

IN THE MATTER OF THE AVAILABLE MECHANISMS

FOR REMOVING AND REPLACING A PRIME MINISTER

OPINION

INTRODUCTION & SUMMARY

1. I am asked by the Good Law Project to advise on the constitutional mechanisms by which Her Majesty the Queen might invite a person who commands the support of the majority of the House of Commons (but is not the Prime Minister) to form a new government.
2. The occasion for this advice is that the current Prime Minister leads a minority government. I am asked to advise on the mechanisms by which Parliament may replace a prime minister without a general election. I understand that the political backdrop to this question is the forthcoming deadline for the United Kingdom to exit the European Union on 31 October 2019, and the current Prime Minister's publicly stated intention to leave, without a deal if necessary, and possibly to dissolve Parliament before that date and to seek a general election which would not be held (or declared) until after it. I am not in a position to offer advice in respect of the political aspects of this situation, on which I express no view. This advice is only concerned with the legal and constitutional mechanisms by which a new government might be formed.
3. In this opinion, I consider:
 - (a) The mechanisms which provide for a change of Her Majesty's Government other than by way of a general election under the Fixed Term Parliaments Act 2011 ("**FTPA**");

- (b) The mechanisms by which the House of Commons can express its confidence in a new prime minister/government without a prior vote of no confidence in the incumbent Prime Minister under the FTPA
 - (1) When the House of Commons is in session; or
 - (2) At a time when it is prorogued and/or not in session; and
 - (c) The mechanisms by which a new prime minister, who commanded the support of the House of Commons, might obtain the Queen's consent to form a new government.
4. In summary, for reasons which I set out below:
- (a) The FTPA does not provide for the mechanisms by which a person who commands the support of the House may be asked to form a government without a general election; it simply provides for the circumstances in which a government may be forced to call an early general election.
 - (b) The House of Commons may express its view as to a prime minister/government in which it would have confidence:
 - (1) at any time when Parliament is in session by way of a humble address to the Queen; and
 - (2) at any other time through unequivocal evidence such as a letter signed by a majority of MPs.
 - (c) While the constitutional Convention is that the prime minister of the day conveys the views of the House to the Queen, there is nothing to stop the Queen, faced with clear evidence in the form of a humble address or otherwise, as to who commands the confidence of the House, to invite that person to form a new Government without first receiving the resignation of an incumbent prime minister. That would particularly be the case in circumstances where a serving prime minister defied the convention that he/she should convey the views of the House of Commons to the Queen.

BACKGROUND FACTS

5. The background facts are well known. In short:
 - (a) The United Kingdom has a minority government;
 - (b) A majority of members of the House of Commons have defeated the Government on six separate occasions, when voting on matters in relation to Brexit;
 - (c) The necessary two thirds majority in Parliament have not voted for a new General Election (see further below in relation to s. 2 FTPA);
 - (d) It is possible that Parliament will only sit for a small number of days between now and 31 October 2019, whether as a consequence of prorogation or a Parliamentary recess (during party conference season).
6. I am asked to assume, for the purposes of this advice, that a majority of MPs would be prepared to express their support for and confidence in an alternative prime minister/government.

THE FIXED-TERM PARLIAMENTS ACT

7. FTPA repealed the Septennial Act 1715, as amended by the Parliament Act 1911. Its purpose is to regulate the timing of, and triggers for, a general election. It provides for the maximum period of time between the dates of general elections (5 years) and the mechanism by which an early general election might be triggered before that period expires. Section 2 provides that:

“(1) An early parliamentary general election is to take place if—

- (a) the House of Commons passes a motion in the form set out in subsection (2), and

(b) if the motion is passed on a division, the number of members who vote in favour of the motion is a number equal to or greater than two thirds of the number of seats in the House (including vacant seats).

(2) The form of motion for the purposes of subsection (1)(a) is—

“That there shall be an early parliamentary general election.”

(3) An early parliamentary general election is also to take place if—

(a) the House of Commons passes a motion in the form set out in subsection (4), and

(b) the period of 14 days after the day on which that motion is passed ends without the House passing a motion in the form set out in subsection (5).

(4) The form of motion for the purposes of subsection (3)(a) is—

“That this House has no confidence in Her Majesty’s Government.”

(5) The form of motion for the purposes of subsection (3)(b) is—

“That this House has confidence in Her Majesty’s Government.”

...”

8. However, the FTPA is silent as to who should be Her Majesty’s Government for the purposes of section 2(5). As a result, it is possible that, in the intervening 14 days, the Queen may have been notified, or concluded that a person other than the existing Prime Minister does have the confidence of the House; have summoned that person to the palace, and so the motion of confidence in section 2(3)(a) and 2(5) may relate to a different government from that in which a prior notice of no confidence has been passed under sections 2(3)(b) and 2(4).

9. In essence, s. 2 FTPA provides that:

(a) There shall be an early general election if two thirds of members of the House of Commons vote in support of an election; and

(b) There shall be an early general election if a majority of the House of Commons votes in favour of a motion that it has no confidence in the Government and thereafter, 14 days passes without a motion of confidence

being passed in support of either the existing government or a new government.

10. I am asked to advise on the mechanisms by which a new government might secure the support of the Queen, in order to become the subject of a confidence vote concerning Her Majesty's Government, for the purposes of s. 2(5) (within the statutory 14-day period). FTPA is silent on this point and it is not addressed in any other primary legislation.
11. The most authoritative source on this question is the Cabinet Manual, a document finalised in October 2011, shortly after the FTPA came into force. It describes itself as a "*guide to laws, conventions and rules on the operation of government.*" It describes two mechanisms by which a prime minister might be changed or replaced during a Parliament:
 12. First, a change of prime minister within a majority government: (¶2.18)

"Where a prime minister chooses to resign from his or her individual position at a time when his or her administration has an overall majority in the House of Commons, it is for the party or parties in government to identify who can be chosen as the successor."
 13. This is the process that was followed when Theresa May was replaced by Boris Johnson.
 14. Second, a change of prime minister following a vote of no confidence under s. 2 FTPA. It provides that:

"The prime minister is expected to resign where it is clear that he or she does not have the confidence of the House of Commons and that an alternative government does have the confidence." (¶2.19)
 15. Where a range of possible administrations could be formed, the Cabinet Manual provides that the same processes and considerations should be followed as would follow the election of a Parliament that does not result in a single-party majority:

- (a) The incumbent prime minister and government remain in power: “*Where an election does not result in an overall majority for a single party, the incumbent government remains in office unless and until the prime minister tenders his or her resignation and the Government’s resignation to the Sovereign.*” (¶2.12) Paragraph 2.20 provides that this principle applies following a no confidence vote.
- (b) There are certain discretionary constraints on the Government’s activity. The Government retains the obligation to govern but “*it is customary for [ministers] to observe discretion in initiating any action of a continuing or long-term character.*” (¶2.28)
- (c) The incumbent prime minister has the critical role in this process: (¶¶2.9-10)

“In modern times the convention has been that the Sovereign should not be drawn into party politics, *and if there is doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons. As the Crown’s principal adviser this responsibility falls especially on the incumbent prime minister, who at the time of his or her resignation may also be asked by the Sovereign for a recommendation on who can best command the confidence of the House of Commons in his or her place.*

The application of these principles depends on the specific circumstances and it remains a matter for the prime minister, as the Sovereign’s principal adviser, to judge the appropriate time at which to resign, either from their individual position as prime minister or on behalf of the government.” (emphasis added).

16. Various things emerge from this:

- (a) The principles described above are protocols or conventions. They are not hard-edged rules of law, and so it can be said they do not impose strict legal obligations on anybody.
- (b) The incumbent prime minister plays a key constitutional role in the process. He or she bears the primary responsibility for communicating with the Queen and he or she must determine whether or not to resign. It is,

therefore, a realistic possibility that a prime minister might refuse to resign and refuse to advise the Queen that another individual should be invited to form a Government during the 14-day period provided for in s. 2, whether or not that individual had the support of the Commons.

- (c) The combined effect of the ‘hard edged’ 14-day period in the FTPA and the ‘soft edged’ conventions set out in the Cabinet Manual lead to the result that a prime minister who loses a confidence vote pursuant to the FTPA might, in theory at least, attempt to defy convention, and to frustrate any other party or individual who seeks to form a government, with the result that a general election is triggered.
17. This is important, because s. 2 FTPA only provides a mechanism by which the House of Commons may only express its support for Her Majesty’s *Government*. If a new government is to secure that vote of confidence, a new prime minister must already have been invited to form a government by the Queen. An incumbent prime minister who refused to propose an alternative prime minister to the Queen might seek to rely on his or her status, as the principal adviser to the Monarch, in order to run down the clock and trigger a general election.
18. The Cabinet Manual also affirms that the Cabinet is the executive committee of the Privy Council. All Cabinet members must be Privy Councillors and so, when he advises on who commands the confidence of the House, the prime minister advises the Queen in his or her capacity as a Privy Councillor.¹ I return to this point below when assessing what steps might be taken in the unlikely event that a prime minister were to refuse to inform the Queen that he or she had lost the confidence of the House of Commons.
19. In conclusion, the FTPA contemplates one means by which an incumbent prime minister and government might be replaced during the term of a Parliament. However, as set out more fully below, it does not provide the only means by

¹ Cabinet Manual ¶1.14: “*Cabinet is the executive committee of the Privy Council.*” See also the House of Commons Library Briefing Paper on the powers of the Privy Council at: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7460#fullreport>

which that may be achieved. And it is silent as to the conventions that govern the process by which Parliament might express its confidence in an alternative government, and that government might be commended to the Queen. The remainder of this advice describes those conventions and their possible application in this case.

IN WHAT CIRCUMSTANCES MIGHT THE QUEEN INVITE A NEW PRIME MINISTER TO FORM A GOVERNMENT?

20. As the Cabinet Manual explains, “*The government of the day holds office by virtue of its ability to command the confidence of the House of Commons.*” (¶12). As set out above, in cases where the position is uncertain “*it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons.*”
21. This process is governed by convention, rather than legislation, and raises three questions:
 - (a) Who are “those involved in the political process”?
 - (b) How might those involved in the political process determine who is best placed to be able to command the confidence of the House of Commons?
 - (c) How might those involved in the political process communicate that to the Sovereign, particularly if a prime minister were to be unwilling to do so?
22. The first and most obvious group of people ‘involved in the political process’ are members of parliament. I am not an expert in Parliamentary procedure. However, I consider that the most appropriate mechanism by which the House of Commons might identify a Government that would command their support is by way of a humble address. These are motions, ordinarily tabled by the opposition, that may be debated, amended and voted on like any other motion. Erskine May provides: (¶9.10)

“An Address to Her Majesty is the form ordinarily employed by both Houses of Parliament for making their desires and opinions known to the Crown as well as for the purpose of acknowledging communications proceeding from the Crown. In the House of Commons the procedure upon a motion for an Address is the same as upon an ordinary substantive motion. It requires notice and can be debated, amended and divided upon.”

23. There is no constraint on the subject matter of a humble address: (§9.11)

“Addresses have comprised matters of foreign or domestic policy; the administration of justice; the expression of congratulation or condolence (which is agreed to *nemine contradicente* by the Commons and *nemine dissidente* by the Lords); public appointments; and, in short, representations upon all points connected with the government and welfare of the country; but they ought not to be presented in relation to any bill in either House of Parliament.”

24. Accordingly, a humble address might be proposed to the effect that the House of Commons has confidence in a particular individual to form a Government and humbly inviting the Queen to invite them to do so. In principle at least, the Commons might vote upon and determine its support for first one, then another candidate for prime minister during the same debate, by way of amendments to that motion, and divisions upon the motion as amended; or by way of sequential motions.
25. There is no precedent for the use of a humble address in this fashion. However, I am not aware of any reason of form or principle why it should not be deployed in that way. I also consider that it would be a highly effective means of securing the dual objectives of: (a) identifying an individual who would command the support of the majority of the House of Commons; and (b) communicating that conclusion to the Queen.
26. There is also no authority, or even precedent, concerning what would happen if a prime minister, were to refuse to advise the Queen to invite a different individual to form a government, following a motion of this kind. Needless to say, this would be a breach of the fundamental constitutional understanding that a prime minister is the Queen’s principle advisor and representative in Parliament only because he or she commands the confidence of the House of Commons. Were a prime

minister to refuse to resign, when Parliament had made it clear that it had confidence in another person, that would place the Queen in an intolerable position. I consider that it is vanishingly unlikely that any prime minister would choose to act in that manner.

27. A further alternative mechanism is provided by Standing Order 24. It provides, where relevant:

“(1) On Monday, Tuesday, Wednesday and Thursday a Member rising in his place at the commencement of public business may propose, in an application lasting not more than three minutes, to move the adjournment of the House for the purpose of discussing a specific and important matter that should have urgent consideration. If the Speaker is satisfied that the matter is proper to be so discussed, the Member shall either obtain the leave of the House, or, if such leave be refused, the assent of not fewer than forty Members who shall thereupon rise in their places to support the motion, or, if fewer than forty Members and not fewer than ten shall thereupon rise in their places, the House shall, on a division, upon question put forthwith, determine whether such motion shall be made.

(2) If leave is given or the motion is so supported or the House so determines that it shall be made the motion shall stand over until the commencement of public business on the following day (or, on Thursdays, until the commencement of public business on the following Monday) when proceedings upon it shall be interrupted after three hours, or, if the Speaker directs that the urgency of the matter so requires, until seven o'clock on the same day if it is a Monday, Tuesday or Wednesday or four o'clock if it is a Thursday.

...

(4) In determining whether a matter is proper to be discussed the Speaker shall have regard to the extent to which it concerns the administrative responsibilities of Ministers of the Crown or could come within the scope of ministerial action. In determining whether a matter is urgent the Speaker shall have regard to the probability of the matter being brought before the House in time by other means.

...

(6) Debate on motions made under this order may include reference to any matter that would be in order on a motion to take note of the subject under discussion, and a motion may be made under this order notwithstanding the fact that a motion for the adjournment is already before the House or is proposed to be made.”

28. Following the passage of the European Union (Withdrawal) Act 2019 and the European Union (Withdrawal) (No 2) Act 2019, it is clear that SO 24 may be relied upon to create Parliamentary space to debate and pass primary legislation.

In this case, we do not consider that this would be necessary. SO 24 might be used, at the Speaker's discretion, to provide for a debate on a motion expressing the confidence of the House of Commons in a particular individual as a prospective prime minister. While a motion of that kind is not directly addressed to the Queen – in contrast to a humble address – it would be difficult or impossible for a prime minister to ignore a vote of that kind.

29. Accordingly, I conclude that:

- (a) There are established mechanisms by which the House of Commons may express its support for a new prime minister, as a means of communicating with the Queen that that individual should be invited to form a Government.
- (b) There is no established protocol concerning how the Queen would respond if a prime minister were to refuse to resign and refused to recommend that a new government were formed, following a vote of this kind.
- (c) Much the better view is that the Queen, recognising that the prime minister is the representative of the Crown in Parliament, to whom the Crown is answerable in a democratic society, would prefer the views of Parliament – clearly expressed – and resist the attempts of an incumbent prime minister to frustrate those views. That is consistent with the recognised principle that the government “*holds office by virtue of its ability to command the confidence of the House of Commons.*” (Cabinet Manual ¶12)
- (d) Ultimately, I consider that an incumbent prime minister is vanishingly unlikely to refuse to resign, if Parliament has expressed their confidence in another person, because to behave in that manner would contravene established constitutional principle and would be putting the Queen in an impossible and intolerable position, and because, if placed in so invidious a position, it is likely that the Queen would invite the person who was proved to command the confidence of the House to become her new prime minister in any event.

30. I am affirmed in that conclusion by the conclusions of Anson's *Law and Custom of the Constitution*, 3rd ed, vol 1, p. 37, describing the reign of Queen Anne:

“In the history of the time the rudiments of party government appear. The personal wishes of the Queen have great influence; a ministry does not stand or fall together but ministers of one party replace ministers of another by a gradual process of change. And yet *the opinion of the country represented by a majority in the House of Commons determines the Queen's choice and by that opinion she must abide.*” (emphasis added).

31. He notes that this process solidified over successive centuries. By the 19th century “*the pressure of such majorities upon the choice of the Crown now became irresistible.*” (p. 38). By Victoria's reign, the Queen did not follow personal or political preferences but the choice was “*really an endeavour to find ministers acceptable to the majority of the House of Commons and to the people, who had sent that majority to Parliament.*” (p. 39)

32. I am also affirmed in that conclusion by the logic and structure of FTPA. As set out above, FTPA sets out the ‘trigger’ for the 14-day period and a mechanism by which it may a government may come to an end (without an election), namely a motion in Parliament that the House now does have confidence in ‘Her Majesty's Government’. Such a motion could be passed either because the House has acquired confidence in the former government (perhaps by way of that government altering its political position in some material way), or because the House has expressed confidence in some other person to lead an alternative government, and so the Queen has, in that period, invited someone other than the incumbent at the time of the first vote to become prime minister and to form a new government. It is silent as to the processes by which the House of Commons may express its views to the Queen as to the person who should be invited to form a Government. In making FTPA, therefore, Parliament assumed that there were established mechanisms by which a new government might be commended to the Queen (during the 14-day period). It did not legislate for that process but left those conventional mechanisms in place. Accordingly, I consider that this is an area governed entirely by convention and that if the Commons clearly and unambiguously articulates its views to the Monarch, the prime minister of the day is bound to convey that view to the Queen.

33. In the unlikely event that a prime minister refused to resign and declined to advise the Queen as to the views of the House of Commons, the Queen is entitled to (indeed convention requires and Privy Council authority, discussed in paragraph 36 below, suggests that she should) act on some other source of evidence. The most obvious – but by no means the only - basis for her action is a humble address. On the strength of that humble address, the Queen could invite someone else to form a new government without the incumbent prime minister offering his or her resignation first.

WHAT MECHANISMS MIGHT BE AVAILABLE IF PARLIAMENT IS NOT IN SESSION?

34. The position is more complicated if Parliament is not in session. Such a situation might arise where Parliament was prorogued, or suspended, whether before or after a no confidence vote pursuant to s. 2 FTPA.²
35. In those circumstances, it is much more difficult for those involved in the political process to determine and articulate who commands the confidence of the House of Commons. Neither of the mechanisms described above would be available.
36. There is some judicial authority that in those circumstances, it would be open to the majority of the House to communicate with the Queen instead by way of a letter. Some guidance on this question is given in the decision of the Privy Council in *Alhaji DS Adegbenro v SL Akitola and another* [1963] 3 WLR 63. Section 33 of the Constitution of Western Nigeria provided that the Governor should not remove the Premier from office “*unless it appears to him that the Premier no longer commands the support of the majority of the members of the House of Assembly.*” 66 members of the House of Assembly – which was made up of 124 members – wrote to the Governor stating that they no longer supported the Premier. There was no vote in the Assembly to that effect.

² This is not entirely academic. In 2008 the Canadian Prime Minister, Stephen Harper, prorogued Parliament in order to avoid a no confidence vote. However, in the light of the decision of the Supreme Court in *Miller (No 2) and Cherry & Others v the Prime Minister* [2019] UKSC 41 handed down this morning, such use of the power of prorogation (to avoid a no confidence vote or its consequences) would be unlawful.

37. The Privy Council, led by Viscount Radcliffe, noted that the constitution of Western Nigeria should be construed in the light of the British constitutional system, on which it was partially based. He noted that: [628]

“It recognises the basic assumption of that Constitution, as it has been developed, that, so long as the elected house of Representatives is in being, a majority of its members who are prepared to act together with some cohesion is entitled to determine the effective leadership of the Government of the day. It recognizes also one other principle that has come to be accepted in the United Kingdom: that, subject to question as to the right of dissolution and appeal to the electorate³, a Prime Minister ought not to remain in office as such once it has been established that he has ceased to command the support of a majority of the House. But, when that is said, the practical application of these principles to a given situation, if it arose in the United Kingdom, would depend less upon any simple statement of principle than upon the actual facts of that situation and the good sense and political sensitivity of the main actors called upon to take part.”

38. He went on to note that the support of the House would ordinarily be shown by way of proceedings in the House itself. However, it is unreal to suggest that activities outside the House are not capable of also providing an indication of the support enjoyed by a prime minister: [628-9]

“It is said, too, that the "support" that is to be considered is nothing else than support in the proceedings of the House itself, and with this proposition also their Lordships are in agreement. They do not think, however, that this is in itself a very pregnant observation. No doubt, everything comes back in the end to the question what action the members of a party or a group or a combination are resolved to take in proceedings on the floor of the House; but in democratic politics speeches or writings outside the House, party meetings, speeches or activities inside the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called upon to vote in the House, and it appears to their Lordships somewhat unreal to try to draw a firm dividing line between votes and other demonstrations where the issue of "support" is concerned.”

39. Their Lordships concluded that the Sovereign must weigh the evidence before them on each occasion and that there was nothing in the wording of s. 33 of the Constitution of Western Nigeria that led to the opposite result.

³ Which Prime Ministerial right to call a general election was abolished in the UK by the FTPA.

40. This authority has not been doubted subsequently, though its comments as to the operation of the English constitution are clearly *obiter*. I consider that *Adegbenro* offers support for the proposition that Members of Parliament might express their support for, and confidence in, a potential prime minister by extra-Parliamentary means, if Parliament is not in session at the relevant time. The most obvious mechanism would be by way of adding their signatures to a document which stated that they would support a particular prime minister.
41. I do not consider that the passage of the FTPA has altered the constitutional convention, recognised by the Privy Council in *Adegbenro* and the Cabinet Manual, that the Queen will choose, as her prime minister and representative in Parliament, a person who has the confidence of the legislature. The FTPA simply provides an exclusive statutory mechanism through which a general election may be called earlier than five years after the previous general election. It is silent as to the mechanisms by which the individual or party that enjoys the confidence of the House of Commons might be identified and commended to the Queen during the statutory 14 day period or otherwise. This is left to convention and those conventions will govern the process, whether following a vote of no confidence under s. 2 FTPA, or in circumstances where no such vote has occurred.
42. Against this view, I anticipate that might be suggested by an incumbent prime minister, who did not wish to step down that:
- (a) The confidence of Parliament in an alternative prime minister may only be expressed by way of a vote in Parliament and communicated by the incumbent to the Queen;
 - (b) There is no need to provide for the removal a prime minister other than through a vote of no confidence in the incumbent in Parliament, because Parliament will have the opportunity to express its views as soon as it is recalled; and

- (c) The FTPA has now provided a comprehensive statutory scheme for the removal of a government, by way of a vote of no confidence, as set out in s. 2(4).
43. However, the first limb of this argument is contrary to Privy Council authority in *Adegbenro*.
44. As to the second, if this were right, Parliament could be frustrated in its choice of prime minister by a prime minister proroguing or refusing to recall Parliament during a recess, in order to prevent Parliament expressing its view through what (on this argument) would be the only means open to it, and this is contrary to the constitutional principle that a prime minister is entitled to be recognised as such only because he or she commands the support of Parliament, not in spite of unequivocal evidence that he or she does not.
45. As to the final point, I have already explained why I do not find it persuasive. The headnote to FTPA describes it as “*An Act to make provision about the dissolution of Parliament and the determination of polling days for parliamentary general elections; and for connected purposes.*” FTPA does not regulate the mechanisms by which the Monarch may be informed – by Parliament or the Privy Council, acting through the prime minister – as to the person who commands the confidence of the House and should be invited to replace an existing prime minister.
46. I say ‘the Privy Council, acting through the prime minister’, because, as set out above, constitutionally, his or her role in conveying advice to the Queen arises as a result of his or her membership of the Privy Council. In modern times, the Privy Council as a whole has only been consulted on who should succeed the throne in the event of the sovereign’s demise. Although the Privy Council is a body which consists of every living Cabinet minister or former Cabinet minister, every judge of Her Majesty’s Court of Appeal or Supreme Court, and every living person who has been a leader of Her Majesty’s Loyal Opposition, it is now the Cabinet which advises the Queen and (as noted in the Cabinet manual), it is now

for the prime minister to act as her prime source of advice in relation to executive action.⁴

47. If, however, in the face of clear evidence (such as a letter from the majority of MPs), a prime minister were to refuse to convey the view of the majority of the House to the Queen, in accordance with constitutional convention, then in theory, the entire Privy Council, or a body of Privy Councillors might be summoned to advise the Monarch that a particular individual commands the support of the Commons (because the prime minister had failed to fulfil their advisory role on their behalf). But I would not expect this situation to arise, because I would expect every Parliamentarian, including the Prime Minister, to recognise that the right to exercise executive authority in the United Kingdom arises from commanding the confidence of the majority of the elected House of Commons.

CONCLUSION

48. A prime minister speaks for the Crown in Parliament because the Queen is satisfied that there is no other person who commands the confidence of the House of Commons. The House of Commons has more than one mechanism available to it by which it could identify an individual in whom it had confidence and communicate that view to the Queen. Even in the face of an incumbent prime minister who refused to resign, much the more likely outcome is that the Monarch would follow the advice of Parliament on this question.
49. Those mechanisms are available, both when Parliament is in session, by means of a humble address, and when it is not.
50. Parliament could inform the Monarch of its confidence in a person to command its confidence as Prime Minister by means of a humble address without the need first to express lack of confidence in an incumbent prime minister, and without triggering the 14 day period for holding a general election under the FTPA.

⁴ Anson, *The Law and Custom of the Constitution*, 3rd edn., (1907), Vol II, pp. 40, 77 and 96-7.

51. In any event, the FTPA does not establish the only means by which a government and prime minister might be replaced without a general election. Indeed, it is silent as to how the Commons might identify that it has confidence in a new prime minister and communicate that confidence to the Queen (during the statutory 14-day period). That process is governed by convention and those conventions will apply equally whether or not Parliament has passed a no confidence vote in the Government, pursuant to s. 2 FTPA.

52. While it may be more difficult in practical terms for the Commons to identify an individual in whom it has confidence and communicate that confidence to the Queen, if it is not in session, the authority of *Adegbenro* establishes that it is not impossible, either as a practical question or as a matter of constitutional convention. The common sense position – consistent with the limited authority in this area – is that if a majority of members of the House of Commons were to clearly identify an individual in whom the House has confidence, the Queen would invite that individual to form a new government, whether or not that individual was identified via a vote in Parliament and whether or not the incumbent Prime Minister was prepared to resign.

HELEN MOUNTFIELD QC

Matrix Chambers

24 September 2019