Brexit, the Revocation of Article 50, and the Path Not Taken:

Wightman and Others for Judicial Review against the Secretary of State for Exiting the European Union

A. INTRODUCTION

In January 2017, the Supreme Court in Miller¹ held that the UK Government could not trigger Article 50 Treaty on European Union to initiate the UK’s withdrawal from the European Union without Parliament’s consent. Consequently, Parliament enacted the European Union (Notification of Withdrawal) Act 2017 to grant the Prime Minister the power to trigger Article 50. Theresa May accordingly gave notification of the UK’s intention to withdraw on 29 March 2017. The UK is accordingly due to leave the EU on 29 March 2019.

One question unanswered by Miller was whether an Article 50 notification can be revoked. The Supreme Court largely ignored the issue because it was common ground between the parties that notifications are irrevocable.² This outstanding issue has since been raised by a group of politicians in the Scottish courts in Wightman.³ This case might be considered the successor to Miller, but has attracted much less attention. The petitioners sought judicial review of the UK Government’s position on the revocability of Article 50, seeking a referral to the Court of Justice of the European Union (CJEU) on the matter as a question of EU law. The case was heard in the Outer House of the Court of Session by Lord Boyd of Duncansby, who dismissed the petition. Referral to the CJEU was accordingly not sought, thus again leaving the question of revocability unanswered.

This question is of profound relevance to the ongoing Brexit discussions in Parliament and elsewhere. A successful referral to the CJEU could fundamentally alter the terms of the current debate, however Article 50 was interpreted. Confirmation of revocability allows the possibility of the UK changing its mind and remaining in the EU; confirmation of irrevocability removes any such possibility rendering calls for a second referendum on EU membership redundant.

The fatal deficiencies in the petitioner’s claim may appear to make both appeal of Lord Boyd’s decision and future litigation on the issue by other parties unlikely. However, it is submitted that Wightman could mark the beginning rather than the end of finding a resolution on this issue. This analysis will suggest that framing the petitioner’s argument differently could address many of Lord Boyd’s concerns, thus perhaps resulting in a different outcome. This provides opportunity for further litigation on the revocability of Article 50, which may successfully yield an answer to this outstanding yet constitutionally significant legal question at a crucial stage in the Brexit process.

B. WIGHTMAN

This case’s history is unusual. Section 27B of the Court of Session Act 1988 requires that permission to bring a judicial review action must be granted by the court; permission is granted only if a petitioner

¹ R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.
can show “sufficient interest” and “a real prospect of success”. The petitioners in Wightman initially sought permission for judicial review from Lord Doherty in the Outer House of the Court of Session. He refused permission, finding that the section 27B test was not met. He held that the action would constitute a breach of parliamentary privilege and would be based on a hypothetical question (given neither the UK Government nor Parliament had indicated an intention to revoke). The petitioners in Wightman initially sought permission for judicial review from Lord Doherty in the Outer House of the Court of Session. He refused permission, finding that the section 27B test was not met. He held that the action would constitute a breach of parliamentary privilege and would be based on a hypothetical question (given neither the UK Government nor Parliament had indicated an intention to revoke).4

The petitioners successfully appealed to the Inner House. Lord Carloway, who delivered the opinion of the court, noted that the petition failed to present a clear, succinct argument (as is required by Somerville).5 However, the court granted leniency because of the important constitutional considerations raised therein. Lord Carloway considered that there might be an argument which would have “a real prospect of success” and that the CJEU would likely respond to any referral. The court therefore permitted the case to progress, with time for adjustment of the petition to address the requirements of Somerville.6

The case was heard at first instance by Lord Boyd of Duncansby in the Outer House. The adjusted petition sought a preliminary reference from the CJEU on whether the UK could unilaterally revoke its Article 50 notification. They additionally sought, on return of that reference, a declarator specifying “whether, when and how” a revocation could be effected.7

Lord Boyd considered the preliminary issues of the case’s appropriateness for judicial review and the petitioners’ “sufficient interest”. He doubted, citing West,8 whether the court’s supervisory jurisdiction was engaged given there was no alleged misuse of power; this was not, however, within judicial contemplation because it was not a matter of contention between the parties.9 Regarding “sufficient interest”, he observed that the petition’s outcome was of clearest relevance to the petitioners who were MPs rather than MSPs and MEPs, whose legislatures were not able to revoke the Article 50 notification; he accordingly focused on the MPs’ role in his judgement.10

Lord Boyd thereafter considered three substantive points relevant to the petition: whether the question before the court was hypothetical; whether there was a breach of parliamentary privilege; and whether the CJEU would likely accept a reference from the court. He found against the petitioners on all three points.

First, Lord Boyd found that the question of whether the notification was revocable was merely hypothetical so not within the court’s concern, per MacNaughton.11 The UK Government had made it clear that it would not seek to revoke the Article 50 notification, therefore the issue was not “live” and would not become live unless either the Government’s policy or House of Commons majority changed.12

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6 Wightman CSIH paras 30-34.
8 West v Secretary of State for Scotland 1992 SC 385.
9 Wightman CSOH (no 2) para 37.
10 Ibid paras 38-40.
11 MacNaughton v MacNaughton’s Trustees 1953 SC 387.
12 Wightman CSOH (no 2) paras 45-51.
Regarding parliamentary privilege, applying Adams, Jackson and Axa,\(^\text{13}\) Lord Boyd found that the court was being asked to settle a legal dispute arising out of parliamentary discussions during the legislative process, which was a “clear and dangerous encroachment on the sovereignty of parliament”.\(^\text{14}\) He reflected that “the rule of law should not be transposed to rule by the courts … The court is not there to be used by one side or another to advance one side of a political debate.”\(^\text{15}\) With respect to the parliamentary statements submitted as evidence, he distinguished Pepper v Hart\(^\text{16}\) and other judicial decisions\(^\text{17}\) from the present case on the basis of parliamentary privilege.\(^\text{18}\)

Finally, Lord Boyd concluded that he would not send a reference to the CJEU. He suggested that the European Council and Parliament and other Member States might take an interest in such a CJEU reference, but at the same time find this undesirable because of the hypothetical nature of the issue and because this could be “an unwelcome distraction” during the Brexit negotiations.\(^\text{19}\) He also expressed concern that the CJEU would not consider a hypothetical situation and should not be asked to give consideration “without the background of fact essential to a proper determination”.\(^\text{20}\)

C. THE PATH NOT TAKEN

Lord Boyd’s decision implied that the petition was without merit. Had the petition been framed differently, however, it is submitted that the court might have resolved otherwise and granted the referral.

The requirements to bring a judicial review action in Scotland are set down in West, namely a “tripartite relationship” comprising a power conferred by statute or other mechanism onto a decision-maker, whose decisions affect the rights of others.\(^\text{21}\) Lord Boyd was correct to raise concerns in Wightman because the petition did not appropriately address this test. However, it is submitted that the West test could have been satisfied if the petitioners had framed their arguments around the Prime Minister’s exercise of executive authority under the European Union (Notification of Withdrawal) Act 2017, which was overlooked in the case.

Section 1(1) of the 2017 Act conferred on the Prime Minister a power to trigger Article 50. This power is discretionary, as is indicated by the wording that the Prime Minister ‘may notify’: the Act did not command her but instead allowed her to decide whether and when to trigger Article 50. This satisfies the first two requirements of the West test, namely an enabling Act and a decision-maker. Reframing the case on the exercise of executive authority under this Act would therefore address Lord Boyd’s concerns over both the applicability of judicial review and the hypothetical nature of the petitioners’ case.

\(^{13}\) Adams v Guardian Newspapers 2003 SC 425; R (Jackson and others) v Attorney General [2006] 1 AC 262; Axa General Insurance and others v HM Advocate and others [2012] 1 AC 868.  
\(^{14}\) Wightman CSOH (no 2) para 58.  
\(^{15}\) Ibid para 59.  
\(^{16}\) 1993 AC 593.  
\(^{18}\) Wightman CSOH (no 2) esp. paras 52-53, 61-62.  
\(^{19}\) Ibid para 69.  
\(^{20}\) Ibid para 70.  
\(^{21}\) West v Secretary of State for Scotland 1992 SC 385 at para 400.
The petitioners were clearly of the view that revocation of the Article 50 withdrawal notification was possible. They could therefore have raised a statutory interpretation argument, suggesting that the discretion afforded to the Prime Minister by section 1(1) could encompass, not only the power to notify an intention to withdraw, but also the power to revoke that notification.

The scope of the Prime Minister’s power is bounded by section 1(1) to be that “under Article 50(2) of the Treaty on European Union”. The explicit association of her powers with the Treaty means that the interpretation of section 1(1) turns on EU law and the interpretation of Article 50. Itself, Article 50 is silent on whether revocation is possible, and there has been no CJEU dicta on its correct interpretation. A CJEU reference is permitted under Article 267 TFEU on “the interpretation of the Treaties” if a court “considers that a decision on the question is necessary to enable it to give judgment”.

It is submitted both that this is the critical test for whether to make a referral to the CJEU and that this test is clearly satisfied: an interpretation of EU law is required on an issue which is central to the case before the national court, namely whether Article 50 encompasses the power of revocation. Lord Boyd therefore erred when, as mentioned above, he gave consideration to how a referral would impact upon EU institutions and other Member States during the Brexit negotiations.22

On return of such a reference, should the CJEU confirm that revocation is encompassed within Article 50, then the court would have to decide whether the Government had acted lawfully in relation to its non-exercise of this executive authority.

Judicial review is predominantly concerned with the exercise rather than non-exercise of executive power. However, the non-exercise of a discretionary executive power was successfully judicially reviewed in the case of Fire Brigades Union.23 Per Lord Nicholls, to establish the unlawful non-exercise of a statutory power, the decision-maker must be shown to have “acted in breach of some duty imposed upon him, or acted improperly in some other respect”.24 That duty can be implied by the court rather than explicitly stated in the enabling Act, as per that same case. Furthermore, it was held that “the Secretary of State [was] under a legal duty to consider whether or not to exercise the power” and could not preclude that consideration altogether through alternative executive action.25

It is submitted that, should the CJEU confirm that Article 50 does encompass powers of both notification of withdrawal and revocation of that notification, then the discretion accorded to Prime Minister under the 2017 Act with regard to the first power by extension should apply to the second power. Furthermore, the notification of withdrawal would not render the revocation power inoperable. Applying Fire Brigades Union analogously, therefore, it is further submitted that the court may find that the Prime Minister, although not obligated to exercise the power, nevertheless remains under a duty to consider its exercise, and at the very least cannot preclude its exercise altogether.

Evidence that the Prime Minister has precluded revocation because of what might be a misunderstanding of the law, thus potentially putting her in breach of such a duty, is found in the Government’s explicit position in Miller that Article 50 was irrevocable. Whereas Miller was decided before the 2017 Act, it remains reflective of the Government’s understanding of the Article 50 powers,

22 Wightman CSOH (no 2) para 69.
23 R v Secretary of State for the Home Department, ex parte Fire Brigades Union and Others [1995] 2 AC 513.
24 Ibid para 575
25 Ibid para 575.
and therefore by extension the power conferred on the Prime Minister by the subsequent Act. The Government’s position can no doubt be evidenced further in a variety of executive decisions since the triggering of Article 50, and was assumed to be such in Wightman. Such evidence might also include decisions made as part of the Brexit negotiations with the EU, decisions which will have an impact on the EU rights of UK citizens.

Following Miller, therefore, the third strand of the West test is therefore satisfied. There was therefore no need in the original petition to frame the action around the proper functions of a MP, MSP or MEP. That unnecessarily complicated the petitioners’ arguments by inviting the court to consider the internal working of Parliament, thereby raising parliamentary privilege concerns.

Since Wightman was decided, Parliament has passed the European Union (Withdrawal) Bill, which provides for the UK’s withdrawal from the EU. It could be said that Parliament’s enactment of this legislation, which presumes withdrawal, impliedly repeals any power of revocation exercisable under the 2017 Act. Consequently, a reverse-Miller situation may arise whereby the express legislative consent of Parliament would be required before the Prime Minister could untrigger Article 50. It is submitted, however, that the Withdrawal Bill’s presumption of the UK’s exit from the EU is rebuttable.

First, the Bill requires that the final withdrawal agreement, if reached, be ratified only with the approval of Parliament. The Bill is silent on the consequences of either parliamentary rejection of the agreement or failure by the Government to reach any agreement, other than to say that the Government in both scenarios must make a statement to the Commons on how they intend to proceed under Article 50(2); the Commons may then pass a motion responding to the statement. Although this motion is meant to be cast “in neutral terms” and therefore unamendable, the Bill does not restrict other motions being brought; such a motion might include a vote to remain in the EU.

Secondly, the Bill explicitly associates the Government’s intended actions as expressed in the statement with the powers under Article 50(2). If the CJEU decided that these powers include revocation, it would still be open to the Government to revoke the notification of withdrawal. Yet again, as with the 2017 Act, the Government would not be able to preclude the possibility of revocation irrespective of the presumption of withdrawal in the Bill.

It is therefore arguable that Parliament in passing the Bill, although subject to fierce disagreement, nonetheless contemplated a situation where the UK could decide to remain in the EU should the withdrawal agreement be either rejected or not forthcoming. Such a reading of the Bill would preserve the power of the Prime Minister under the 2017 Act to untrigger Article 50, albeit subject to these new conditions. However, this is dependent upon Article 50 encompassing a power of revocation, which is still an open question. Consequently, the enactment of the Withdrawal Bill may strengthen rather than nullify the case for a referral on Article 50 to the CJEU.

D. CONCLUSION

This analysis is not making a judgement on whether Article 50 encompasses revocation: that is a matter of EU law for determination by the CJEU. However, by critiquing the judgement, this analysis proposes a better path to receiving a referral to the CJEU and its judgement accordingly. Lord Boyd stressed that, in his view, the arguments raised by the petitioners were not live issues because the

26 Wightman CSOH (no 2) para 47.
Government did not at the time have the political will to revoke the withdrawal notification.\footnote{Ibid paras 45-51.} It is submitted, however, that this is a live issue because finding an answer to this question is of profound importance to the UK’s negotiating stance. It is also an issue of significant expediency. If Article 50 does encompass revocation, then this power could only be exercised by the UK while it is still a member of the EU. Despite any transitional arrangements, this membership will end on 29 March 2019. It is therefore vitally important to know whether the law has been correctly understood beforehand.

Robert Brett Taylor

Lecturer, University of Aberdeen School of Law

Adelyn L. M. Wilson

Senior Lecturer, University of Aberdeen School of Law