

IN THE SUPREME COURT OF THE UNITED KINGDOM

**IN THE MATTER OF
R (on the application of GINA MILLER)**

Appellant

– v –

THE PRIME MINISTER

Respondent

AND

**IN THE MATTER OF
JOANNA CHERRY QC MP and OTHERS**

Respondent

– v –

THE ADVOCATE GENERAL

Appellant

AND

RAYMOND McCORD

Intervener

ARGUMENT OF RAYMOND MCCORD (INTERVENER)

I. INTRODUCTION

1. Raymond McCord, a victims' campaigner whose son was murdered by paramilitaries in Northern Ireland, is grateful for the opportunity to present these written submissions supplemented with oral submissions if permission is so granted.

2. On 13 August 2019, Mr McCord brought an application for leave to apply for judicial review in the High Court of Justice in Northern Ireland in which he challenged, *inter alia*, the decision of the Prime Minister to advise the Queen to prorogue Parliament. McCloskey J (as he then was) refused to rule on the issue of prorogation in order to await the outcome of these proceedings before the Supreme Court. Those proceedings argue that the decision of the Government to leave the EU with or without a deal is unlawful, in short, because: a no deal has to be expressly sanctioned by Parliament and is necessarily inconsistent with section 10 of the European Union Withdrawal Act 2018 which expressly recognises the oppressive and deeply damaging impact a no deal exit would have on Northern Ireland and would be unconstitutional as a breach of the Good Friday Agreement. The prorogation is part of the mechanism by which this decision to leave is being put into effect. Mr McCord has appealed to the Court of Appeal in Northern Ireland against this refusal to rule on the prorogation issue. It is in this context that McCord seeks to intervene with these written and oral submissions at the hearing.

Auth 2

3. Mr McCord has had the opportunity to read the written arguments of the Respondent and the Lord Advocate from the courts below in *Cherry*. He has also had the benefit of reading all of the written arguments of the parties and interveners in *Miller* and heard the oral arguments in *Miller* in the court below. Mr McCord respectfully agrees with and supports the arguments of the Respondents and Lord Advocate in *Cherry* and the Appellants and interveners in *Miller*.

Auth 5

Auth 11

4. The relevant facts and evidence are well set out in the *Cherry* and *Miller* printed cases and it is not proposed that they be rehearsed in this argument. Moreover, Mr McCord respectfully submits that he can usefully confine his supporting argument to the following areas, namely that this prorogation is, from a Northern Ireland perspective:

Auth 5,
Auth 11

- (a) an abuse of power; and is
- (b) disproportionate or irrational.

II. ABUSE OF POWER

5. Mr McCord agrees with *Cherry* and the Lord Advocate and *Miller* that the decision to advise Her Majesty the Queen to prorogue Parliament can properly be reviewed by this Court on the ground of being an abuse of power. Auth 5,
Auth 11
6. In common with *Cherry* and *Miller*, Mr McCord says that the summary of the Divisional Court in *Miller* sets out succinctly the context in which the abuse of power arises: Auth 5,
Auth 11
- (1) because of the exceptional length of the prorogation, during a critical period, when time is of the essence;
 - (2) because the Prime Minister provides no reasonable justification on the facts for requiring a prorogation of such exceptional length; and
 - (3) because the evidence demonstrates that the decision of the Prime Minister is infected by ‘rank bad reasons’ for the prorogation, namely that Parliament does nothing of value in September and the risk that Parliament will impede the achievement of his policies, both of which demonstrate a fundamental failure on the Prime Minister’s part to understand the principle of Parliamentary Sovereignty.¹
7. Mr McCord also agrees that the constitutional and legal principles involved and infringed are Parliamentary sovereignty and holding the executive to account in Parliament. However, to this he adds the constitutional principles that, firstly an executive decision is not oppressive in its effect on Northern Ireland and secondly, that the decision does not permanently damage Northern Ireland’s position in the United Kingdom by undermining the consent of its people to be governed – a fundament of the rule of law.

¹ *R (Miller) v The Prime Minister* [2019] EWHC 2381 (QB), [26].

III. PROPORTIONALITY

(a) Proportionality in the *Cherry* case

8. In the evidence in *Cherry*, the stated aim of the Prime Minister in a letter to Conservative MPs was to bring about the end to the current session of Parliament so as to have a Queen’s Speech to set out a domestic programme. The main complaint in *Cherry* was the length of the prorogation, not the fact that it occurred. However, having considered the evidence at [118]–[122], the Court of Session Inner House in *Cherry* found *as a fact* that there was no justification or ‘rational explanation’ that the prorogation of Parliament is required to take place 5 weeks before the Queen’s Speech.² The Inner House therefore expressly found with the petitioner through the lens of rationality.

Auth 5,
MS 210–212

MS 213

9. The Lord Advocate framed the same arguments as a proportionality test: if the aim was to bring about a Queen’s Speech for a domestic programme, the length of time was disproportionate. The Inner House expressly recognised that the Lord Advocate sought the court to apply a proportionality test ([76] and [104]). At [104], the Court opined that applying a proportionality standard may be difficult where it involved consideration of the merits of what are ‘likely to be based on political consideration.’ The Inner House then opined that while it was not necessary to apply the standard of proportionality in that case:

Auth 5,
MS 184–185,
MS 202–203

Auth 5, MS 203

Nevertheless, standards of review are flexible, and in appropriate circumstances it would be possible for a court to hold that a decision by the executive to exercise a prerogative power is one that no reasonable person in that position could exercise: see, for example, *Pham v Home Secretary*, [2015] 1 WLR 1591, in particular at paragraphs [105]–[107].

Auth 7,
MS 263–265

10. In the extraordinary circumstances of this case with its profound impacts on the constitutional structure and the rights of citizens in every region of the UK, including in particular Northern Ireland, it is respectfully submitted that

Auth 5,
MS 210–212,
MS 213

² *Cherry v Advocate General* [2019] CSIH 49, [118]–[122], [123].

it is appropriate that this Court review the impugned decision using a proportionality test.

(b) Proportionality in domestic law

11. It is now proposed to set out what way the proportionality might be applied. *De Smith* identifies two broad versions of proportionality that appear in domestic law: (i) unstructured test – test of fair balance; and (ii) a structured test.³

(i) Unstructured test – ‘test of fair balance’

12. One category of the unstructured fair balance test is the manifest failure of a decision maker to balance relevant considerations.⁴ The other category is where the decisions have been held to be unreasonably onerous or oppressive in that there has been a disproportionate interference with a claimant’s rights or interests.⁵

(ii) Structured test

13. In *R (Daly) v Secretary of State for the Home Department*,⁶ a case heard before the ECHR was incorporated, the House of Lords adopted the three-stage test of the Privy Council in *de Freitas v Permanent Secretary of Ministry* Auth 9

³ Woolf, Jowell, Donnelly and Hare, *De Smith’s Judicial Review* (8th edn, Sweet & Maxwell, 2018) pp. 636–641. Auth 14

⁴ See for example *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] 3 WLR 80; *R v Ministry of Defence Ex p. Walker* [2000] 1 WLR 806. Auth 8

⁵ See for example *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052, 1057 and 1063 (‘the punishment is altogether excessive and out of proportion’ (Lord Denning)).

⁶ [2001] UKHL 26, [2001] 2 AC 532. Auth 9

of *Agriculture, Fisheries, Lands and Housing*⁷ and recognised that it was much more than a 'fair balance' test:

Auth 9, MS 311 In determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."⁸

14. To these three steps, Lord Steyn added the fourth: (iv) whether the measure was 'necessary' to genuinely address a 'pressing social need'.⁹ The requirement for the fourth test – balancing between rights and public interest – was subsequently endorsed by Lord Bingham in *Huang v Secretary of State for the Home Department*.¹⁰ In *Daly*, Lord Bingham also made it clear that proportionality was the test to be applied where common law constitutional rights were at stake.¹¹

Auth 6, MS 227

Auth 9, MS 309

Auth 7, MS 251

15. Of course, this Court has recently considered the application of the common law proportionality test in *Pham v Secretary of State for the Home Department*¹² where all 7 judges supported 'flexible approaches to principles of judicial review'¹³ and where the majority explicitly endorsed the *possibility* of a common law standard of proportionality review. In particular, Lord Sumption at [105]–[106]:

There is in reality a sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference.

⁷ [1999] 1 AC 69.

Auth 9, MS 311 ⁸ N 6 above at [27].

⁹ Ibid.

Auth 6, MS 227 ¹⁰ [2007] 2 WLR 581 [19].

Auth 9, MS 309 ¹¹ N 6 above at [21].

Auth 7 ¹² [2015] 1 WLR 1591.

Auth 7, MS 251 ¹³ Ibid [60] (Lord Carnwath).

16. This Court also considered the issue of common law proportionality again in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs*¹⁴ with Auth 10 the majority emphasising the overlap between proportionality and reasonableness, but declined to use the occasion to displace the rationality standard with proportionality in all domestic judicial review cases holding that to do so would require a panel of 9 justices.¹⁵ The relationship between rationality and proportionality arises due to the elements of unreasonableness forming three steps of the proportionality test: the weight of relevant considerations to be fairly balanced; the prohibition of unduly oppressive decisions; and the ‘rational connection’ between the means and the end. The court recognised that this closeness meant that the outcomes would be identical. Lord Kerr supported the use of proportionality as a test in relation to interference with ‘fundamental’ rights.¹⁶ It is respectfully submitted that ‘fundamental’ rights must include constitutional rights.

(c) Proportionality in EU law rights

17. *De Smith* sets out succinctly the test to be applied where EU law rights are engaged:

Here the courts ask first whether the measure which is being challenged is suitable to attaining the identified ends (the test of *suitability*). Suitability here includes the notion of ‘rational connection’ between the means and the ends. The next step asks whether the measure is necessary and whether a less restrictive or onerous method could have been adopted (the test of *necessity*, requiring *minimum impairment* of the right or interest in question). If the measure passes both tests the court may then go on to ask whether it attains a *fair balance* of means and ends.¹⁷ Auth 14, MS 494

¹⁴ [2015] UKSC 69, [2015] 3 WLR 1665.

Auth 10

¹⁵ *Ibid* [131]–[132] (per Lord Neuberger PSC).

MS 349–350

¹⁶ *Ibid* at [280]–[282].

MS 386–387

¹⁷ N 3 above at 637.

Auth 14, MS 494

(d) Proportionality in ECHR rights

18. *Bank Mellat v Her Majesty's Treasury (No 2)*¹⁸ provides the test for the court where ECHR rights are engaged where it is necessary for a court is required to determine:

Auth 4, MS 116

(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

IV. THE EFFECTS OF PROROGATION ON THE PEOPLE OF NORTHERN IRELAND

19. Although Mr McCord acknowledges that this exceptionally long prorogation at this time breaches the constitutional and legal principles of Parliamentary sovereignty and responsible and accountable government which will affect all the people of the United Kingdom, he asserts that the effects of this prorogation have already been and will be more acute and severe for the people of Northern Ireland.

20. The relevant facts, considerations and context demonstrating that *this* prorogation has a much greater impact on the rights of people in Northern Ireland are as follows:

(a) Northern Ireland (Executive Formation etc) Act 2019

Auth 3, MS 15

21. The Northern Ireland (Executive Formation etc) Act 2019 ('NIEFA') makes the following requirements:

(i) The Secretary of State for Northern Ireland is to lay a report on or before 4 September 2019 explaining what progress has been made towards the formation of an Executive in Northern Ireland (s 3(1)) with a further report to be laid on or before 9 October

Auth 4, MS 116 ¹⁸ [2013] UKSC 38; [2014] AC 700, [74] (Lord Reed).

2019 and at least every fourteen calendar days thereafter until either an Executive is formed or until 18 December 2019, whichever is the sooner. Auth 3, MS 15

- (ii) Under the heading 'Debates', a Minister of the Crown must, within the period of two sitting days beginning with the first sitting day on or after the day on which the s 3 report is published, make arrangements for a motion to the effect that the House of Commons has approved that report to be moved in within 7 Commons sitting days of the publishing of the report in relation to the following topics: Auth 3, MS 18–19
- Section 4 – Law on gambling and support for those experiencing problem gambling
 - Section 5 – Assistance and support for victims of human trafficking
 - Section 6 – Pension for victims and survivors of Troubles-related incidents
 - Section 7 – Historical institutional abuse

22. On 9 September 2019, the timetable for the list of business of the House of Commons¹⁹ was to debate the following issues arising under the Northern Ireland (Executive Formation etc) Act 2019: Auth 16
Auth 3

Motion – Debate to approve a Motion relating to Section 7 of the Northern Ireland (Executive Formation etc) Act 2019 (Historical institutional abuse) – Julian Smith Auth 16, MS 540

Motion – Debate to approve a Motion relating to Section 6 of the Northern Ireland (Executive Formation etc) Act 2019 (Victims' payment) – Julian Smith

Motion – Debate to approve a Motion relating to Section 5 of the Northern Ireland (Executive Formation etc) Act 2019 (Human trafficking) – Julian Smith

Motion – Debate to approve a Motion relating to Section 4 of the Northern Ireland (Executive Formation etc) Act 2019 (Gambling) – Julian Smith

Motion – General Debate on a Motion relating to Section 3(2) of the Northern Ireland (Executive Formation etc) Act 2019 – Julian Smith

¹⁹ Timetable for the list of business of the House of Commons available at: <<https://calendar.parliament.uk/calendar/Commons/All/2019/9/9/Daily>> last accessed on 15 September 2019.

23. However, when asked by the Speaker at 8.57pm to move the required motions relating to section 4 (Gambling), section 5 (human trafficking), section 6 (victims' payments) and section 7 (historical institutional abuse), a whip on behalf of Ministers of the Crown declined to move any of them. The Secretary of State for Northern Ireland provided this excuse: 'To be fair to the business managers tonight, there has been a major challenge with the number of unexpected and emergency debates.'²⁰
- Auth 15, MS 500
24. There can be no surprise that there would be emergency debates tabled arising from the exceptional prorogation. This included an application for and the 2 hour hearing of an emergency debate on prorogation from 5.04pm to 7.13pm.
- Auth 3
25. The persons affected by ss 4–7 NIEFA are all victims: compensation for historical institutional abuse victims (s 7); pensions/compensation for victims of the Troubles (ss 6 and 10); assistance and advice for victims of human trafficking (s 5); and support for victims of gambling (s 4). In particular, Mr McCord is directly affected by ss 6 and 10 which provide for payments to victims of the Troubles. Arguably article 2, 3 and 8 ECHR rights are engaged or at least considered by ss 4–7 and 10 NIEFA.
26. The prorogation of Parliament has therefore already affected victims in Northern Ireland by frustrating their *statutory right* to have their issues debated in Parliament so as to ensure moves towards preparing the relevant legislation to address their needs.

Auth 15, MS 500 ²⁰ Julian Smith, Secretary of State for Northern Ireland, Hansard, *Official Report* 9 September 2019, vol 664, c 584.

(b) European Union (Withdrawal) Act 2018

27. Northern Ireland is the only region given specific statutory protection in the withdrawal process. S 10 of the European Union (Withdrawal) Act 2018 (‘EUWA’) provides: Auth 2

10 Continuation of North-South co-operation and the prevention of new border arrangements

- (1) In exercising any of the powers under this Act, a Minister of the Crown or devolved authority must—
 - (a) act in a way that is compatible with the terms of the Northern Ireland Act 1998, and
 - (b) have due regard to the joint report from the negotiators of the EU and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 of the Treaty on European Union.
- (2) Nothing in section 8, 9 or 23(1) or (6) of this Act authorises regulations which—
 - (a) diminish any form of North-South cooperation provided for by the Belfast Agreement (as defined by section 98 of the Northern Ireland Act 1998), or
 - (b) create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which feature physical infrastructure, including border posts, or checks and controls, that did not exist before exit day and are not in accordance with an agreement between the United Kingdom and the EU.

28. S 10 EUWA is the subject of ongoing emergency proceedings taken by Mr McCord in the Court of Appeal in Belfast and it is not proposed that the arguments made therein are rehearsed at before this Court this point in time. Suffice it is to state that s 10 EUWA sets clear parameters for the government in its approach to the withdrawal process and how it legislates for same. It was expressly envisaged in *R (Miller) v Secretary of State for Exiting the European Union; Agnew's Application for Judicial Review; Re McCord's Application for Judicial Review*²¹ (*Miller No. 1*) that legislation Auth 2

²¹ [2017] UKSC 5, [2017] 2 W.L.R. 583.

would be required for the process of withdrawal after the triggering of Art 50 TEU. At [94], the Court referred to the argument of the Secretary of State:

...that it was inevitable that Parliament should be formerly involved in the process of withdrawal from the European Union in that primary legislation, not least the great repeal bill referred to in paragraph 34 above, would be required to enable the United Kingdom to complete its withdrawal in an orderly and coherent manner.

29. At paragraph [100] the requirement for prior Parliamentary sanction for the process of withdrawal is repeated:

Secondly, if, as the Secretary of State has argued, it is legitimate to take account of the fact that Parliament will, of necessity, be involved in its legislative capacity as a result of UK withdrawal from the EU Treaties, it would militate in favour of, rather than against, the view that Parliament should have to sanction giving Notice. An inevitable consequence of withdrawing from the EU Treaties will be the need for a large amount of domestic legislation. There is thus a good pragmatic argument that such a burden should not be imposed on Parliament by exercise of prerogative powers and without prior Parliamentary authorisation. We do not rest our decision on that point, but it serves to emphasise the major constitutional change which withdrawal from the European Union will involve, and therefore the constitutional propriety of prior Parliamentary sanction for the process.

30. Lord Carnwath at [259] of his dissenting judgment makes this observation:

That process [of withdrawal] will be conducted by the Executive, but it will be accountable to Parliament for the course of those negotiations and the contents of any resulting agreement. Furthermore, whatever the shape of the ultimate agreement, or even in default of agreement, there is no suggestion by the Secretary of State that the process can be completed without primary legislation in some form.

31. The decision to advise Her Majesty the Queen to prorogue Parliament frustrates the purpose of s 10 EUWA by removing the ability of Parliament, or at least severely curtailing its, time to scrutinise regulations made and the exercise of powers by ministers under EUWA in the crucial weeks in the run up to Exit Day. It also frustrates Parliament's ability to further legislate in advance of Exit Day so as to give effect to or fortify s 10 EUWA or to otherwise give further protection to Northern Ireland/the Belfast Agreement, which is the clear purpose of s 10 EUWA. Parliament has determined that Northern Ireland will not be sacrificed to achieve

withdrawal from the EU. The Prime Minister took the impugned decision recklessly and in a manner which is oppressive to Northern Ireland, which is already suffering a democratic deficit, and has wrested this control from Parliament.

(c) The Constitutional position of Northern Ireland

32. In *Robinson v Secretary of State for Northern Ireland*,²² Lord Hoffman famously said:

The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the 1998 Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.²³

Auth 13, MS 470

33. It is urged that it is through this 'generous and purposive' lens this Court views the decision to advise her Majesty the Queen to prorogue Parliament. Even without the protections of s 10 EUWA and the further scrutiny of the executive by Parliament in the weeks before Exit Day, it would be unconstitutional to allow Northern Ireland to be sacrificed or suffer severe harm as a result an executive's use of power, prerogative or otherwise. On the basis of the Government's own assessments, Northern Ireland will suffer disproportionately compared with the other countries of the UK, including the imposition of a hard border (see Yellowhammer). The EUWA, which is another constitutional statute required to effect a lawful withdrawal, must be read in a way which is compatible with the Constitution of the United Kingdom and therefore with the delicate peace settlement achieved through the Good Friday Agreement which establishes the consent of the people of Northern Ireland to be governed by the United Kingdom's constitution in conjunction with the rule of law. In no way is this prorogation generous or purposive to the peace of the people of Northern Ireland. It attacks the

Auth 2

²² [2002] UKHL 32, [2002] NI 390, [2002] All ER (D) 364 (Jul).

Auth 13

²³ *Ibid* at [11].

Auth 13, MS 470

peace settlement by attempting to undermine the protections and scrutiny of Parliament which in section 10 set out the necessary minimum constitutional safeguards that must be in place before withdrawal from the EU can take place.

34. The rule of law is based upon the consent of people to be governed. The Troubles in Northern Ireland stem in part from one community withdrawing their consent to be governed. Consent was restored by the Good Friday Agreement and the enabling referendum. Withdrawal from the EU in terms that are harmful and oppressive to the people of Northern Ireland is, firstly, undermines the principle of consent of the people of Northern Ireland by preferring the interests of English nationalism over the safety and welfare of the people of Northern Ireland. Secondly, it is a breach of the terms of the Good Friday Agreement which states that it would be wrong for there to be any constitutional change in Northern Ireland without the consent of its people. While *Miller No. 1* one decided that the mere withdrawal from the EU may not necessarily interfere with or constitute such constitutional change as would be a breach of the Northern Ireland Act, it did not specifically address the Good Friday Agreement. However there can be no doubt that the catastrophic upheaval, damage and uncertainty of a no deal would cause to Northern Ireland would be impermissible constitutional change and would require the prior express consent of its people. Thirdly, proroguing Parliament with the real aim or effect being to cause or allow the UK to withdraw without a deal by 31 October 2019 is contrary to the safeguarding provisions contained within s10 EUWA in their letter, purpose and spirit. Fourthly, per *Miller No. 1*, in the absence of express statutory provision given by Parliament, leaving without a deal would be unlawful and unconstitutional due to the removal of rights and the major constitutional change effected by doing so. If the prorogation is aimed at facilitating a no deal Brexit as found by the Inner House,²⁴ then the advice to prorogue or the prorogation itself is unlawful and unconstitutional.

Auth 2

Auth 5, MS 171 ²⁴ N 2 above at [53].

35. In any union of democratic countries, the imposition of one country's majoritarian will on another causing oppression must be unconstitutional. Such actions by one country against another inevitably lead to friction, discontent and the breakup of that union. Discussion, debate and respect are essential features of any workable and sustainable relationship between countries in a democratic union. The proper constitutional forum for such debate is Parliament which acts as a safety valve and a self-regulating, inter-country constitutional tool. To remove Parliament at such an intense time of strain for the union removes this rightful and proper constitutional safeguard and the ability of Parliament to react in legislation in real time to events.

V. THE PROPORTIONALITY OF THE IMPUGNED DECISION

36. As seen above, where constitutional, EU and ECHR rights are engaged, it is proper for the Court to apply the structured proportionality test to the impugned decision. In the context of how the people of Northern Ireland will be disproportionately affected by the prorogation of parliament with the intention or effect of causing or allowing a no deal Brexit and the constitutional, EU and ECHR rights engaged, it is now proposed that the decision to advise her Majesty the Queen to prorogue Parliament be put to the structured proportionality test.

(a) What is the Prime Minister's aim in proroguing Parliament?

37. It is submitted that the Inner House's finding of fact that the true aim of prorogation was to reduce Parliamentary time for the scrutiny of Brexit and 'stymie any further legislation regulating Brexit' is correct. Therefore, the aim is not legitimate and the decision falls at the first hurdle of proportionality test and must be disproportionate.

Auth 5, MS 172

(b) Is prorogation appropriate or rationally connected to achieve the aim?

38. Even if this Court finds that the stated aim – to allow for a Queen’s Speech to set a domestic programme – is legitimate, then the Court must ask, is the prorogation for 5 weeks appropriate or rationally connected to achieve the aim? Mr McCord does not contend that a prorogation is not appropriate to achieve a Queen’s Speech, and acknowledges that convention would seem to suggest that in order to set out a new domestic agenda, it may be appropriate most times to bring about a Queen’s Speech by proroguing Parliament.

(c) Does the prorogation go further than is necessary to achieve the aim?

39. Assuming prorogation is appropriate to bring about a Queen’s Speech to set out a domestic programme, the next step is whether *this* prorogation of 5 weeks at *this* time is necessary. According to the House of Lords Library, this is the longest prorogation since 1930 with the mean average length of prorogation since then being 5 calendar days.²⁵ It is submitted that when measured against past practice, the period of time is excessive. The burden then falls to the Prime Minister to demonstrate that the ‘means used to impair the right or freedom are no more than is necessary to accomplish the objective’. As recognised by the Inner House at [54]–[57] as a finding of fact, the Prime Minister has failed to do this. Where the decision has the profound effect of suspending the constitutional law-making body, and where there are direct consequences for groups of victims in Northern Ireland, a failure to demonstrate that the degree of intrusion must mean that the proportionality test fails here. In any event, if the aim really is to bring about domestic programme, it can be done so without having a Queen’s Speech, or with a prorogation of a shorter, more usual length or prorogation at another time after 31 October 2019 or 31 January 2020. The Prime Minister

Auth 5,
MS 171–173

²⁵ Available: < <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2019-0111#fullreport> > last accessed 15 September 2019.

has not provided evidence that a Queen's Speech can *only* be made after a prorogation.

(d) Does the prorogation strike a reasonable balance between the Prime Minister's interest and those of society's interests?

40. The decision, if it has survived to this point, must surely fail this balancing test, particularly when the special features of Northern Ireland and the effect on those features are taken into account:

(1) Prorogation has *already* resulted in the denial or frustration of the statutory rights of groups of vulnerable victims in Northern Ireland under NIEFA to have their issues debated with a view to progressing to legislating. Further, art 2, 3 and/or 8 ECHR rights are engaged and are being frustrated or breached by this prorogation. Auth 3

(2) The statutory protection given by s 10 EUWA to the Northern Ireland Act, the Good Friday Agreement, the Joint Report and the prohibition of physical infrastructure would be emptied of content if the aim or effect of prorogation led to a no deal Brexit. Auth 2
Auth 17

(3) The only reason that Northern Ireland is a part of the United Kingdom is by the consent of its people freely given in the 1998 Good Friday Agreement referendum. Therefore, if the rule of law is being undermined by a prorogation with the illegitimate, unlawful or unconstitutional aim or purpose or facilitating a no deal Brexit, the constitutional position of Northern Ireland itself in the United Kingdom is undermined by this prorogation.

When looked at in this way, the balance between the Prime Minister's right to advise the Queen to prorogue Parliament in order just to have a Queen's speech (which aim is denied) is vastly outweighed by the effects of the prorogation on the people of Northern Ireland and the ensuing risk to the very essence of the constitutional make-up of the United Kingdom.

41. Using the structured common law proportionality test, the impugned decision is therefore disproportionate. However, for the same reasons, the

decision is disproportionate using the unstructured, 'fair balance' proportionality test due to the failure to balance relevant considerations as set out above and the oppressive effect that a no deal Brexit brought about by this prorogation would have on the rights of the people of Northern Ireland. In the alternative, and again for the same reasons given above, the decision is irrational. Under both standards of review, the decision is an abuse of power.

VI. CONCLUSION

Auth 11
Auth 5

42. For the reasons given above, and those given by *Miller* and *Cherry*, the Prime Minister's decision to advise the Queen to prorogue Parliament at this time and for this long is unlawful and unconstitutional.

RONAN LAVERY QC

CONAN FEGAN

RICHARD SMYTH

The Bar Library

Belfast

15 September 2019

**IN THE SUPREME COURT OF
THE UNITED KINGDOM**

**IN THE MATTER OF
R (on the application of
GINA MILLER)**

Appellant

– v –

THE PRIME MINISTER

Respondent

AND

**IN THE MATTER OF
JOANNA CHERRY QC MP
and OTHERS**

Respondent

– v –

THE ADVOCATE GENERAL

Appellant

AND

RAYMOND McCORD

Intervener

**ARGUMENT OF RAYMOND MCCORD
(INTERVENER)**

McIVOR FARRELL SOLICITORS LTD

129 Springfield Road

Belfast

BT12 7AE

Agent for the Intervener