

IN THE SUPREME COURT OF THE UNITED KINGDOM

UKSC 2019/0192

on appeal from

THE HIGH COURT OF JUSTICE

Claim No. CO/3385/2019

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N

R (on the application of GINA MILLER)

Appellant

- v -

THE PRIME MINISTER

Respondent

**BARONESS SHAMI CHAKRABARTI
THE COUNSEL GENERAL FOR WALES**

THE RT HON SIR JOHN MAJOR

THE LORD ADVOCATE

THE PUBLIC LAW PROJECT

Interveners

**WRITTEN SUBMISSIONS ON BEHALF OF
THE PUBLIC LAW PROJECT**

*References in the form [JT1 *\$para*] and [JT2 *\$para*] are to the first and second witness statements of Dr Joe Tomlinson respectively*

A. Introduction

1. PLP intervenes in support of the Claimant to contend that the advice of the Prime Minister to prorogue Parliament was unlawful. PLP submissions are primarily concerned with the legal defect in such advice, though it believes its argument contributes to the answer to question of justiciability.
2. The flaw is this: the Prime Minister failed to have any, alternatively any due, regard to a mandatory relevant consideration, namely the impact of the lengthy prorogation proposed on the Government's ability to deliver, and to deliver in accordance with the special Parliamentary controls devised by Parliament in the European Union (Withdrawal) Act 2018 (the "**2018 Act**"), the exceptional delegated legislation required for an orderly "No Deal" exit of the United Kingdom from the European Union by 31 October 2019 (the intended immovable date of departure). With the loss of both standard and potential additional Parliamentary time (as made available through extra or late sitting, shortening of planned recesses etc.) due to prorogation, the outstanding statutory instruments can only realistically be enacted in advance of 'Exit Day' on 31 October 2019 using the 'urgency procedures' in the 2018 Act, which circumvent the

special Parliamentary scrutiny ordinarily required by the 2018 Act and deprive Parliament of any proper opportunity to debate secondary legislation of real moment amending primary legislation.

3. Subsequent events have proved this analysis: as explained in **JT2 §§10-14**, Statutory Instruments (“**SI**s”) which, due to their content, would have been debated by Parliament (either because their content required affirmative resolution or because the ‘sift’ procedures discussed below led to them being earmarked for debate due to their significance) have simply been made under the urgency procedure, and the anticipated Parliamentary debate either lost outright (in the case of those that were or would have been promoted by the ‘sift’) or delayed until after they would come into effect.
4. Given that these were safeguards Parliament itself designed closely to control the delegated legislation required to deliver Brexit, delegated legislation that was both exceptional in bulk/breadth and in nature (being key “Henry VIII” legislative powers to amend primary legislation), the Prime Minister was obliged to consider the impact of the prorogation proposed upon the Parliamentary scrutiny possible, and he failed so to do.
5. More particularly, there was and is a direct correlation between the length of the prorogation in the critical window between August 2019 and 31 October 2019 and the possibility of Parliamentary scrutiny: the longer the period of prorogation, the earlier and longer the period of ‘urgency’ that would thereby be created, and the greater the loss of Parliamentary scrutiny required by the 2018 Act as default. Such required at least some reason for requiring a prorogation of the extended length proposed, as opposed to the conventionally far shorter prorogation. No such reason was or has been provided.

B. Legal Background

6. Section 8 of the 2018 Act contains powers to amend primary legislation by statutory instrument of unprecedented span. Section 8(1) of the 2018 Act provides the broad power for a Minister of the Crown to make delegated legislation as the Minister considers appropriate to prevent, remedy or mitigate: (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU. The type of “deficiencies” that may be cured using such delegated legislation are defined very widely in section 8(2) and (3).

Section 8(5) provides that “Regulations under subsection (1) may make any provision that could be made by an Act of Parliament”.

7. Such “Henry VIII” powers are constitutionally exceptional, such that their use must be carefully scrutinised and confined by the Courts to protect the primacy of Parliament and Parliamentary sovereignty.¹
8. Thus, the Lords Select Committee on the Constitution, in its 9th Report of Session 2016-17 *The Great Repeal Bill and delegated powers*, noted the constitutional significance of the shift of legislative power from Parliament to Government in permitting delegated legislation to address deficiencies upon exit from the EU (emphasis added):

“45. The ‘Great Repeal Bill’ [i.e. the 2018 Act] will likely propose that Parliament delegate to the Government significant powers to amend and repeal (primary) and revoke (secondary) legislation to enable it to carry out the significant task of preparing the ground for the conversion of the body of EU law into UK law within the timeframe set out for the UK’s exit from the EU.

46. Parliament should ensure that the delegated powers granted under the ‘Great Repeal Bill’ are as limited as possible. However, the degree of uncertainty as to what exactly the process of converting EU law into UK law will involve – and, in particular, the unknown outcomes of the UK’s ongoing Article 50 negotiations with the EU – will almost certainly necessitate the granting of relatively wide delegated powers to amend existing EU law and to legislate for new arrangements following Brexit where necessary.

47. The ‘Great Repeal Bill’ is thus likely to involve a massive transfer of legislative competence from Parliament to Government. This raises constitutional concerns of a fundamental nature, concerning as it does the appropriate balance of power between the legislature and executive.”

9. To contribute to the control over these powers, the 2018 Act devised and applied special safeguards to enhance the Parliamentary scrutiny of section 8 legislation. The Government White Paper *Legislating for the United Kingdom’s withdrawal from the European Union* (15 May 2017), which preceded the 2018 Act (emphasis added) explained that:

“3.7 To overcome [legislative deficiencies upon exiting the EU], the Great Repeal Bill [i.e. the 2018 Act] will provide a power to correct the statute book, where necessary, to rectify problems occurring as a consequence of leaving the EU. This

¹ See, for example, Lord Judge (extra-judicially) “*Ceding Power to the Executive; the Resurrection of Henry VIII*” (12 April 2016): “Unless strictly incidental to primary legislation, every Henry VIII clause, every vague skeleton bill, is a blow to the sovereignty of Parliament. And each one is a self-inflicted blow, each one boosting the power of the executive.” See also *R (Public Law Project) v Secretary of State for Justice* [2016] AC 1531, per Lord Neuberger (with whom the other members of the Supreme Court agreed), at [24]-[28].

will be done using secondary legislation, and will help make sure we have put in place the necessary corrections before the day we exit the EU.

3.8 Primary legislation can provide a framework within which Government can propose secondary legislation for parliamentary approval. Ultimately, the power to make secondary legislation is granted by Parliament and each use of these powers is subject to Parliament's control.

...

3.19 Making sure domestic law works as we leave the EU will be a substantial challenge for both Government and Parliament in complexity and planning to deal with a number of scenarios. In the previous two Parliaments, an average of 1,338 (2005-10) and 1,071 (2010-15) statutory instruments were made per year. A proportion of this secondary legislation, as it has been every year, was implementing EU law. We currently estimate that the necessary corrections to the law will require between 800 and 1,000 statutory instruments. ...

3.21 The Government proposes using existing types of statutory instrument procedure. These allow Parliament to see all statutory instruments, with different levels of scrutiny. The most commonly used procedures are the negative procedure (which does not require debate) and the affirmative procedure (which requires debate and approval by both Houses). Parliamentary committees scrutinise statutory instruments for technical and policy content. Under the negative procedure, members of either House can require a debate, and if necessary, require a vote.

3.22 The Bill will therefore provide for the negative and affirmative procedures to be used. The mechanistic nature of the conversion of EU law to UK law suggests that many statutory instruments will follow the negative procedure (for example, removing the requirement to send reports to the Commission on the UK's public procurement activity). The affirmative procedure may be appropriate for the more substantive changes."

10. This captures Parliament's concern that the normal SI scrutiny procedures would not prove adequate to ensure effective Parliamentary oversight of the Executive, given the scope and nature of the "Henry VIII" powers contained in section 8, which can be used to amend both domestic primary legislation and rights currently derived from EU Treaty provisions and EU Regulations, and the likely volume of SIs. As a result of these concerns, provisions were inserted into the Act to: (a) require amendments to rights derived from EU Treaty provisions and EU Regulations to be made only by primary legislation or by relevant "Henry VIII powers";² and (b) provide for special strengthened scrutiny procedures in respect of delegated legislation under the Act which is not required to be made by the affirmative procedure.

² Section 7(2) and (4) of the 2018 Act and paragraphs 3-4 of Schedule 8 to the 2018 Act.

11. The detail of these special procedures is contained in Schedule 7 to the 2018 Act, which provides the “Brexit specific” procedures for enhanced scrutiny of section 8 delegated legislation. The procedures are summarised in the Explanatory Notes to the 2018 Act in the following terms (emphasis added):

“Part 1: Scrutiny of power to deal with deficiencies

290. Paragraphs 1, 2 and 5 set out the three parliamentary scrutiny procedures by which regulations can be made under the power to deal with deficiencies arising from withdrawal in section 8(1) and the circumstances in which each will apply. The main procedures are the draft affirmative (generally referred to as the affirmative), the negative (subject to a sifting procedure, except in urgent cases) and, for urgent cases, the made affirmative.

291. Draft affirmative resolution procedure (paragraph 1(1) of Schedule 7): These instruments cannot be made unless a draft has been laid before and approved by both Houses.

292. Negative resolution procedure (paragraph 1(3) of Schedule 7): These instruments become law when they are made (they may come into force on a later date) and remain law unless there is an objection from either House. The instrument is laid after making, subject to annulment if a motion to annul (known as a ‘prayer’) is passed within forty days.

293. Instruments to be made under the negative resolution procedure must (unless the Minister makes a declaration of urgency (see paragraph 5(8) of Schedule 7)) first be laid in draft before each House of Parliament for sifting (see paragraph 3 of Schedule 7).

294. Made affirmative resolution procedure (paragraph 5 of Schedule 7): These instruments can be made and come into force before they are debated, but cannot remain in force unless approved by both Houses within 28 days. The Government believes that the exceptional circumstances of withdrawing from the EU might necessitate the use of the made affirmative procedure so the Act allows for this as a contingency.

...

Parliamentary committee to sift certain deficiencies regulations of a Minister of the Crown

300. Paragraph 3 requires, before instruments under section 8(1) being proposed for the negative procedure may be made, that the minister lays a draft of the instrument before both Houses of Parliament, along with a memorandum explaining the choice of procedure. This committee has 10 sitting days (beginning on the first day both Houses are sitting, and where Commons sitting days are different to Lords sitting days, whichever period ends later) to make a recommendation as to the appropriate procedure for the instrument. After receiving the recommendation, or after 10 sitting days without a recommendation, a Minister may either proceed with making a negative instrument, or proceed with an affirmative instrument instead. In either circumstance, the minister need not proceed immediately, but may proceed with the instrument at a later date. If the

Minister disagrees with a recommendation of a committee for the affirmative procedure, they will be required to make a statement in writing explaining why they disagree before they can proceed with the negative procedure.

...

Scrutiny procedure in certain urgent deficiencies cases

304. Paragraph 5 allows the made affirmative procedure to be used instead of the draft affirmative, for regulations under section 8 made by a minister of the Crown in urgent cases.

305. Paragraph 5(8) enables Ministers to make negative regulations without going through the procedure at paragraph 3 in urgent cases (in cases which do not trigger the affirmative procedure). Urgent cases could include, for example, where a statutory instrument needs to come into force because of a lead-in time required to allow systems to be changed or put in place before exit or, where, due to the progress of negotiations, statutory instruments are made close to exit day."

12. The sift system is thus a means by which Parliament (through its dedicated Select Committees³) may scrutinise the content of draft section 8 legislation and decide, according to its priorities, that the legislation raises issues of such importance as to require a debate in Parliament and the use of the affirmative resolution process. This would include where the legislation proposes significant amendments to primary legislation, or otherwise raises matters of policy or public concern. Whilst the Explanatory Notes anticipate urgency arising as result of last minute developments in negotiations with the EU (or, by extension, the EU's own "No Deal" arrangements), prorogation was not anticipated as a source of urgency.
13. This sifting process is entirely set aside in cases of "urgency". Paragraph 5 of Schedule 7 to the 2018 Act provides (emphasis added):

"Scrutiny procedure in certain urgent deficiencies cases: Ministers of the Crown

(1) Sub-paragraph (2) applies to –

- (a) a statutory instrument to which paragraph 1(1) applies [i.e. the mandatory affirmative resolution procedure], or*
- (b) a statutory instrument to which paragraph 1(3) applies [i.e. eligible for the negative resolution procedure] which would not otherwise be made without a draft of the instrument being laid before, and approved by a resolution of, each House of Parliament [i.e. those measures*

³ The European Statutory Instruments Committee ("ESIC"), established for this purpose in the House of Commons; and the Secondary Legislation Scrutiny Committee ("SLSC") in the House of Lords.

identified by the sift procedures as requiring the use affirmative resolution procedures].

- (2) The instrument may be made without a draft of the instrument being laid before, and approved by a resolution of, each House of Parliament if it contains a declaration that the Minister of the Crown concerned is of the opinion that, by reason of urgency, it is necessary to make the regulations without a draft being so laid and approved.
- (3) After an instrument is made in accordance with sub-paragraph (2), it must be laid before each House of Parliament.
- (4) Regulations contained in an instrument made in accordance with sub-paragraph (2) cease to have effect at the end of the period of 28 days beginning with the day on which the instrument is made unless, during that period, the instrument is approved by a resolution of each House of Parliament.
- (5) In calculating the period of 28 days, no account is to be taken of any time during which –
 - (a) Parliament is dissolved or prorogued, or
 - (b) either House of Parliament is adjourned for more than four days.
- (6) If regulations cease to have effect as a result of sub-paragraph (4), that does not –
 - (a) affect the validity of anything previously done under the regulations, or
 - (b) prevent the making of new regulations.
- (7) Sub-paragraph (8) applies to a statutory instrument to which paragraph 1(3) applies where the Minister of the Crown who is to make the instrument is of the opinion that the appropriate procedure for the instrument is for it to be subject to annulment in pursuance of a resolution of either House of Parliament.
- (8) Paragraph 3 [i.e. the negative resolution procedure subject to sifting by Parliamentary committee] does not apply in relation to the instrument if the instrument contains a declaration that the Minister is of the opinion that, by reason of urgency, it is necessary to make the regulations without meeting the requirements of that paragraph.”

14. Therefore, in the circumstances of an ‘urgent deficiency case’ as provided for by paragraph 5 of Schedule 7 to the 2018 Act:

14.1. A statutory instrument which otherwise has to be made by the affirmative resolution procedure can be made as law without any prior Parliamentary scrutiny at all. It receives Parliamentary scrutiny within 28 days (not including any time when Parliament is prorogued) after it is made.

- 14.2. The same analysis applies to a statutory instrument which has already been identified through the sift procedures as requiring ‘upgrading’ to the affirmative procedure.
- 14.3. Any other statutory instrument – including any other statutory instrument to which the sift procedures have not yet been applied – can be made without any Parliamentary scrutiny at all. The effect is that such measure can be adopted without being considered by the duly appointed Parliamentary Committees as to whether it ought to be subject to the affirmative resolution procedure, provided that a Minister declares that “*by reason of urgency*” it is necessary to make the regulations without meeting such requirements.
15. When exercising any Executive powers that might cause or contribute towards a situation of urgency or its duration, the Executive must at least take this factor, and the consequential curtailing of the Parliamentary scrutiny (in the manner provided for in paragraph 5 of Schedule 7) into account, to satisfy itself that the “cost” in terms of lost Parliamentary involvement in scrutiny in the measures affected or likely to be affected is justified by the demand or need for the Executive action in question, in this case the prorogation of the proposed length.
16. Any contrary conclusion would run counter to the purpose of requiring enhanced Parliamentary scrutiny in the 2018 Act in the first place, and would leave open the abuse of the urgency procedures by creating a form of “self-induced” urgency.⁴ It is noted that the oversight of the Parliamentary Committee was introduced to the 2018 Act following the Report of the House of Commons Procedure Committee *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: Interim report*, First Report of Session 2017-19; paragraph 18 of this report explained, in respect of the Bill as initially proposed absent scrutiny by the sifting committee (emphasis added):

“It is of primary importance that the process by which European law is repatriated is, and is seen to have been, subject to proper parliamentary scrutiny. In our view, the Government’s proposals for scrutiny as provided for in the European Union (Withdrawal) Bill establish a system over which elected Members of Parliament

⁴ See, by way of analogy in the private law context, *Canary Wharf (BP4) T1 Limited & ors v European Medicines Agency* [2019] EWHC 335 (Ch) *per* Marcus Smith J at [206]-[207], in which the European Medicines Agency (“EMA”) was not able to rely upon frustration of a lease following the European Union’s 2018 Regulation ordering the relocation of the EMA; it was not permissible to rely upon frustration where “*certain options – that might have ameliorated the frustrating event – had been closed off by the acts or omissions of the party claiming frustration*”. So, too, with a claim to ‘urgency’.

have insufficient control over the means by which adequate scrutiny and consequential changes are to be achieved. We believe that it would be preferable to have a system for exercising control which could not give rise to any suspicion that the motives of the Government are to avoid scrutiny rather than ensure the means whereby from exit day the statute book contains a workable framework of law seamlessly transposed from existing EU law."

17. Such logic no doubt informs the letter sent by Sir Charles Walker KBE MP, Chair of the Procedure Committee, on 10 September 2019 to the Leader of the House of Commons, the contents of which merit close review, but which point out the imperative need for Parliamentary debate before measures of this kind are adopted: [JT2 §§18-19].
18. Since it is incumbent on the Government to use its executive powers so as to avoid creating an unnecessary state of "urgency", and/or so as to minimise its span, it follows that when using any executive powers that might cause, create or exacerbate a situation of "urgency", and thereby deprive the special sifting safeguards of their utility and thus Parliament of its key role in identifying and then debating key pieces of section 8 legislation, such was a consideration that was required to be taken into account. This is a mandatory relevant consideration in effect dictated by section 8 of and Schedule 7 to the 2018 Act itself (the "**Scrutiny Consideration**") read against the 31 October 2019 exit date set by the 2018 Act, as amended, and the Government's stated intention to stick to such date at all costs.

C. Factual Background

19. As to the primary legislation required for an orderly withdrawal from the EU, there were, at the time of prorogation, five Government 'Brexit Bills' progressing through Parliament. Such Bills are a blend of repeals, amendments, substantive provisions and subject-matter specific enabling powers, including further subject-specific Henry VIII powers, reliance upon which was necessary to complete a coherent domestic regime to take effect on 1 November 2019 by making further SIs.
20. When Parliament is prorogued, all Bills fall unless expressly carried over to the next session. In consequence of prorogation, all five Brexit Bills have fallen [JT2 §§4-5]: two, the Trade Bill and the Financial Services (Implementation of Legislation) Bill, were ineligible to be carried over to the next Parliamentary session because they had already progressed too far; three, namely the Agriculture Bill, the Fisheries Bill, and the Immigration and Social Security Coordination (EU Withdrawal) Bill fell because they were not carried over. (A number of significant non-Brexit Bills also fell, such as the

Domestic Abuse Bill). Such outstanding primary legislation required for Brexit, materially delayed by prorogation, will require extraordinary measures to be passed in the time after the Queen’s Speech on 14 October and before 31 October 2019 and will necessarily occupy available Parliamentary time.

21. As to the secondary legislation required for an orderly withdrawal from the EU, there were, PLP estimates, no less than 70-80⁵ statutory instruments yet to be made at the time the advice to prorogue was provided [JT1 §§31-37]; indeed, now that the Brexit Bills have fallen, the Executive may seek to make further SIs under section 8 of the 2018 Act in an attempt to plug the legislative holes they leave [JT2 §5]. For the greater part, such statutory instruments have not been made publicly available in draft in advance, even for informal consultation, making Parliamentary scrutiny all the more pivotal [JT1 §56]. In circumstances of the prorogation advised by the Prime Minister, in respect of all or most of those statutory instruments and in respect of those pending review by the designated Parliamentary Committees (the European Statutory Instruments Committee (“ESIC”) and the Secondary Legislation Scrutiny Committee (“SLSC”)), the Government would, at the time of the advice on prorogation (and given the length of prorogation proposed) inevitably need to rely on the urgency procedures in paragraph 5 of Schedule 7 to the 2018 Act in order for them to be made in advance of Exit Day on 31 October 2019. Such has already proven to be the case: [JT2 §§10-15].
22. As to the consideration given by the Prime Minister to the necessary Parliamentary steps to be taken in the September session of Parliament, there has been disclosure of the hand-written note dated 16 August 2019, in which the Prime Minister described the September session of Parliament as a “*rigmarole introduced ... to show the public that MPs were earning their crust*” and that he did not see “*anything especially shocking about this proposition [i.e. prorogation]*”. Such analysis shows that no thought was given by the Prime Minister to the disabling of Parliament’s opportunity to scrutinise section 8 legislation in advance of its adoption, and in particular to its ability to identify and debate key measures through the use of the sifting processes; nor any thought given to

⁵ On 27 June 2019, Stephen Barclay MP, the Secretary of State for Exiting the European Union stated that the number of statutory instruments that remain to be enacted in order the United Kingdom to exit the EU in an orderly fashion was “*around 100*”: HC Deb, 27 June 2019, c795. Between that statement and the advice to prorogue, only 27 further statutory instruments under the 2018 Act had been laid [JT §36].

the fact that the longer the period of prorogation, the greater the loss of the opportunity of Parliamentary scrutiny.

D. Unlawfulness of Prime Minister's Advice

23. Given the timing and length of the prorogation advised by the Prime Minister, there was insufficient time for all of the 70-80 section 8 statutory instruments which would be required for an orderly withdrawal from the EU, plus those statutory instruments presently pending before ESIC/SLSC or awaiting debate under the affirmative procedure, to be made in accordance with the standard procedures for Parliamentary scrutiny specified in the 2018 Act.
24. When Parliament is prorogued, none of the Parliamentary Committees required by the 2018 Act to act as an important constitutional check and balance on the Executive (i.e. a Brexit-specific Parliamentary safeguard) will be able to sit – including ESIC and the SLSC. Those checks and balances over the exceptional powers of secondary legislation, conferring enormous power on the Executive, are of critical importance in a defined period in which identifiable legislation remains to be passed by a fixed and imminent date if the United Kingdom's legislation and rules are to be coherent and effective (rather than 'deficient' as statutorily defined) on its withdrawal from the EU.⁶
25. Instead, in consequence of the Prime Minister's advice to the Queen to prorogue Parliament, such statutory instruments will need to be made pursuant to the urgency procedures in paragraph 5 of Schedule 7 to the 2018 Act.
26. Therefore, where Parliament is disabled for such an extended period, it was and is inevitable that the Executive would have to legislate during that period, and would do so without due Parliamentary scrutiny. The consequence of the Prime Minister's advice is that the Executive, by reason only of the Prime Minister's self-induced urgency, would become the *de facto* legislature.
27. There was (at the time of the Prime Minister's formulation of and provision of advice to the Queen) a self-evident and predictable democratic and constitutional cost (in terms of effective Parliamentary scrutiny of section 8 legislation) to the inevitable invocation

⁶ See generally [JT §§41-53]. For example, the Lords scrutiny in the SLSC of the Transmissible Spongiform Encephalopathies and Animal By-Products (Amendment etc.) (EU Exit) Regulations 2018 noted that the secondary legislation had removed a statutory duty to ensure staff had appropriate education and training in relation to TSE checks [JT §§47-49].

of the urgency procedures in paragraph 5 of Schedule 7 to the 2018 Act to which proroguing would give rise:

27.1. In respect of the statutory instruments that have to be made by affirmative resolution, such statutory instruments would be enacted as law without any prior Parliamentary scrutiny. Further, they would likely fall to be debated only after Exit Day on 31 October 2019, in circumstances where they are already operative, with individuals, companies and public authorities relying on them. In such circumstances: (i) any damage caused by improper legislation by the Executive may already have been caused, and/or (ii) Parliament can be expected to feel pressure not to vote such measures down. See the concerns of the Chair of the House of Commons Procedure Committee, summarised at **JT2 §19**.

27.2. In respect of all other statutory instruments, including those which would otherwise have been promoted for debate by the sift procedure, the Parliamentary oversight of ESIC and SLSC is circumvented altogether, provided a Minister is of the opinion that the negative resolution procedure is appropriate given the (self-induced) urgency. Although such measures can be made during prorogation, prayer motions against such measures cannot be laid during prorogation and, therefore, even if Members of Parliament wish to object to such an instrument, they will not be able to do so during the period of prorogation.

This cost to the due legislative process and Parliamentary scrutiny was the factor that that was required to be taken duly into account by the Prime Minister in his advice to prorogue Parliament.

28. In giving such advice, and in advising upon a prorogation of this duration, the Prime Minister was required to take into account the Scrutiny Consideration, since the effect of the prorogation proposed would be to strip Parliament of its advance scrutiny role for a very lengthy portion of the limited window in which action to cure legislative deficiency due to Brexit was possible. There must be a countervailing reason to justify the creation of a situation in which the Executive has legislated in place of the Parliament it has incapacitated.
29. For the reasons explained in paragraph 22 above, and in particular the failure to have any regard for the necessity of the September Parliamentary session and/or the effect

of the length of the prorogation on Parliamentary scrutiny, it is apparent that the Scrutiny Consideration was not so taken into account.

30. For the reasons above, the Prime Minister's advice failed to have regard to material considerations. It is unlawful.
31. Such point of law raises no concerns of justiciability, as none of the reasons advanced by the Defendant to explain the fact of and timing of prorogation explain or provide any basis for its length.

THOMAS DE LA MARE QC
DANIEL CASHMAN
Blackstone Chambers

ALISON PICKUP
Public Law Project

13 September 2019