

## UK Supreme Court holds suspension of Parliament unlawful

[Scott Barker](#), [Willie Palmer](#), [Susan Rowe](#), [David Broadmore](#), [Kelly Paterson](#), [Peter Niven](#), [Bridie McKinnon](#), [Olly Peers](#)

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In a unanimous judgment handed down late last night, the United Kingdom Supreme Court (UKSC) has held that the Rt Hon Boris Johnson's advice to Her Majesty the Queen that she should prorogue Parliament was unlawful. The legal effect is that Parliament is treated as never having been suspended – and it can now continue its scrutiny of the terms, if any, on which the Government proposes to exit from the European Union (Brexit). The decision is a high-water mark in the courts' scrutiny of executive power and the contemporary flexibility and breadth of judicial review.

### What is prorogation?

Prorogation describes the process by which a current session of Parliament is ended. When Parliament is prorogued, it does not sit. That prevents Parliament from meeting, debating, and passing legislation. It also limits parliamentary scrutiny of the Government, whether by questions in the House, or by parliamentary committees. The next parliamentary session begins, usually a short time later, with the Queen's Speech. In that Speech, the Government sets out its legislative agenda. In New Zealand, that typically only occurs at the beginning of a Parliamentary term, following a General Election.

Parliament is prorogued by the Queen (or in New Zealand, through the Governor-General, as her representative), acting on the advice of her Ministers in Government. By constitutional convention, the Queen must act on the advice of her Ministers, since they, unlike she, are politically accountable.

### What did Mr Johnson do?

On 27 or 28 August 2019, Mr Johnson advised the Queen that Parliament should be prorogued from a date between 9 and 12 September 2019 until 14 October 2019. Following that advice, Government Ministers met with the Queen on 28 August 2019, and the Queen issued an Order in Council ordering prorogation on the terms advised to her by Mr Johnson.

The prorogation occurred against the backdrop of Brexit. By late August 2019, there was intense disagreement between Parliament and the Government about the way Brexit should occur. The United Kingdom was then, and remains, scheduled to exit the European Union on 31 October 2019.

From the time of the prorogation until 31 October 2019 there remained only eight weeks in which Parliament could sit. The prorogation purported to suspend Parliament for five of those eight weeks.

### The parties' arguments

Ms Miller and Ms Cherry, the appellants in the two consolidated cases, argued that the prorogation was an improper and unlawful attempt to prevent parliamentary scrutiny of the Government's Brexit strategy during the crucial period leading up to exit date of 31 October 2019. They sought a declaration that the prorogation was null – meaning that it had no legal effect.

Mr Johnson argued that the prorogation was necessary to reset the domestic legislative agenda and enable the Government to prepare for delivery of that. He also argued that prorogation was essentially a political question, with which the courts could not interfere.

### The Court's decision

The Court rejected Mr Johnson's arguments and allowed the appeals.

In doing so, it emphasised the following key points:

- **Court's role is to review 'prerogative' powers exercised by the Crown:** The Court was clear that it was entitled to determine the existence, extent, and limits of Government's powers. Equally, it was also entitled to determine if a purported exercise of that power falls within its limits. It is only when a power has been exercised properly that the courts will not intervene – because it then becomes 'non-justiciable' – or something that the courts cannot decide.
- **Government's 'prerogative' powers must be exercised consistently with common law principles:** The prerogative power to prorogue Parliament is not codified in any written statute. It is simply recognised in law as being a power that exists.

But, because of that, it must be defined by the fundamental principles of constitutional law. In this case, these were:

- **Parliamentary Sovereignty:** This principle is usually understood as meaning that laws enacted by the Crown in Parliament are the supreme form of law. However, the Supreme Court added a further dimension to the principle. The Court held that it also requires that the proper functioning of Parliament cannot be improperly impeded by the executive.
- **Parliamentary Accountability:** This principle means that the Government is accountable to the elected representatives in Parliament.
- **Limits to the power of prorogation – 'reasonable justification':** In light of the principles of Parliamentary Sovereignty and Parliamentary Accountability, the Court held that “a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course” (at [50]).
- **The prorogation frustrated Parliament’s constitutional role without a reasonable justification:**
  - **Not a normal prorogation:** The Court found that “[t]his was not a normal prorogation in the run-up to a Queen’s Speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on the 31st October”.
  - **Total suspension during key period:** Unlike a recess – during which Parliament could still perform parliamentary functions, prorogation prevented it from doing so. That was critically important, given the fundamental change due to take place in the Constitution of the United Kingdom on 31 October 2019.
  - **No reasonable justification for the extraordinarily long prorogation:** Evidence from Sir John Major, a former Prime Minister, was clear in that the typical time to prepare for a Queen’s Speech (setting out a new legislative agenda) was four to six days. Here, there was no evidence supporting a prorogation of five weeks as necessary. The Government’s own internal memorandum did not address the merits or difference between prorogation (a complete suspension) and a mere recess (which does not suspend Parliament).

The Court therefore declared Mr Johnson’s advice to the Queen to prorogue Parliament as null, which made the Order in Council null, and which also meant that Parliament was not prorogued.

## Significance

The Court’s decision arises in a unique context, which is unlikely to be repeated in New Zealand, at least any time soon.

However, it is nonetheless significant for New Zealand:

- New Zealand has a substantially similar, and unwritten, Constitution to that in the United Kingdom. Our courts would be almost certain to follow the UKSC’s decision in determining the same or similar issues
- The UKSC developed flexible and powerful remedies to restrain the Government from suppressing parliamentary scrutiny, which demonstrates the modern conception of judicial review as being one fundamental to the rule of law
- The decision signals that fundamental constitutional principles may increasingly form substantive and independent grounds of judicial review, which can define and limit the scope of Government powers, at least when those powers arise at common law
- The case demonstrates that Parliament’s supremacy is not a concept limited only to the supremacy of parliamentary law within our system, but that, in a broader sense, it also means that the executive cannot unreasonably impede Parliament’s functions.

## What can Mr Johnson do now?

It remains an open question how Mr Johnson will respond.

In theory, it remains open to Mr Johnson to prorogue Parliament again. If he were to do so for a similar period, or at a time that would seriously impede Parliament’s functions, it is almost certain that the courts would restrain him from doing so.

It is a separate question whether Mr Johnson would choose to wear the political cost.

A copy of the decision is available [here](#).

*This article was written by Luke Sizer (senior solicitor).*



## **Auckland**

188 Quay Street  
Auckland 1010

PO Box 1433  
Auckland 1140  
New Zealand

P: +64 9 358 2555

F: +64 9 358 2055

## **Wellington**

Aon Centre  
1 Willis Street  
Wellington 6011

PO Box 2694  
Wellington 6140  
New Zealand

P: +64 4 499 4242

F: +64 4 499 4141

## **Christchurch**

83 Victoria Street  
Christchurch 8013

PO Box 322  
Christchurch 8140  
New Zealand

P: +64 3 379 1747

F: +64 3 379 5659