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Brexit: the final say

Article 50: an incorrect concession? **Nicholas Strauss QC** proposes an alternative line of attack

IN BRIEF

- There is little point in a referendum which is advisory only, as it just throws the ball back to Parliament, so that the public vote is little more than an opinion poll.
- The government's best hope may be to reconsider its concession that the referendum was advisory before the appeal to the Supreme Court is heard next month.

In *Santos v Miller v Secretary of State for Exiting the EU* [2016] EWHC 2768 (Admin), [2016] All ER (D) 19 (Nov), the Divisional Court decided that the government's prerogative powers did not enable it to implement the result of the EU referendum by giving notice under Art 50 of the Treaty on European Union. Another Act of Parliament is required, in addition to the EU Referendum Act 2015 (the 2015 Act).

Government's concession

The government had accepted that the result of the referendum did not itself provide the source of a power to give the notice, because it was only "advisory", even though neither the Act nor the ballot paper said any such thing. If this is wrong, and the referendum was binding, then neither the use of the prerogative nor another Act would be needed.

The court approved the concession on the grounds that the principles of parliamentary sovereignty dictated that a referendum is always advisory unless there is very clear language to make it binding, that a parliamentary briefing paper available to parliamentarians said that the EU referendum was only intended to be advisory, and that a vote to leave would entail many outstanding questions as to how to implement the decision (see paras 105–8 of the judgment).

It is respectfully submitted that the government's concession was wrong, that there is at least a respectable argument that the result of the referendum by itself required the government to implement leaving the EU by the only means possible, an Art 50 notice, and that the popular view, that the referendum was held to decide the issue, is correct. That is what the electorate was told, not that it was just being given an opportunity to proffer advice to Parliament.

The court's decision was based on the rule that prerogative powers could not deprive people of their existing EU rights acquired by virtue of the European Communities Act 1972, which would disappear once notice under Art 50 resulted in the UK leaving the EU. But if the referendum was binding, then the rights were lost because that is what the electorate, with the authority of Parliament under the 2015 Act, voted for. The rights will, of course, be reintroduced into domestic law by the inaptly named Great Repeal Bill.

Alternative argument

The argument should run along the following lines:

- Referendums can be advisory or binding. An example of the latter is the type of referendum provided for by the European Union Act 2011, relating to future treaty changes in the EU, where a negative vote would prevent the government from ratifying the change.
- Obviously, an Act can easily be drafted to make it clear whether the referendum is advisory or binding. The Referendum Act 2015 is ostentatiously silent on the point, and therefore ambiguous. It said nothing about what effect the outcome was to have.
- It follows that the general approach to statutory interpretation, that an Act should be interpreted in accordance with its legislative background and

context, is of central importance. See for example per Lord Bingham in *R v Sec of State for Health ex p Quintaville* [2003] UKHL 13, [2003] 2 All ER 113at [8] and per Lord Steyn at [21].

- Although the view that, where the Act is silent, the referendum is presumed to be advisory appears to be widely held, the Political Parties, Elections and Referendums Act 2000, which governs the conduct of referendums, does not so provide, nor does any case law or leading textbook on constitutional law support such a proposition.
- The supposed justification for this view—that Parliament cannot be taken to have intended to curtail its sovereignty unless clear words have been used—is weak. A binding referendum does not detract from sovereignty, it is an expression of it. The result of the referendum is binding precisely because Parliament has so decreed. Parliamentary sovereignty anyhow permits subsequent legislation to undo or modify the effect of a referendum. For example, if a proposed EU treaty change was rejected in the referendum, Parliament could overturn this by new legislation. The choice is between an advisory referendum and a referendum which is binding, but is subject to later legislation if Parliament changes its mind. Both are consistent with upholding parliamentary sovereignty.
- There is much, on the other hand, to be said for the proposition that a referendum should be presumed, unless the statute provides otherwise, to be binding. That is because the object of a referendum is usually to enable the nation to decide an issue which it is inappropriate for Parliament to decide, because it is constitutionally important or exceptionally divisive or both. There is therefore little point in a referendum which is advisory only, as it just throws the ball back to Parliament, so that the referendum is little more than an opinion poll. The House of Lords Select Committee report in 2009 on Referendums in the UK heard expert evidence that advisory referendums were less likely to be taken seriously and more open to voting for reasons other than the merits of the question (see paras. 190–92).
- The referendum on EU membership was on a supremely divisive issue on a matter of prime constitutional significance. As the foreign secretary said, in introducing the Referendum Bill: "The decision…should be taken by the British people, not by parliamentarians." and every household received a government leaflet saying much the same. It therefore makes no sense to construe the 2015 Act in such a way that the only means of implementing the decision which Parliament has asked the electorate to make is via another Act of Parliament (or, possibly, it has been suggested, by resolutions of both Houses). In general, the practical effect of such a construction is that Parliament may refuse to implement the decision it has asked the nation to make. In this case, not a few MPs have said that they will vote against giving notice and the outcome in the House of Lords looks uncertain.
- Although the Divisional Court is undoubtedly right to say that MPs will have had access to a briefing paper that stated that the referendum would be advisory, this is not of great weight. This was a paper dated 3 June 2016 prepared, not by the government, but as a politically neutral exercise by a member of the House of Commons library, with a statement at the end that every effort had been made to be accurate. The only reason given for the briefly stated view that the referendum was advisory was that the Act did not provide that it was binding. It was hardly definitive.
- Other aspects of the legislative context and history, equally admissible to resolve the ambiguity, suggest the contrary and probably outweigh the briefing paper and the legislative presumption against a binding referendum, if there is one. Opening the debate on the second reading, a few days later, on 9 June 2016, the Foreign Secretary said: "This is a simple, but vital, piece of legislation. It has one clear purpose; to deliver on our promise to give the British people the final say on our European membership in an in/out referendum."
- In seeing what that promise was, one may refer, for example, to the following:
  - The prime minister in the Bloomberg speech in January 2013, announcing the commitment to hold an in/out referendum, published by the coalition government: "I say to the British people this will be your choice… at the end of (the) debate you, the British people will decide."
  - In the Conservative manifesto for the 2015 election: "We will let you decide whether to stay or leave the EU...we will honour the result, whatever the outcome."
  - All the above are inconsistent with the outcome of the referendum not being "the final say" but subject to another vote in Parliament; they were all available to the public at large, not just to parliamentarians, and they were not subject to a health warning.
- Parliament should be taken not to have intended to mislead the electorate, which it will have done if the referendum is only advisory. The nation has repeatedly been told that the people, not the government, will decide whether the UK should leave the EU, not that they will be given an opportunity to give advice: that would hardly have had quite the same ring.
- There is also the point that, if Parliament had intended to seek no more than a consultative opinion, the rules governing the conduct of the referendum would have ensured that the participants were informed of the nature of the exercise in which they were being asked to participate.
- There is little in the point that many other decisions will have to be taken by the government in connection with leaving the EU. That is the case whatever the result is on this issue. There are many situations in which government has a duty to achieve an end, with discretion as to how and when to do it. Air quality standards are a recent example.

Divisional court's decision

The reasons given by the Divisional Court for its decision, on the other issues that were fully argued before it, appear to be very cogent. The government's best hope may be to reconsider its concession that the referendum was advisory before the appeal to the Supreme Court is heard. If it was not advisory but mandatory, that would sidestep all the other arguments and provide a straightforward route to reversal of the decision.

It seems extraordinary that the government, having relentlessly emphasised for more than three years that the people would decide the issue by the referendum, should have accepted that it was only advisory. It is to be hoped that, in a case as important as this, the point will be properly argued in the Supreme Court. **NLJ**

Nicholas Strauss QC, One Essex Court (*www.oeclaw.co.uk; nstrauss@oeclaw.co.uk*)