



In Focus

High Court Judgment on Article 50: Responses

High Court Judgment

On 3 November 2016, the High Court of England and Wales handed down a judgment in which it held that the Secretary of State does not have power under the Crown's prerogative to give notice pursuant to Article 50 of the Treaty on European Union for the UK to withdraw from the European Union.¹ The Court accepted the claimants' arguments that the Crown could not change domestic law and nullify rights under the law unless Parliament had conferred upon the Crown authority to do so by an Act of Parliament, and that the European Communities Act 1972 did not give the Crown the necessary authority.²

Government Response

The Government issued a press release later that day, stating that it was "disappointed" in the judgment and intended to appeal.³ Writing in the *Sunday Telegraph* on 5 November 2016, Theresa May, the Prime Minister, said:

This may appear to be a debate about process, and the legal argument is complex, but in reality there is an important principle at stake. Parliament voted to put the decision about our membership of the EU in the hands of the British people. The people made their choice, and did so decisively. It is the responsibility of the Government to get on with the job and carry out their instruction in full. MPs and peers who regret the referendum result need to accept what the people decided.⁴

In phone calls with Angela Merkel (German Chancellor), Jean-Claude Juncker (President of the European Commission), François Hollande (French President) and Donald Tusk (President of the European Council) on 4 November 2016, Mrs May said that the Government's planned timetable to notify under Article 50 before the end of March 2017 was unchanged by the High Court judgment.⁵

David Davis, the Secretary of State for Exiting the European Union, made a statement to the House of Commons on 7 November 2016, in which he outlined the Government's position following the High Court judgment, and the steps it had already taken towards launching an appeal to the Supreme Court:

The Government disagree with the Court's judgment. The country voted to leave the European Union in a referendum approved by an Act of Parliament. Our position remains that the only means of leaving is through the procedure set out in Article 50, and that triggering Article 50 is properly a matter for the Government using their prerogative powers. As a result, we will appeal the High Court's judgment at the Supreme Court.

[...] We have taken two necessary procedural steps. First, the Government have been granted a certificate to bypass the Court of Appeal and leapfrog the case to the Supreme Court. This will ensure that, when we lodge our appeal, it will be heard directly in the Supreme Court without further delay. Secondly, we will this week apply for substantive permission to appeal to the Supreme Court. It is likely that any hearing will be scheduled in the Supreme Court in early December. We would hope that the judgment would be provided soon after. This timetable remains consistent with our aim to trigger Article 50 by the end of March next year.⁶

Whilst maintaining the position that the power to trigger Article 50 lay with the Government, Mr Davis said that there was an important role for Parliament in the process, with time allowed for debates and parliamentary statements on Brexit, committee scrutiny, and a Bill to be introduced in the next parliamentary session to repeal the European Communities Act 1972.⁷ He stated that the Government would “observe in full all relevant legal and constitutional obligations that apply”, and that it would “give no quarter to anyone who, while going through the motions of respecting the outcome of the referendum, in fact seeks to thwart the decision of the British people”.

The Supreme Court confirmed on 8 November 2016 that it had granted the Government permission to appeal the case.⁸ The Supreme Court has set aside four days, 5–8 December 2016, to hear the appeal. The Court noted that the exact number of days would depend on further submissions from the parties on the precise legal arguments to be considered, the number of interveners and whether any other related cases were joined. The Court said it expected at this stage that the hearing could last all four days, and judgment would follow at a later date, probably in the New Year. It was confirmed that all eleven justices would sit on the panel considering the appeal. This would be the first occasion on which all eleven of the Court’s permanent justices, including those from Northern Ireland and Scotland, would preside over a case.⁹

Labour Party

In an interview with the *Sunday Mirror* on 6 November 2016, the Labour Leader Jeremy Corbyn said that his party would vote against the Government in the House of Commons unless Theresa May agreed to Labour’s “Brexit bottom lines”—UK access to 500 million customers in the single market; no watering down of EU workplace rights; guarantees on safeguarding consumers and the environment; and pledges on Britain picking up the tab for any EU capital investment lost because of Brexit.¹⁰ Later that day, Tom Watson, Labour’s Deputy Leader, said that “Article 50 will be triggered when it comes to Westminster”, and that Labour would not “hold it up”.¹¹

Responding to David Davis’s statement in the House of Commons on 7 November 2016, Keir Starmer, the Shadow Secretary of State for Exiting the European Union, repeated that Labour would “not frustrate the process by voting down Article 50”, but insisted that “we cannot have a debate in a vacuum”, suggesting that the Government needed to answer “basic questions” such as what future relationship it wanted with the single market and the EU customs union.¹² In response, Mr Davis said that the Government’s strategic aims were to “bring back control of our laws to Parliament; to bring back control of decisions over immigration to the United Kingdom; to maintain the strong security cooperation we have with the EU; and to establish the freest possible market in goods and services with the EU and the rest of the world”. However, he insisted that it would not be possible to achieve a good outcome “if the negotiation is being run by 650 people in the House of Commons and nearly 900 people in the other place”. He warned that “if Parliament insists on setting out a detailed minimum negotiating position”, this would “quickly become the maximum possible offer from our negotiating partners”.¹³

Liberal Democrats

Nick Clegg, the Liberal Democrats' spokesman on Exiting the European Union, said on 4 November 2016 that he would work with MPs from all parties to amend any legislation the Government brought forward as a result of the Court judgment to ensure that the Government would have to pursue "a soft rather than a hard Brexit" and that the British people would have a say on the final terms of the UK's departure at the end of the negotiation process.¹⁴ In the House of Commons, Mr Clegg pointed out that previous governments had published white papers setting out their negotiating positions in advance of previous EU treaties, and there had been a House of Commons vote in advance of the Maastricht Treaty.¹⁵ He asked Mr Davis why such an approach was not appropriate in relation to leaving the EU. Mr Davis said that Parliament would have the chance to debate and amend the Great Repeal Bill, and probably other Bills that would deal with individual elements of the negotiation.¹⁶

UKIP

Following the judgment, Nigel Farage, acting Leader of UKIP, said he was worried "that a betrayal may be near at hand" as he feared "that every attempt will be made to block or delay the triggering of Article 50".¹⁷ He told the BBC that if the British people thought the referendum result would not be implemented, "we will see political anger the likes of which none of us in this country have ever witnessed".¹⁸ Mr Farage is reportedly planning to lead a "100,000-strong march" to the Supreme Court to coincide with the start of the appeal hearing.¹⁹

Green Party

Caroline Lucas, Co-Leader of the Green Party, welcomed the ruling, arguing that "Parliament must have the opportunity to debate and vote on triggering Article 50, rather than a group of Ministers at the top table having total control over this country's future place in the world".²⁰

Scotland

Noting that in the referendum Scotland had voted in favour of remaining in the EU, Nicola Sturgeon, Leader of the Scottish National Party (SNP) and First Minister of Scotland, said that SNP MPs in the House of Commons "will certainly not vote for anything that undermines the will or the interests of the Scottish people".²¹ She also said that she would "actively consider" whether there was a case for the Scottish Government to become an active participant in the legal case as it proceeded. Ms Sturgeon confirmed on 8 November 2016 that the Lord Advocate would lodge a formal application to intervene on the UK Government's appeal to the Supreme Court. She argued that triggering Article 50 would "directly affect devolved interests and rights in Scotland" and that "it simply cannot be right that those rights can be removed by the UK Government on the say-so of a Prime Minister without parliamentary debate, scrutiny or consent".²² She therefore called for legislation to be required at Westminster and the consent of the Scottish Parliament to be sought before Article 50 could be triggered.

Wales

On 3 November 2016, Carwyn Jones, Leader of Welsh Labour and the First Minister of Wales, said that it would be a "mistake to challenge such a clear ruling".²³ He stated that the position of the Welsh Government had been consistent throughout: "we accept the decision made by the people and will not work against the referendum result". On 4 November 2016, Mike Antoniw, Counsel General for Wales,

issued a statement saying that he intended to make an application to be granted permission to intervene in the proposed appeal before the Supreme Court to make representations about the specific implications of the Government's proposed decision for Wales.²⁴ His statement argued that the High Court judgment, and the Northern Ireland case (see below), raised questions about the use of prerogative powers in ways that might affect the role and powers of the National Assembly for Wales and Welsh Ministers.

Leanne Wood, Leader of Plaid Cymru, welcomed the High Court judgment.²⁵ She also welcomed the Counsel General for Wales's decision to seek permission to intervene, arguing that it was "imperative that Wales's voice is heard in this appeal".

Northern Ireland

Responding to the judgment of the High Court of England and Wales, Nigel Dodds, Leader of the Democratic Unionist Party (DUP) at Westminster and spokesperson on Reform and Constitutional Issues and Current Affairs, described himself as "disappointed".²⁶ He said the referendum result was a "democratic vote" which "must be respected". Mark Durkan (Social Democratic and Labour Party (SDLP) MP for Foyle) welcomed the judgment on behalf of his party, saying that the SDLP had been "consistent in its objection to the use and abuse of the dubious royal prerogative powers" and would "unapologetically defend the will of the 56 percent of people [in Northern Ireland] who voted to remain in the European Union".²⁷ The Ulster Unionist Party (UUP) said that the party would "study the detail of the judgment" and await the outcome of the Government's appeal.²⁸ If the appeal was unsuccessful and a vote took place, UUP MPs would vote in favour of triggering Article 50. Martin McGuinness (Sinn Féin), Deputy First Minister of Northern Ireland, said following the judgment that he had "no faith" in the Westminster Parliament "supporting the democratically expressed wishes of the people of Northern Ireland to remain in Europe".²⁹

On 28 October 2016, the High Court of Justice in Northern Ireland dismissed two applications for judicial review of the Government's intention to use the royal prerogative to invoke Article 50.³⁰ Four members of the Northern Ireland Assembly—Steven Agnew (Green), Colum Eastwood (SDLP), David Ford (Alliance) and John O'Dowd (Sinn Féin)—were involved in bringing one of the applications. Both applications had contended that Article 50 could not be triggered by the use of the royal prerogative and that legislation (or other mandate from Parliament) was required for this purpose.³¹ In view of the overlap between these cases and the *Miller* case before the High Court of England and Wales, the High Court in Belfast concentrated on the impact of Northern Ireland's constitutional provisions in respect of notice under Article 50. The Northern Ireland Court dismissed the applications for judicial review on these Northern Ireland specific grounds, but the grounds of challenge that overlapped with those to be dealt with in *Miller* by the High Court of England and Wales were held over pending the outcome of that litigation.³²

On the day of the England and Wales High Court judgment, David Lidington, Leader of the House of Commons, stated that: "We now have the High Courts in two different parts of the United Kingdom coming to opposite conclusions about the same constitutional legal question".³³ He said that this would need to be considered by a higher court. David Davis said on 7 November 2016 that in the event of any appeal in the Northern Ireland litigation, the Government would "robustly defend their position".³⁴ He also clarified that in the Government's view, the legal timetable in relation to the Northern Ireland case in the event of an appeal "should also be consistent with our commitment to notifying under Article 50 by the end of March next year". He said that the need to properly resolve the "very wide constitutional issue" raised by Northern Ireland was one of the reasons he was resisting calls to act before the Supreme Court had ruled on the issue.³⁵

A hearing took place on 8 November 2016 to decide on appeal routes for the two Northern Ireland applications. It had been expected that requests would be made for both to “leapfrog” the Court of Appeal in Northern Ireland and go directly to the Supreme Court. However, the *Belfast Telegraph* reported after the hearing that John Larkin QC, Attorney General for Northern Ireland, had disclosed his intention to seek to refer only one of the two cases—that brought by the four MLAs and others—to the Supreme Court using powers under the Northern Ireland Act 1998 dealing with devolution issues.³⁶ Mr Larkin is reported to have said that it was “in that litigation the points are best pleaded”.³⁷ Mr Justice Maguire indicated that if the notice was properly served, he could not prevent the legal step. The *Belfast Telegraph* reported that if the other case, brought by victims’ campaigner Raymond McCord, is not referred to the Supreme Court, it could be appealed in the Northern Ireland Court of Appeal. The hearing was adjourned on 8 November 2016 for further written submissions.

A Bill or a Resolution?

There has been some debate as to whether the High Court ruling would require Parliament to pass legislation before notification of the UK’s intention to leave the EU could be formally given under Article 50, or if a vote on a resolution would suffice. David Davis said to the BBC on the day of the ruling: “The judges have laid out what we can’t do, and not exactly what we can do, but we’re presuming it requires an Act of Parliament, therefore both Commons and Lords”.³⁸ He subsequently clarified that this comment related to the situation as of the hearing on 3 November 2016, but the final outcome would depend on what the Supreme Court judges rule.³⁹ According to press reports, some senior ministers have urged the Prime Minister to present Parliament with a resolution rather than a full Bill if the Government is “forced” to grant a vote on activating Article 50.⁴⁰ The *Times* quoted a “well-placed ministerial source” as saying that “if Parliament were to vote on a resolution then I don’t think the court would second-guess that”.⁴¹ Dominic Grieve, the former Attorney General, however, argued that a resolution could only be used to authorise prerogative powers.⁴²

In response to suggestions from UKIP and Conservative MPs that the Government could hold a vote straight away on a straightforward resolution to trigger Article 50, David Davis indicated that although this was a tempting idea, “the proper route for the Government to pursue is to await the outcome of the court case and then act properly under the law”.⁴³ He gave a similar response to suggestions that the Government could quickly introduce a one-line Bill authorising the triggering of Article 50.⁴⁴

It has been reported in the media that the Government has already begun drafting a Bill in case it loses its appeal.⁴⁵ In the House of Lords, Baroness Hayter of Kentish Town and Baroness Ludford, respectively the Labour and Liberal Democrat spokespersons for Exiting the European Union, asked whether a Bill was in preparation.⁴⁶ Lord Bridges of Headley, Parliamentary Under Secretary of State at the Department for Exiting the European Union, said that if the Supreme Court did not rule differently to the High Court, the Government would assess what remedy was required and set out its position then, but “speculation about a Bill at this juncture is just that—speculation”.⁴⁷

¹ [R \(Miller\) v Secretary of State for Exiting the European Union \[2016\] EWHC 2768 \(Admin\)](#), para 111.

² *ibid.*, paras 95–6.

³ Prime Minister’s Office, Department for Exiting the European Union and Attorney General’s Office, ‘[High Court Ruling on Article 50: Statement](#)’, 3 November 2016.

⁴ Theresa May, ‘[Why I Will Not Allow the British People’s Vote for Brexit to be Sabotaged](#)’, *Telegraph*, 5 November 2016.

⁵ Prime Minister’s Office, ‘[PM Calls with Chancellor Merkel and President Juncker: 4 November 2016](#)’ and ‘[PM Calls with President Tusk and President Hollande: 4 November 2016](#)’, both 4 November 2016.

⁶ [HC Hansard, 7 November 2016, col 1256](#).

⁷ [ibid., col 1257](#).

⁸ Supreme Court, ‘[Article 50 \(Brexit\) Case](#)’, 8 November 2016.

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- ⁹ BBC News, '[The 11 Supreme Court Judges Who Could Rule on UK's Brexit Appeal](#)', 4 November 2016.
- ¹⁰ Nigel Nelson, '[Jeremy Corbyn Gives Theresa May Ultimatum](#)', *Mirror*, 5 November 2016.
- ¹¹ BBC News, '[Brexit: Labour's Tom Watson Says Article 50 "Will Be Triggered"](#)', 6 November 2016.
- ¹² [HC Hansard, 7 November 2016, col 1258.](#)
- ¹³ [ibid, col 1260.](#)
- ¹⁴ ITV, '[Nick Clegg Vows to Amend Law Before Article 50 so Public Has Final Say on Brexit Deal](#)', 4 November 2016.
- ¹⁵ [HC Hansard, 7 November 2016, col 1262.](#)
- ¹⁶ [ibid, col 1263.](#)
- ¹⁷ UKIP, '[Article 50 Decision Risks Provoking Huge Public Anger](#)', 3 November 2016.
- ¹⁸ BBC News, '[Nigel Farage Warns of Brexit "Anger" Protests](#)', 6 November 2016.
- ¹⁹ Christopher Hope, '[Farage to Lead 100,000-Strong March on Supreme Court on Day of Historic Brexit Court Hearing](#)', *Telegraph*, 7 November 2016.
- ²⁰ Green Party, '[Caroline Lucas Responds to Article 50 Court Ruling](#)', 3 November 2016.
- ²¹ Scottish Parliament, '[Official Report: Meeting of the Parliament Thursday 3 November 2016](#)', cols 19–20.
- ²² Scottish Government, '[Scottish Government Will Intervene in Article 50 Legal Case](#)', 8 November 2016.
- ²³ BBC News, '[Brexit Court Ruling Challenge a Mistake, Carwyn Jones Says](#)', 3 November 2016.
- ²⁴ Welsh Government, '[Statement by the Counsel General: Intervention in Appeals to the Supreme Court—Article 50 and EU Exit](#)', 4 November 2016.
- ²⁵ Plaid Cymru, '[Leanne Wood's Response to the High Court's Ruling on R\(Miller and Others\) v Secretary of State for Exiting the European Union](#)', 4 November 2016.
- ²⁶ DUP, '[High Court Ruling is Disappointing But Government Will Appeal Decision—Dodds](#)', 3 November 2016.
- ²⁷ SDLP, '[Durkan Welcomes London High Court Ruling on Brexit](#)', 3 November 2016.
- ²⁸ UUP, '[Statement from the Ulster Unionist Party on High Court Article 50 Judgment](#)', 3 November 2016.
- ²⁹ Sinn Féin, '[Tory Approach to EU Referendum has been Shambolic—McGuinness](#)', 3 November 2016. Sinn Féin's four MPs do not take their seats at Westminster.
- ³⁰ High Court of Justice in Northern Ireland, '[Court Dismisses Brexit Challenge—Summary of Judgment](#)', 28 October 2016. The full text of the judgment is available: [McCord's \(Raymond\) Application \[2016\] NIQB 85.](#)
- ³¹ High Court of Justice in Northern Ireland, '[Court Dismisses Brexit Challenge—Summary of Judgment](#)', 28 October 2016.
- ³² [ibid.](#)
- ³³ [HC Hansard, 3 November 2016, col 1052.](#)
- ³⁴ [HC Hansard, 7 November 2016, col 1256.](#)
- ³⁵ [ibid, col 1269.](#)
- ³⁶ *Belfast Telegraph*, '[Northern Ireland Brexit Challenge Ruling Could go to Supreme Court](#)', 8 November 2016.
- ³⁷ [ibid.](#)
- ³⁸ Video embedded in BBC News, '[Brexit Court Defeat for UK Government](#)', 3 November 2016.
- ³⁹ [HC Hansard, 7 November 2016, col 1263.](#)
- ⁴⁰ Francis Elliott and Sam Coates, 'Rush Brexit Through Parliament, May is Urged', *Times*, 7 November 2016.
- ⁴¹ [ibid.](#)
- ⁴² [ibid.](#)
- ⁴³ [HC Hansard, 7 November 2016, col 1265, col 1267, col 1271 and col 1274.](#)
- ⁴⁴ [ibid, col 1266, col 1281 and col 1283](#)
- ⁴⁵ Sky News, '[Government Already Drafting Brexit Article 50 Bill](#)', 7 November 2016.
- ⁴⁶ [HL Hansard, 7 November 2016, col 933 and col 934.](#)
- ⁴⁷ [ibid, col 934.](#)

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