

Brexit...where next?
Rosling King LLP



In a landmark case brought by the Secretary of State as the representative of the Crown the Divisional Court has decided that the government does not have prerogative power to invoke Article 50 without a vote by Parliament. The decision went against the Secretary of State's application which was defended by a range of representatives of interested parties.

The well written judgment summarises British constitutional law and the supremacy of Parliamentary sovereignty before going on to describe the powers of the Crown under its prerogative. These were described by Lord Reid as "a relic of a past age, not lost by disuse, but only available for a case not covered by statute" and that description was repeated today. In this scenario the cabinet, led by the Prime Minister of the day, also referred to as the executive government, can make decisions and act, but cannot override statute or primary legislation.

On the other hand, much of what the executive government does on foreign policy, including making and unmaking treaties, is done through the use of the Crown's prerogative powers. In an international context there has been no limitation to the Crown's prerogative, it is only in the domestic sphere that Parliament is supreme. There has been a "convention" to have a referendum when it comes to EU matters but there is no binding requirement on any government to do so.

The judgment refers to the rights granted to some by the European Communities Act 1972 (ECA), the legislation which the UK government passed which brought us into the then European Community, now superseded by the EU. The judgment states that "Parliament knew and intended that enactment of the ECA would provide the foundation for the acquisition by British citizens of rights under EU law which they could enforce in the courts of other Member States." Of course, they could also enforce them in domestic courts. The judgment makes clear that in its reasoning the effect of Article 50, is to alter domestic law and therefore Parliament as a whole must do so.

In other words, Parliament needs to vote in favour of doing so before Article 50 is invoked, thereby allowing the UK to leave the EU. Theresa May (or, more probably, the Secretary of State for Exiting the European Union) cannot invoke it without Parliament's approval. This is going to be very difficult as the majority of MPs believe that remaining in the EU is in the UK's best interests, although some have indicated that despite their privately held beliefs they will follow the decision of the referendum. Certainly putting the matter to a Parliamentary vote will heighten tensions.

This is possibly the most important constitutional case of the century and the Divisional Court has certified the case as suitable for a 'leapfrog' appeal straight to the Supreme Court. Technically the Supreme Court still needs to give permission but there is little doubt over whether they will give it. This means that the highest court of the land will now consider the legal question and provide a definitive answer. It has also been reported that it is likely that all the judges of the Supreme Court will sit to decide this case.

It may be over simplified logic but it is hard to see how the Supreme Court could come to a



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different decision. Parliament needed to pass an Act for us to join the European community; it must be the case that Parliament would need to follow the same process in order for us to leave. Article 50 can only define what is needed to leave as between the UK and other EU member states.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.