



## Behind the Scenes of Brexit: An Inside Look on the Work of UK Supreme Court

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## Behind the Scenes of Brexit: An Inside Look on the Work of UK Supreme Court

— [Simon Drugda](#), PhD Candidate at the University of Copenhagen

The UK referendum on its continued membership in the European Union had taken place on June 16, 2016, but it took almost four years until the country eventually left the EU on January 31, 2020. During that time, the Supreme Court decided twice on questions related to the withdrawal of the UK from the Union. Most recently in a high-profile case *R (Miller II) v The Prime Minister*,<sup>i</sup> which concerned the legality of prorogation of the Parliament by the PM. The Court determined that the advice of the PM to the Queen to prorogue Parliament was unlawful. *Miller II* was a momentous decision for the Supreme Court and the country.

Much ink has been spilt on the subject of Brexit, but there is little to no writing on the view from the Court. Building on data gathered from the meeting minutes of the UK Supreme Court Management Board, which consists of non-judicial and executive staff of the Court, this blog examines how the UKSC handled the litigation and the general fallout from Brexit. The data reveals a different facet of the work of the Court; one that is not readily visible on the face of the record.

Meeting minutes of the UKSC Management Board are freely available on the website of the Supreme Court, at the subpage on [corporate information](#). The UKSC Management Board minutes are published with a slight delay because minutes of a meeting are usually approved at the beginning of the next scheduled meeting.

### Helping Hands

In the run-up to the delivery of the judgment in both Brexit-related cases, UKSC Justices made their best effort to boost the throughput legitimacy of the decision-making process by, for example, constituting the largest possible panel of 11 Justices. However, it was not only judges working towards the successful resolution of the case. There is often a tendency in comparative constitutional studies to focus on courts over their component parts, but courts work as a team, and their decision-making is a team production. In the UK, the ones responsible for helping judges to successfully deliver and communicate their decisions, is the support staff, including clerks, executive, and non-executive officers of the Court. Working mainly in the background, the UKSC support staff had also contributed to making Brexit-related adjudication successful.

The nonjudicial staff of the UKSC consists of the Chief Executive at the apex, who has two deputies, and numerous other staff members organised in the three committees and several smaller divisions. The Chief Executive has a statutory obligation under the Constitutional Reform Act 2005 to ensure that the Court's resources are “used to provide an efficient and effective system to support” Justices in carrying out their judicial work (Sec 51). Assisting the Chief Executive in this function is the Management Board (MB) of the Court. The MB meets every month to discuss the business of the Court, including potential risks to the reputation of the Court and any issues that may impede the ability of judges to adjudicate.

MB minutes and other internal documents of the Court are thus a useful source of information for learning about what goes on inside the Court. Based on the minutes of the Management Board, the main challenges posed by the Brexit-related litigation were the 1) reputational risks to the Court and 2) management of workflow.<sup>ii</sup>

## Reputational Risk

The UKSC has shortly after its establishment invested in the capacity to handle risk. The Chief Executive at the time set up a robust system for effectively managing, identifying, and monitoring risks to its operation. The risk management system of the Court is designed to: a) identify and prioritise risks; based on the b) likelihood of those risks being realised and their impact; and c) manage them “efficiently, effectively and economically.”<sup>iii</sup> For the purpose of managing risk, the MB, in cooperation with the Audit and Risk Assurance Committee, keep and review the Risk Register,<sup>iv</sup> which also sets out mitigating actions to significant risks. Risks on the Register are scored based on their likely impact and gravity on the scale from green, through amber, to red risks.<sup>v</sup> Members of MB each “own” risks within their areas of direct responsibilities and are responsible for their management and reporting to the Board.

The number of risk categories, which the Court monitors has changed over the years, but among the regular risk areas are disruption from breach of physical security of the Court, financial challenges, or potential disruption to relations with government, Parliament, and devolved bodies.<sup>vi</sup> The monitoring category “Damage to Reputation” was first added to the Risk Register in late 2015. As the MB noted at the time, although the corporate reputation of the UKSC was a new entry on the list, it “was, inevitably, ongoing,” since concerns for judicial reputation factor into all aspects of the work of the Court.

Damage to reputation	<p>↓ Risk decreased.</p> <p>Risk remained low but with the likelihood staying at low but impact increasing to medium.</p>	<ul style="list-style-type: none"> <li>■ Pro-active monitoring of all media coverage about the UKSC and its justices and responding quickly and effectively when required</li> <li>■ Work collaboratively with the media for all judgments and cases of significance</li> <li>■ FOI requests handled within the required timeframes</li> <li>■ Oversee a programme of engagement and exhibitions to ensure the best visitor experience and react proportionately to feedback received</li> </ul>
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Table “Overview of risks managed by the UKSC in 2018-19” p. 76 of the Supreme Court Annual Report 2018–2019

One of the determinants the reputation of the Court is the media coverage of its decision-making, which features prominently on the Risk Register,<sup>vii</sup> but mundane problems such as the “noisy floorboard in the second floor lobby,” occasionally also make it on the Register.<sup>viii</sup> The UKSC has in place several strategies to manage different reputational risks. When it comes to media coverage, the Court pro-actively monitors and, if necessary, responds to the media coverage about the UKSC and its justices. Second, the Court collaborates with the

media for “all judgments and cases of significance.”<sup>ix</sup> Thus, for example, accredited members of the media occasionally receive an advance copy of the judgment of the Court from the UKSC communications team, to inform the reporting on the case.<sup>x</sup>

In anticipation of the application for judicial review in the prorogation case, the MB noted that the communications team would need to “emphasise the Court’s constitutional role in enabling the Rule of Law” above all else,<sup>xi</sup> to avoid giving off the appearance of an improper overreach into politics. The Court was clearly cognizant of the fact that the two Brexit-related cases will become the most high-profile hearings in its history, and reach a far wider audience than the rest of its judicial output.<sup>xii</sup> The increased focus on the Court required it to be “more proactive with communication to safeguard [its] reputation,”<sup>xiii</sup> for negative coverage or any mistake could give the political actors pretext for criticism. This sentiment proved to be correct since PM Boris Johnson and his new Cabinet recently announced that one of their priorities would be to conduct a review of the constitutional relationship between the UK government and the courts.

Judicial reputation is an important factor for the effective functioning of any court system. Courts rely on the executive for the implementation of their decisions because they neither wield the sword nor have the power of the purse; “neither force nor will.”<sup>xiv</sup> Judicial review must be ultimately sustained by the institutional actors in complementary roles, and a “high-reputation court is more likely to be complied with than a low-reputation court.”<sup>xv</sup> The UKSC, therefore, carefully monitors potential risks to avoid damage to its reputation.<sup>xvi</sup>

### **Freedom of Information Requests**

Another element of the judicial impression-management involves replies to correspondence and FOI requests. Both Brexit-related cases “generated exceptional levels of public interest and correspondence,” which the Court had to process.<sup>xvii</sup> Immediately after the decision in *Miller II*, the UKSC received searching FOI requests that implicitly questioned the legitimacy of the Justices and their backgrounds. Several of the requesters wanted to know whether the Justices received any stipends or payments from the “EU or any of its associated bodies;”<sup>xviii</sup> how did the Justices vote in the 2016 EU Referendum;<sup>xix</sup> whether they or their immediate families invested in the EU; or whether Justices met Gina Miller outside their judicial capacity.<sup>xx</sup>

The Court replied to each of the requests exhaustively. Although, in several cases, FOI officers instead of a reply explained to the requester that Justices are bound by the “Guide to Judicial Conduct” and their Judicial Oath to decide impartially irrespective of their vote in the 2016 Referendum, or social network.

### **Strained Human and Financial Resources**

While *Miller II* was considered primarily under the framework for risk management, the Article 50 case *Miller I*<sup>xxi</sup> was discussed in relation to workflow movement.<sup>xxii</sup> The MB first noted the potential application to the Court in connection with the Notification of Withdrawal from the EU in July 2016. The case was expected to be heard before Christmas, and all the while the Court was preparing to handle it well.<sup>xxiii</sup>

In November 2016, the MB received updates on the legal administration, communications, infrastructure, and security preparations for the Brexit case. One of the non-executive directors on the MB advised the regular staff of the Court to set aside “business as usual” while the case is being processed, and “offered praise for the tone and clarity of the Court’s communications.”<sup>xxiv</sup> The Court needed processing capacity to react to unanticipated issues, and any failure in such a high-profile case would reflect poorly on its work.

Judicial decisions are knowledge-products, and courts expend considerable cognitive and normative resources for their production. In the course of the last two years, the UK Supreme Court had in fact applied twice for extra Brexit-related funding. First, the Court applied and received GBP 25k from the Treasury in early 2017, to cover additional expenditure relating to *Miller I*.<sup>xxv</sup> A year later, the Court made a reserve application for funding in the sum of GBP 505k, to cover “the costs of an increase in the number of Judicial Assistants as well as greater use of the Supplementary Panel.”<sup>xxvi</sup>

“Due to exceptional staff performance,” as the MB noted, the UKSC managed to handle *Miller I* successfully and without controversy. For their work on the case, the staff received a half-day leave before Christmas, and the Justices also be made a donation to “enable the purchase of items to enhance the working environment for staff.”<sup>xxvii</sup> Additional awards were made to those who significantly contributed to handling the case, and the Chief Executive, together with Lord Neuberger, sent emails to all staff expressing gratitude for their performance.

## Conclusion

This short blog post reviewed internal documentary material produced by the UKSC Management Board, to look closer on the work in the background of the decision-making of the UK Supreme Court. Although much of the “heavy lifting” is done by Justices, judicial decision-making is teamwork. If the primary goal of adjudication is dispute resolution, helping hands at UKSC work to support Justices to achieve that goal. The UKSC support staff works to communicate the decisions of the Court, interact with external audiences, secure financial resources so that the Court as a team can maximise its primary-goal attainment.

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<sup>i</sup> *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41

<sup>ii</sup> Here I focus on the litigation, although the MB also paid close attention to Brexit-related items on party manifestos before election, and after the publication of the EU Withdrawal Bill established a dedicated internal working group to “monitor the impact of Brexit on the Court.” UKSC MB Minutes of the meeting held on 24 July 2017

<sup>iii</sup> UKSC Annual Report and Accounts 2010-2011, 63

<sup>iv</sup> Unlike MB minutes, the risk register is largely inaccessible. Items from the register sporadically find their way to the MB minutes, but the precise content of the risk register are confidential, because it contains sensitive information. I have previously applied to access the register, but was denied access under Section 36 of the Freedom of Information Act 2000, which stipulates that public organization are exempt from sharing information if it would likely prejudice their effective functioning, including free and frank advice and discussion.

<sup>v</sup> Disruption from breach of physical security has been recently flagged as a red risk, and the financing of the UKSC came close on one occasion. See, MB Minutes of the meeting held on 29 September 2014

<sup>vi</sup> The Risk Register was streamlined from fifteen to seven main risk categories in the legal year 2015/16. See UKSC Annual Report and Accounts 2015-2016, 77

<sup>vii</sup> See, for example UKSC MB Minutes of the meeting held on 21 March 2016 (noting the management of media coverage of the Court in the joint enterprise case *R v Jogee* [2016] UKSC 8); MB Minutes of the meeting held on 23 May 2016 (noting the impact of coverage in *PJS v News Group Newspapers Ltd* [2016] UKSC 26); and MB Minutes of the meeting held on 28

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November 2016 (noting that recent news stories with the potential to undermine the perception of impartiality in the Court had proven challenging to handle)

viii UKSC MB Minutes of the meeting held on 25 July 2016

ix UKSC Annual Report and Accounts 2018-2019, 76

x UKSC Practice Direction 6

xi Such documents are under a strict embargo before the final delivery of the judgment. UKSC MB Minutes of the meeting held on 25 March 2019

xii Statistics from the time when *Miller I* was decided show that the judgment in that case was download approx. 35,000 times and figures for online viewing on the first day of the hearing totalled 300,000 views. UKSC Annual Report and Accounts 2016-2017, 50-51

xiii UKSC MB Minutes of the meeting held on 30 September 2019

xiv Alexander Hamilton, "Federalist No. 78," in Michael A Genovese (ed), *The Federalist Papers* (Palgrave Macmillan 2009) 236

xv Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Cambridge University Press 2015) 11

xvi The monitoring under this category also extends to extrajudicial activities of the Justices, who are free to engage in lecture, but it is a good practice that they should at least "run speeches past the Communications team before they are delivered." Newly appointed Justices also receive media training. MB Minutes of the meeting held on 25 September 2017 and the Minutes of the meeting held on 23 July 2018

xvii UKSC MB Minutes of the meeting held on 27 March 2017

xviii Reply to a FOI request(a) dated 23 October 2019

<[https://www.whatdotheyknow.com/request/607629/response/1455468/attach/2/FOI%202019%2072.pdf?cookie\\_passth\\_rough=1](https://www.whatdotheyknow.com/request/607629/response/1455468/attach/2/FOI%202019%2072.pdf?cookie_passth_rough=1)>

xix Reply to a FOI request dated 29 October 2019

<[https://www.whatdotheyknow.com/request/608597/response/1459496/attach/2/FOI%202019%2081.pdf?cookie\\_passth\\_rough=1](https://www.whatdotheyknow.com/request/608597/response/1459496/attach/2/FOI%202019%2081.pdf?cookie_passth_rough=1)>

xx Reply to a FOI request(b) dated 23 October 2019

<[https://www.whatdotheyknow.com/request/607984/response/1455578/attach/2/FOI%202019%2077.pdf?cookie\\_passth\\_rough=1](https://www.whatdotheyknow.com/request/607984/response/1455578/attach/2/FOI%202019%2077.pdf?cookie_passth_rough=1)>

xxi *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5

xxii UKSC MB Minutes of the meeting held on 26 September 2016

xxiii UKSC MB Minutes of the meeting held on 25 July 2016

xxiv UKSC MB Minutes of the meeting held on 28 November 2016

xxv *ibid*

xxvi UKSC MB Minutes of the meeting held on 26 November 2018

xxvii UKSC MB Minutes of the meeting held on 23 January 2017