Claim No: CO/3214/2018

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN: -

THE QUEEN
on the application of

SUSAN WILSON & OTHERS

Claimants

-and-

THE PRIME MINISTER

Defendant

-and-

THE ELECTORAL COMMISSION

Interested Party

CLAIMANTS' REPLY

Mischaracterisation of the claim

1. The Defendant's Summary Grounds of Resistance ('SGR') mischaracterise the claim and then purport to resist it on seven grounds (which in fact collapse into three). The Claimants briefly address these matters below.

2. The Defendant states that the challenge is to *"(a) the referendum outcome, and (b) the decision to give the Article 50(2) notification."* This conflates distinct points raised and is an incorrect characterisation of the claim and the way that it is put.

3. First, this is not a challenge to the outcome of the Referendum, which the Defendant correctly states was advisory only. Rather, it is a challenge to an executive decision, taken by the Defendant ('the Decision') on 29 March 2017 and to the Notification: *"The target is the Decision […] and the Notification which depends upon it."* [Grounds, §19]. In addition, the Claimant challenges recent decisions by which the Defendant has refused to take any steps in light of the Electoral Commission Reports, ICO Reports and DCMS Reports. The Defendant's decision has most recently been confirmed by the Secretary of State for Exiting the EU in his evidence to the EU Scrutiny Committee on 5 September 2018 and is set out at paragraph 7 below ('the Recent Decisions' – see Grounds, at Ground (6) and §6, on p.4).

4. The Decision was wholly and solely dependent upon the Referendum result and, necessarily therefore, upon the Referendum having been lawful and/or democratic. Put another way, it would not have been lawful for the Defendant to decide to take the UK out of the EU on the basis of a Referendum in which there was serious and significant unlawful conduct by significant campaign groups and third parties. The challenge is thus based on the serious illegalities perpetrated during the Referendum campaign, which render the result undemocratic and illegitimate. As stated in the Grounds: *"it is irrational for the Prime Minister to treat as binding the result of a Referendum which, had it been binding, would be*

void, by reason of the [misconduct relied upon]" [§(4), on p.2].

5. As stated in paragraph 6 of the Grounds, on 5 July 2018 Fair Vote wrote to the Prime Minister to raise significant concerns regarding the findings of the Electoral Commission and the ICO and asking the Prime Minister: "*to reconsider whether in light of what you know now, you would have triggered Article 50…*". Fair Vote also asked the Prime Minister to consider taking steps to seek an extension of time in relation to the Article 50 process from the EU 27 in order to do one or more of the following: *"(a) hold another vote, possibly under more strictly controlled conditions; or (b) order an independent speedy investigation into what happened, which would bring together all the different strands of illegality mentioned above and consider how best to conduct another referendum*." The Prime Minister refused to do either of the above. Her decision to take no steps at all having regard to the findings of the Electoral Commission is also subject to challenge.

6. That decision was reiterated on 1 August 2018 when the Government responded to a petition that had reached 100,000 petitioners requesting that the Prime Minister revoke the Article 50 notification on the basis of the illegal and corrupt practices found by the Electoral Commission to have taken place by Vote Leave and Leave.EU during the Referendum campaign. It stated:

> *"The British people voted to leave the EU and the Government respects that decision. We have always been clear that as a matter of policy our notification under Article 50 will not be withdrawn.*
>
> *The British people voted to leave the EU, and it is the duty of the Government to deliver on their instruction. There can be no attempt to stay in the EU.*
>
> *The result of the referendum held on 23 June 2016 saw a majority of people vote to leave the European Union. This was the biggest democratic mandate for a course of action ever directed at any UK Government. Following this, Parliament authorised the Prime Minister to trigger Article 50, passing the EU (Notification of Withdrawal) Act.* […]
>
> *We were given a national mandate and this Government is determined to*

deliver a deal in the national interest.

As the Prime Minister has said: "This is about more than the decision to leave the EU; it is about whether the public can trust their politicians to put in place the decision they took." The British people can trust this Government to honour the referendum result and get the best deal possible. To do otherwise would be to undermine the decision of the British people. The premise that the people can trust their politicians to deliver on the promises they make and will deliver them in Parliament is fundamental to our democracy. […]

It is the Government's duty to deliver the will of the people and reach a desirable final outcome."

7. On 5 September 2018, Dominic Raab, Secretary of State for Exiting the EU further stated in the European Scrutiny Committee in response to a question from Darren Jones MP regarding the illegality of the Referendum campaign and the fact that the relevant illegalities which would have voided an election result:

> *"we are going to give effect to the referendum because it was the decision of the British people and I think in fairness notwithstanding the seriousness of any impropriety I don't think any of that would have vitiated or invalidated the decision of the British people."*

8. Accordingly, this challenge addresses not only the Decision and Notification, but also the subsequent decisions by the Prime Minister refusing to take any action having regard to the findings by the Electoral Commission, the ICO and the DCMS (see for example relief sought at para. 6(3)(b) Grounds).

9. In so far as the Defendant argues that the claim amounts to a call for a fresh decision (SGR para. 2(d) and 41-42[1]), that is precisely what the letter of Fair Vote dated 5 July 2018 referred to in paragraph 5 above did, and what the petition referred to in paragraph 6 also did. The Government responded negatively to both requests and those decisions are also under challenge in this claim. Further or in

[1] In any event, a fresh decision would be open (if not inevitable) following the quashing of the Decision.

the alternative, if the Court grants the relief sought at paragraph 6(2)(a), the Defendant has the power lawfully to take the decision afresh, under the 2017 Act, in any event.

Defendant's Grounds of Resistance

10. The seven grounds of resistance set out in paragraph 2 can be collapsed into three points. The Claimants will not pursue the Human Rights Act argument (A3P1) set out in the Grounds.

(1) **Time:** First, it is said that the claim is out of time (**paras. 2(a) and (b), 19-37**).

(2) **Unarguable:** Secondly, the claim is said to be unarguable because, at the time that the Prime Minister took her decision to take the UK out of the EU, she did not know that the Referendum had been conducted unlawfully, or alternatively, she did know that it had been conducted unlawfully and took that into account (**paras. 2(c), 2(e) 38-49**).

(3) **Non-justiciable:** Thirdly, it is said that the claim is non-justiciable because:-

(i) **Referendum advisory:** Alternatively, it is said that there can be no challenge to a Referendum result when the result has no legal consequences: **§§ 2(e) and (f)**;

(ii) **Confirmed by Parliament:** Alternatively, it is a decision that has been confirmed by Parliament and is not therefore open to challenge: **§§ 2(g) and 53**;

(1) Time

11. This is dealt with at paragraphs 10-15 of the Grounds. In addition, it should be noted that, as set out above, the Defendant has ignored the fact that the recent decision of the Prime Minister not to take any steps at all in response to the findings of the Electoral Commission, ICO or DCMS are under challenge. These are well within time.

12. In so far as the Defendant purports to rely on the time limits set out in paragraph

19 of schedule 3 to the 2015 Act,[2] this provision relates to "*any proceedings for questioning the number of ballot papers counted or votes cast in the referendum as certified by the Chief Counting Officer or a Regional Counting Officer or counting officer*". Accordingly, it is irrelevant to this claim, which is not a challenge to the number of ballot papers counted or votes cast: see Grounds para 21(2).

13. As to the suggestion at paragraph 28 of its SGR that the Claimant should have brought this claim at a time before the Electoral Commission reached its findings in respect of Vote Leave and Leave.EU, it is submitted that such a claim would have been rejected as being premature, academic and/or for failure to pursue an alternative remedy.

14. In that regard, the Defendant fails to mention that the Electoral Commission twice closed its investigations into Vote Leave spending on 4 October 2016 and the second on 21 March 2017. On 23 October 2017, following the release of information obtained in September 2017 from FOIA requests to the Electoral Commission, a judicial review challenge was brought to those decisions by the Good Law Project, arguing inter alia that on the evidence available it was clear that the relevant offences (relating to 'working together') had taken place. In addition, the Good Law Project raised issues regarding the Electoral Commission's lack of progress in relation to its investigation into Leave.EU, which had been opened by the Commission on 21 April 2017.[3]

15. As a result of the Good Law Project claim, on 20 November 2017 the Electoral Commission decided to re-open its investigation into Vote Leave and Darren Grimes.[4] It also opened a new investigation into Arron Banks.[5] Those

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2 §§19-20 of the Defendant's SGR

3 At para. 71 of its Grounds of Claim

4 https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/news-releases-donations/electoral-commission-statement-regarding-vote-leave-limited,-mr-darren-grimes-and-veterans-for-britain-limited

5 https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-

investigations were not concluded until May and July 2018, as set out in the Grounds in this case. Because the Electoral Commission re-opened its investigation, the Good Law Project was refused permission for judicial review in relation to Ground 2 of its grounds of claim, namely that on the evidence available to the Electoral Commission, the Commission should have found that the relevant offences had been committed. The Court refused permission on paper and following an oral hearing, on the basis that the determination of that question was a matter for the Electoral Commission. The Court stated that the Claimant would have to await the outcome of the Commission's findings before that part of its challenge could be heard, since to do so before then would be academic and premature.

16. Seen in this light, it is inconceivable that this claim could have been brought on the basis of speculation as to what the Electoral Commission might or might not find in relation to conduct in the Referendum.

17. As regards the contention at para. 33 SGR that this Court should refuse permission on a separate ground that "*even if part of this claim could be regarded as having been brought within time, it has been brought with obvious undue delay*" such that relief should be refused pursuant to s. 31(6)(a) Senior Courts Act 1981 on the basis that to grant permission would "*plainly be detrimental to good administration*", the Claimant submits:

    (a) First, as explained in the Grounds and above, this claim has been brought extremely swiftly following the Electoral Commission releasing its findings and the decision of the Prime Minister not to take any steps in response. A claim could not have been brought before those findings for the reasons set out above.

    (b) Secondly, a core part of the Claimants' case is that the failure of the

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centre/news-releases-donations/electoral-commission-statement-regarding-better-for-the-country-limited-and-mr-arron-banks

Defendant to respond in any way to the findings of illegal and corrupt practices, which undermine the legitimacy of the Referendum, is plainly detrimental not only to good administration but to democracy and the rule of law. This claim raises issues of fundamental constitutional importance, namely the effect of significant fraudulent activity in breach of referendum/election laws upon a democratic vote. This plainly goes to the heart of 'good administration'.

(c) Thirdly, it is wrong for the Defendant to suggest that this claim impinges on negotiations with the EU27 in any impermissible sense; it is concerned with the legality of domestic executive action. Moreover, at paragraph 36 of her SGR, the Defendant misquotes the Claimants. The Claimants nowhere say that relief is being sought to keep the UK in the EU. The relief presumably being referred to is that set out in paragraph 6(3)(c) Grounds, namely "*lawfully to consider extending the date of 'exit day' under s. 20(4) of the European Union (Withdrawal) Act 2018*." That discretionary power relates to the retention of the application of the 1972 Act after 29 March 2019.

(2) 'Unarguable'

18. The Defendant makes two contradictory submissions.

19. First, that because the Prime Minister did not have the facts which show that the conduct of the Referendum involved significant illegal and corrupt practices at the time she took her decision, her decision must be deemed lawful: para. 41 SGR. Put another way, the Defendant argues that even accepting that her decision to notify would not have been lawful had she had such knowledge, because she did not have such knowledge, the Court is precluded from reviewing its legality since it can have regard only to the facts known to the decision maker at the time.

20. That submission is wrong for two reasons:

(a) it ignores the nature of the claim which relates not only to the original

decision but to the Defendant's recent decisions, referred to above, to ignore the findings of the Electoral Commission, ICO and DCMS; and

(b) in any event, a court is entitled to review an error of fact taking into account new evidence (*R(A) v Croydon LBC* [2009] UKSC 8). An error of fact constitutes a separate ground of review (*E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] Q.B. 1044). In that case, the court of set out four tests: a) the mistake must be on some fact, b) the fact must be uncontentious, c) the claimant must not be responsible for the mistake, and d) the mistake must have been material in the decision. All the tests are met in the present case.

21. Secondly, and in contradiction to the above, the Defendant submits that irregularities in campaign financing were "*a matter of public record*" and therefore known to the Prime Minister at the time that she decided to make the Article 50 notification. Accordingly, the Defendant says that it is wrong for the Claimants to say that she took her decision to take the United Kingdom out of the EU unaware of the serious illegalities: paras. 2(2) and 44-45 of the SGR. If correct, this submission raises serious questions that require further examination. If it is being said that the Prime Minister was fully aware of the relevant illegalities, including their seriousness and significance but nonetheless took the decision to notify under Article 50(2), that raises serious questions of legality, on a number of fronts. Disclosure is required on this issue in accordance with the duty of candour (and for this reason the Claimants have made a Request for Further Information – copy herewith).

22. As to the submission at para. 48 of the SGR that whether a vote is 'democratic' is a 'political' or a 'value judgment' that the Defendant was entitled to make, this point gets the Defendant nowhere. The question for the Court is one of law: was the Referendum conducted lawfully and if not, was it lawful for the Defendant to exercise her discretionary power under s. 2 of the 2018 Act to take the UK out of the E\U on the basis of its result?

23. It is well established that there are two species of conduct rendering the outcome of an election void [Grounds, §21(3), p.15]:

    (a) the candidate is personally guilty, or guilty by his agents, of any corrupt or illegal practice (as to which proof of its effect is irrelevant and not required – see *Rahman* at [33]); and

    (b) prohibited general conduct of which the candidate need not have been aware under section 164(1) of the 1983 Act, normally called 'general corruption' (as to which all that is required is that it *"may reasonably be supposed to have affected the result"*).

24. The findings of the Electoral Commission Reports included findings of misconduct by Vote Leave, the designated campaign, and Leave.EU were sufficiently serious as to amount to illegal or corrupt practices and/or fraud. There can be no doubt that in the context of an election, whether they fell within the first or second category above (and the Claimants submit that they would have fallen within the first), they would have rendered the outcome of the election void. That is highly relevant to the question of whether the Prime Minister's decision to take the UK out of the EU was lawful and/or further, whether she acted lawfully in taking no steps following revelations of the relevant corrupt and illegal practices.

25. The response of the Defendant at paragraph 49 of the SGR is to say that this is of no relevance because the Electoral Commission reports do not "*suggest that any breaches of campaign finance, or other, requirements identified therein mean that the result of the referendum was procured by fraud…[such that] the reports do not, therefore, suggest (still less demonstrate) that the decision to give the Article 50 notification cannot fairly or properly be described as democratic".*

26. It is unclear what the Defendant means. If she is saying that, absent a finding by the Electoral Commission that the result of the Referendum was caused by the fraud/illegal and corrupt practices (or would have been different absent such fraud/corrupt & illegal practices), the Prime Minister acted lawfully in taking no

steps in response to the Electoral Commission's findings, that cannot be correct.

27. First, if the Referendum had been an election, including a local election (or even a local referendum) the result would have been voided on the basis of the relevant conduct (whether such conduct fell into the first or second species set out above). Secondly, having regard to that, it could not have been reasonable for the Prime Minister to rely on the result as the basis for taking the UK out of the EU had she had the information prior to the Article 50 notification on 29 March 2019. Similarly, her decision to take no action at all in response to the findings of corrupt and illegal practices was unlawful having regard to the original basis for her decision, its grave implications and the necessity for a democratic, that is, lawful mandate.

(3) Non-justiciable

28. At para 51(b) of the SGR the Defendant makes a general point, saying that the Court is not concerned with issues of 'constitutionality' but only with issues of 'legality'. This is a distinction without a difference. The British Constitution is based on the principles of legality, which include constitutional principles as set out in the common law and constitutional instruments: In *R (Buckinghamshire County Council) v Transport Secretary* ([2014] UKSC 3, [2014] 1WLR 324, para. 207, Lord Neuberger and Lord Mance, with whom the rest of the Court agreed, stated as follows:

> *"The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional*

> *instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation."*

29. Democracy and the connected right to free and fair elections are a central plank of the UK constitution. The Supreme Court recognised the 'right to vote' (albeit not a common law right of universal suffrage) as a 'basic or constitutional right in *Moohan and another v Lord Advocate* [2014] UKSC 67, [2015] AC 901, where Lord Hodge said (para. 33): '*It is also not in doubt that the judiciary have the constitutional function of adapting and developing the common law through the reasoned application of established common law principles in order to keep it abreast of current social conditions*.' Further, Lord Hodge did not rule out "*that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful*": para. 35. On constitutional rights in the common law, see further: *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, paras. 58-62 (Lord Rodger).

30. To suggest that the principle of 'democracy' or the concept of 'democratic' is nothing more than a political or value judgement ignores not only fundamental principles of the rule of law as reflected in the common law but also the history of the electoral law as enacted by Parliament. In *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 42, Lord Bingham explained the essential role of the courts in defending democracy:

> *"I do not . . . accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. . . . But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic."*

(i) Referendum advisory

31. The Defendant says the claim cannot run because the Referendum was advisory and has no legal consequence (para. 2(f)). This is manifestly wrong in the context of this case. As the Defendant has repeatedly stated her decision was made on three bases:

    (a) the belief that the Referendum result properly (and lawfully) reflected the *'will of the people'*;

    (b) the Government's manifesto commitment to implement the result of the Referendum; and

    (c) the Defendant's consequent decision to treat the Referendum result as binding.

32. Accordingly, as a result of the Defendant's approach the Referendum had a direct legal consequence: it resulted in the Defendant exercising her power to decide to take the UK out of the EU and notifying the EU to that effect.

33. In any event, there is nothing to prevent this Court declaring a consultation unlawful irrespective of whether or not that consultation was binding: e.g. *R (Stirling v Haringey LBC)* [2014] UKSC 56, at [23]-[28] *per* Lord Wilson and [35]-[41] *per* Lord Reed and [44]. Whilst a decision maker must form his own conclusion independently of the view of any particular section of consultees, such consultations are regularly the subject of Judicial Review: *West Berkshire DC* [2016] EWCA Civ 441; [2016] 1W.L.R. 3923 at [62]. Further, a decision made on the basis of an unfair consultation may be unlawful: *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin); [2007] Env. L.R. 29 (QBD (Admin)).

(ii) Confirmed by Parliament

34. The Defendant says that the claim is non-justiciable because Parliament has confirmed, by passing the 2017 and 2018 Acts, that the UK will leave the EU in March 2019. That analysis is incorrect. Neither Act has the effect contended.

35. By the 2017 Act, Parliament conferred power on the Prime Minister, the lawful exercise of which is in issue: *Webster*, at §13 (Claimant's Grounds §42). In *Webster*, the Court accepted the Government's own submissions that the Prime Minister was given a discretionary power to decide that the UK should leave the EU, which she had to exercise lawfully.

36. As to the 2018 Act, this is nothing to the point.

    (a) By the 2018 Act, Parliament decided to repeal the 1972 Act with effect from 29 March 2019 unless the Government decided to change that date, for which it was given executive powers (s.20(3) and (4)).

    (b) Further, far from the 2018 Act amounting to a decision by Parliament to take the UK out of the EU:

        (i) the 2018 Act did not provide for the UK to leave the EU;

        (ii) on its proper construction, the 2018 Act was consequential upon the Decision and did not ratify the lawfulness of the Decision or Notification;

        (iii) the process set out in s.13 of the Act, which was heavily contested, introduced a complex – and constitutionally unique – process of parliamentary approval of the outcome of negotiations with the EU so as to enable Parliament to reject the Withdrawal Agreement, the Act remaining silent on what happens if a Withdrawal Agreement is rejected.

    (c) Finally, the legality of the Referendum and the Prime Minister's decisions

consequent on the result and the recent Electoral Commission findings are free-standing matters that are central to how Parliament approaches the issues before it. Parliamentarians are entitled to know both whether the Referendum was unlawful (that is, involved illegal and corrupt practices) and whether the Prime Minister's decisions to take the UK out of the EU and not to take any steps following the reports of the Electoral Commission, ICO and DCMS were lawful.

37. Finally, as to the Defendant's argument that the Claimants should pursue the alternative remedy of Part 8 proceedings for a declaration that the Referendum involved corrupt and illegal practices or fraud, such proceeding would now appear to be inappropriate given the factual averments made by the Defendant and, in any event, the most suitable forum for this claim is the Administrative Court.

PATRICK GREEN QC

JESSICA SIMOR QC

PAVLOS ELEFTHERIADIS

ADAM WAGNER

REANNE MACKENZIE

7 September 2018

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