee

18. On 10 September 2019, Sir Charles Walker KBE MP, Chair of the House of Commons Procedure Committee, wrote to the House of Commons with regard to the ‘made affirmative’ urgent case procedure for statutory instruments under EUWA.¹ He noted that 11 statutory instruments had been made using the urgent case procedure since 4 September 2019. The Chair asked if the Government planned to make further use of the urgency procedure and, if so, how many other SIs subject to that procedure would be brought into force prior to 31 October.

19. The Chair further requested reassurance that the SIs that had already been laid would be debated in full prior to exit day, as the Chair said it would be unacceptable for them to be debated and approved by the House only after they were in force. Without such assurances, it is possible that the SIs could come into force before they are debated. This is because the SIs laid on 4 September 2019 could remain in force until 5 November 2019, *i.e.* after exit day.

I believe that the facts stated in this witness statement are true.



Joe Tomlinson

13 September 2019

¹ <https://www.parliament.uk/documents/commons-committees/procedure/2017-19/letter-from-chairman-to-leader-house-parliamentary-under-secretary-of-state-DExEU-10-09-2019.pdf>