CO/3214/2018

IN THE HIGH COURT
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

SUMMARY GROUNDS OF RESISTANCE

A. INTRODUCTION AND SUMMARY

1. The principal ground of claim is the contention that the decision of the Prime Minister, made on 29 March 2017 (ie some 16 months ago), to give notification to the European Council of the UK's intention to withdraw from the EU, was unlawful and should be quashed. The necessary predicate to that submission is that the outcome of the EU Referendum, which was declared on 24 June 2016 (ie more than two years ago) was unlawful and should be quashed or declared to be unlawful. The grounds for making the claim accordingly first arose either on 24 June 2016 or on 29 March 2017 (at the very latest, when the Article 50 notification was given).

2. Permission to apply for judicial review should be refused:

a. First, the claim is out of time.

b. Second, and separately, permission should be refused under s.31(6)(a) of the Senior Courts Act 1981, on the basis that the claim has been brought with undue delay and that to grant the relief sought would give rise to the clearest possible detriment to good administration.

c. Third, and most fundamentally, the central contentions in the claim are substantively unarguable. The Claimants' principal contention is that the Prime Minister's decision to give Article 50 notification on 29 March 2017 is rendered unlawful because of the conclusions of the Electoral Commission that were published in May 2018 and July 2018 (ie more than a year after the impugned decision was taken). However, judicial review is concerned with the legality of the decision made by a public law decision-maker at the date the impugned decision is taken, based on the material that was available at that time. It follows that the fundamental basis of the challenge is misplaced, unarguable and bound to fail.

d. Fourth, and relatedly, the correct basis on which any claim for judicial review relying on the Electoral Commission's 2018 reports would properly fall to be advanced by the Claimants would be by way of a submission that the reports call for a "fresh decision" by the Prime Minister. When the claim is (properly) formulated in this way it becomes crystal clear that the Claimants are seeking to impede the UK's on-going negotiations with the EU27, which are non-justiciable.

e. Fifth, the allegation of 'error of fact' upon which the claim is predicated is unsustainable. As the Claimants' SFG acknowledge, at the time the decision to give Article 50 notice was taken it was a matter of public record that campaigners may have breached campaign finance requirements, and other requirements, during the EU Referendum campaign. The contention that the decision to give Article 50 notice was founded on a premise that there had been universal compliance with those requirements is therefore incorrect and unarguable.

f. Sixth, the EU Referendum was advisory and had no legal consequence of any sort.

g. Seventh, Parliament has now confirmed, by passing the 2017 and 2018 Acts (as defined below) that the UK will leave the EU in March 2019. Any challenge to the decision that the UK will leave the EU must – at this stage – be advanced by political mechanisms. The claim is accordingly academic and/or non-justiciable.

3. In summary, the claim is flawed and bound to fail at every level. Permission to apply for judicial review should be refused accordingly.

B. BACKGROUND

4. Section 1 of the European Union Referendum Act 2015 ("**the 2015 Act**") provided for a referendum on the question as to whether the UK should leave or remain a member of the EU ("**the EU Referendum**"). The 2015 Act did not provide for the EU Referendum to have any legal consequence. So far as relevant, the 2015 Act provided that:

   a. A referendum would be held on whether the UK should remain a member of the EU: s. 1(1)
   b. Certain legal controls on the conduct of campaigning and campaign finance controls would apply, including Part 7 of the Political Parties, Elections and Referendums Act 2000 ("**the 2000 Act**")(subject to the specific provisions of Schedules 1 to 3 of the 2000 Act): s. 3
   c. Any legal challenge to the outcome of the EU Referendum must be brought by judicial review within 6 weeks of the outcome: Sch 3, paragraph 19. Parliament elected not to provide any mechanism for an extension of time in respect of such a legal challenge.
   d. Further, in enacting the 2015 Act Parliament elected not to make the outcome of the EU Referendum subject to challenge by way of electoral petition cf. the position in respect of local referendums (see further below). This was Parliament's legislative choice.

5. The EU Referendum took place on 23 June 2016. A majority (approximately 52%) of those who voted in the EU Referendum voted in favour of the UK leaving the EU. No

legal challenge to the EU Referendum outcome was made within the six week period provided for in the 2015 Act.

6. Neither the Electoral Commission reports of May and July 2018 nor any of the other material referred to in the claim establishes that there was any error in the counting of votes or any wrongdoing or unlawful conduct that affected the outcome of the Referendum. The high water mark of the material referred to in the 2018 Electoral Commission reports is that some individuals and bodies involved in the campaign breached spending limits or committed other breaches of campaign financing requirements.

7. On 2 October 2016, the Prime Minister announced that the Government would commence the formal process of leaving the EU before the end of March 2017.

8. On 24 January 2017, the Supreme Court handed down its judgment in R (***Miller & Ors) v Secretary of State for Exiting the European Union*** [2018] AC 61. A majority of the Supreme Court held that Article 50 notification could only lawfully be given by the Government if Parliament provided prior authorisation for it by primary legislation (see esp. §§82, 101, 115, 122).

9. The procedure for withdrawing from the EU is set out in Article 50 of the Treaty on the European Union ("**the TEU**"). This provides that the member state that is exiting must notify the European Council of its intention: Article 50(2). Article 50(3), TEU provides in relevant part:

"The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend the period."

10. On 24 February 2017, the Electoral Commission announced that it was commencing an investigation into potential breaches of campaign spending limits during the EU

Referendum[1]. The investigation was stated to include the spending returns submitted by both the lead campaign bodies – 'Britain Stronger in Europe' and Vote Leave Limited: see SFG, §54.

11. In March 2017, the Electoral Commission published its 'Report on the regulation of campaigners at the referendum on the UK's membership of the European Union held on 23 June 2016'. The report noted, amongst other things, that: (a) campaigners that registered to campaign for the UK to remain in the EU reported spending £19,309,588, and (b) campaigners that registered to campaign for the UK to leave the EU reported spending £13,332,569[2] (ie 'remain' campaigners reported spending approximately £6 million more than leave campaigners during the EU Referendum campaign).

12. On 16 March 2017, Parliament enacted the European Union (Notification of Withdrawal) Act 2017 ("**the 2017 Act**"). Section 1(1) of the 2017 Act provided Parliamentary approval for the Prime Minister to issue notification under Article 50(2) TEU.

13. On 29 March 2017, the Prime Minister notified the EU of the UK's intention to withdraw under Art 50(2) of the TEU. The European Council accepted the notification.

14. In April 2017, the Electoral Commission formally commenced the investigation relating to Leave.EU's EU Referendum campaigning that culminated in its May 2018 Report. As the report explains, the decision to commence an investigation was based on various publicly available information dating from 2015-2017. The Electoral Commission investigation that culminated in the July 2018 report was commenced in November 2017.

15. In March 2018, there was an emergency debate in Parliament which addressed a number of the issues that form the subject-matter of the Electoral Commission's May and July 2018 reports. This was all a matter of public record.

[1] https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/news-releases-donations/details-of-major-campaign-spending-during-eu-referendum-published-by-electoral-commission.
[2] http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/223267/Report-on-the-regulation-of-campaigners-at-the-EU-referendum.pdf.

16. On 26 June 2018, Parliament enacted the European Union (Withdrawal) Act 2018 ("**the 2018 Act**"). Section 13 provides for Parliamentary approval of the outcome of negotiations with the EU27.

17. The Prime Minister, and Government, are currently engaged in negotiations with the EU27 in respect of the Treaty relating to the UK's withdrawal from the EU.

18. The present claim was issued on 13 August 2018.

C. SUMMARY GROUNDS OF RESISTANCE

(1) The claim is substantially out of time

19. Schedule 3, paragraph 19 of the 2015 Act provides, in relevant part:

> "***Restriction on challenge to referendum result***
> *19(1) No court may entertain 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 unless –*
> *(a) the proceedings are brought by a claim for judicial review, and*
> *(b) the claim form is filed before the end of the permitted period.*
> *(2) In sub-paragraph (1) "the permitted period" means the period of 6 weeks beginning with –*
> *(a) the day on which the officer in question gives a certificate as to the number of ballot papers counted and votes cast in the referendum, or*
> *(b) if the officer gives more than one such certificate, the day on which the last is given."*

20. The Explanatory Notes accompanying the 2015 Act explain that:

> "*Paragraph 19 relates to how the result of the referendum may be challenged in legal proceedings. It provides that any challenge in respect of the number of ballot papers counted or votes cast as certified by the Chief Counting Officer, a Regional Counting Officer or a counting officer must be brought by way of judicial review (sub-paragraph (1)(a)). In addition, the challenge must be commenced within six weeks of the date of the relevant certificate (sub-paragraphs (1)(b) and*

(2)). The six-week period is intended to ensure that sufficient time is allowed for challenges to be brought while avoiding prolonged delay in the final result of the referendum being known."

21. In respect of election petitions challenging Parliamentary elections, on which the claim relies heavily by way of suggested analogy, the time limit for any challenge to the outcome of an election is 21 days, with the possibility of an extension of time of up to 28 days in total: see ss. 121-129 of the Representation of the People Act 1983. These strict, short, time limits cannot be extended: see ***Ahmed v Kennedy*** [2002] EWCA Civ 1793 [2003] 1WLR 1820.

22. As the Court is well aware, CPR 54.5(1) provides that a judicial review claim form must be filed: (a) promptly and (b) in event, not later than 3 months after the grounds to make the claim first arose.

23. The claim is directed to two targets: (a) the EU Referendum outcome, and (b) the decision to give Article 50(2) notification. The grounds in respect of those two matters first arose on 24 June 2016 and 29 March 2017, respectively. The claims are therefore very substantially out of time.

24. As to (a), the challenge to the EU Referendum outcome is a necessary element of the claim. Time in respect of that element began to run when the outcome of the EU Referendum was declared, and the applicable limitation period expired 6 weeks later. Parliament, for the reasons explained in the Explanatory Notes, determined that the relevant limitation period in respect of a challenge to the EU Referendum outcome should not be subject to the possibility of a discretionary extension of time.

25. As to (b), any discrete challenge to the decision to issue the Article 50 notification needed to be brought "promptly" and in any event within 3 months of 29 March 2017. The promptitude requirement was of particular importance in the present case, due to: (a) the nature of the decision in issue, (b) the effect of the Article 50 notice being issued, and (c) the obvious impact of any Court ruling on the on-going UK-EU27 negotiations in respect of a Withdrawal Treaty.

26. The claim was not issued until 13 August 2018, that is: (a) more than two years after the EU Referendum outcome was declared, and (b) approximately 16 months after the giving of Article 50(2) notification.

27. The Claimants argue (SFG, §§10-15) that time should be extended because they wish to rely on the reports of the Electoral Commission that were published in May and July 2018. This argument is untenable.

28. The facts and matters that form the basis of the Electoral Commission reports of May and July 2018 have been in the public domain for some time. By way of example only, there was an emergency debate in Parliament in March 2018 that addressed a number of these very matters. During the same week in March 2018 Parliament was provided with a 50 page legal opinion stating that there were reasonable grounds to conclude that a number of the most significant breaches now relied on by the Claimant had occurred. Indeed, at an even earlier stage the Electoral Commission was subject to judicial review proceedings seeking to compel it to take further action in respect of these matters. If the Claimants wished to challenge either the EU Referendum outcome or the giving of Article 50(2) notification on the basis that they now advance – namely that the EU Referendum outcome was *"procured by fraud"* - they were well able to do so at any time from 2017 onwards. The relevant grounds did not arise for the first time when the Electoral Commission published its reports in May and July 2018. Rather, the Electoral Commission reports are simply further evidence on which the Claimants wish to rely to support the contention that the EU Referendum outcome was *"procured by fraud"*.

29. Further, even if (which is denied) time could be regarded as running from the publication of the Electoral Commission's 2018 reports, the first of the two reports on which the Claimants rely was published on 11 May 2018. On this analysis, the Claimants have waited until the very end of the 3 month limitation period to issue proceedings. In the present context that cannot conceivably satisfy the requirement of promptitude.

30. Accordingly, even if Schedule 3, paragraph 19 is not regarded as precluding the claim, it is submitted that the Claimants require a (very significant) extension of time to bring the claim. This could not be justified:

1) The Claimants have provided no satisfactory explanation for their delay.

2) The delay is very considerable indeed. This is not a case where the Claimants are narrowly outside the time limit. Far from it.

3) Granting the relief sought by the Claimants would obviously give rise to the clearest possible prejudice to good administration (see further below).

4) The claim is in any event without merit/very weak for the reasons explained below.

(2) Detriment to good administration

31. Section 31(6)(a) of the Senior Courts Act 1981 states that:

> *"Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant –*
>
> *(a) leave for the making of the application…*
>
> *if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration".*

32. In contrast to CPR 54.5, section 31(6)(a) does not provide for a time limit. It provides a freestanding basis on which the Court will refuse permission to apply for judicial review.

33. Even if any part of the claim could be regarded as having been brought within time, it has been brought with obvious undue delay, and to grant the relief sought would plainly be detrimental to good administration.

34. There was on any view significant delay between the giving of Article 50(2) notification, the matters on which the claim relies entering the public domain and/or the Electoral Commission's May 2018 report and the date of issue of the claim. The relevant facts were matters of wide public knowledge. There can be no question but that the delay has been "undue" for these reasons and those above.

35. Whether the grant of particular relief would be detrimental to good administration depends on the facts and context (see e.g. ***R v Dairy Produce Quota Tribunal for England and Wales, ex p Caswell*** [1990] AC 738). Material features of the present context are that: (a) Parliament provided that any legal challenge to the outcome of the EU Referendum needed to be brought within 6 weeks of the outcome being declared, and (b) Article 50 notification was given in March 2017, and by operation of public international law the UK will leave the EU in March 2019 (subject to the terms of any Withdrawal Treaty that is agreed).

36. The remedies sought by the Claimants are set out at SFG, §6. In summary, the Claimants seek orders quashing and/or declaring unlawful the EU Referendum outcome and the giving of Article 50(2) notification. It is also suggested, amongst other things, that the Prime Minister should be subject to a mandatory order "to take any other steps to" ensure that the UK remains in the EU after March 2019.

37. The UK is now in the later stages of the negotiations with the EU27 and will leave the EU in March 2019. For the Court to grant the relief in the terms sought at this stage would obviously involve a detriment to good administration of the most serious sort.

(3) The claim is unarguable

38. The legal analysis on which the claim relies is muddled and unclear in a number of respects. The correct legal analysis, and the most obvious reasons the claim is unarguable and bound to fail can be shortly stated.

39. One of the claim's targets is the decision to issue Article 50(2) notification. What is said is that this decision, made on 29 March 2017, is unlawful because of the Electoral Commission's conclusions that were published in its reports in May and July 2018. This contention is hopeless.

40. First, it is trite law that a challenge by way of judicial review to a public law decision must be based on the material that was available to the decision-maker at the time the impugned decision was made. The Prime Minister cannot be said to have acted

unlawfully in making a decision in respect of the giving of Article 50(2) notification on 29 March 2017, because of findings of the Electoral Commission that were not made or published until May/July 2018: ***R v Secretary of State for the Environment ex p Powis*** [1981] 1 WLR 584, 595G per Dunn LJ. For this simple reason alone, the claim is wholly without merit and bound to fail. Permission to apply for judicial review should accordingly be refused.

41. If the Electoral Commission's May and July 2018 reports were to be relied upon to found a claim for judicial review then the proper analysis would require a contention that the content of the reports requires the Prime Minister to take a "fresh decision" of some sort. This is implicitly recognised at §41 of the Claimants' SFG:

"…the current position of the Prime Minister appears to have ignored ***the new facts*** *that have come to light, which show that: (a) her original decision to withdraw the UK from the EU is vitiated as set out in the Grounds…(b) that her current decision to continue with the withdrawal…"* (emphasis added)

42. Thus, it can be seen that the argument that the Claimants' case necessarily entails is that the Prime Minister is subject to an obligation to seek to withdraw the UK's Article 50 notification and/or seek an extension of time from the EU27. The reason the Claimants' SFG go to such lengths to avoid formulating the claim in this way is because doing so makes it crystal clear that what the Claimants are seeking to do is derail or impede the UK's on-going negotiations with the EU, which are non-justiciable: ***R (Webster) v Secretary of State for Exiting the European Union*** [2018] EWHC 1543 (Admin) at §20 per Gross LJ: *"It is to be underlined that the negotiations themselves are non-justiciable"*.

43. Second, the Claimants' central contention that the Prime Minister's decision to give Article 50 notification was based on an 'error of fact', regarding there having been universal compliance with campaign finance arrangements during the EU Referendum, is untenable.

44. As already noted above, and as the SFG admit, allegations that there had been breaches of campaign finance limits etc. during the EU Referendum campaign were a matter of public record at the date of giving Article 50 notification, and it was also a matter of

public record that such allegations were being investigated by the Electoral Commission (and might be found to be made out).

45. The Claimants' contention that the decision was taken in reliance on a proposition that there had been not been any breaches of campaign finance, or other, requirements by campaigners in the course of the EU Referendum is therefore incorrect and unarguable.

46. The Article 50 notice stated as follows:

"*On 23 June last year, the people of the United Kingdom voted to leave the European Union…*

Earlier this month, the United Kingdom Parliament confirmed the result of the referendum by voting with clear and convincing majorities in both of its Houses for the European Union (Notification of Withdrawal Bill)…

Today, therefore, I am writing to give effect to the democratic decision of the people of the United Kingdom…"

47. The facts referred to in the Article 50 notice are that a majority of those who voted in the EU Referendum voted to leave the EU, and that this was subsequently endorsed by votes in Parliament.

48. Neither of these facts is, or could be, subject to challenge in the claim. The description of the decision as "*democratic*", based on the number of votes cast in the EU Referendum and its subsequent endorsement by Parliament, is a political or value judgment. It is not an issue or matter of objective fact.

49. Further, neither of the Electoral Commission reports relied on by the Claimants suggest that any of the breaches of campaign finance, or other, requirements identified therein mean that the result of the EU Referendum was 'procured by fraud'. 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.

50. Third, the issues raised by the claim are on proper analysis non-justiciable. The claim is directed to the Government's exercise of foreign relations powers concerning the UK's withdrawal from one Treaty regime (ie the TEU) and the negotiation of a new Treaty (namely, the Withdrawal Treaty). These are paradigm examples of decision-making exercises that are non-justiciable. The reasons of policy and principle which render such decisions non-justiciable are not altered, and do not cease to apply, because of the judgment of the Supreme Court in ***Miller***. The holding of the majority in ***Miller*** was that because of the particular characteristics and importance of the EU Treaty regime, Parliamentary approval was necessary before the Government could lawfully trigger withdrawal. There is no suggestion or support in the judgment for any contention that orthodox principles of non-justiciability in respect of the conduct of Treaty affairs and negotiations should otherwise be disapplied or diluted. This was confirmed by Gross LJ in ***R (Webster)***.

51. A number of further errors in the analysis on which the claim is based should also be highlighted:

    a. It is asserted that the Claimants have rights under Article 3 Protocol 1 of the European Convention on Human Rights ("**A3P1**") that were engaged in respect of the EU Referendum (SFG, §§5(5), 7(11). However, this is simply incorrect: as is made clear by the binding decision of the Supreme Court in ***Moohan v Lord Advocate*** [2014] UKSC 67. This was clearly explained in the PAP Response but is essentially ignored by the claim. Bizarrely, §7(11) of the SFG refers to the minority judgments in ***Moohan*** in support of the contention that A3P1 applies, without making any reference to the fact that the majority in ***Moohan*** held that it does not.
    b. It appears to be suggested that in exercising its judicial review jurisdiction the Court would not be concerned only with the legality of public law decisions but also with some wider (undefined) notion of 'constitutionality' (see eg SFG, §4). This is incorrect. The Court's jurisdiction is concerned solely with legality, and specifically public law errors in public law decisions. The Court is not the forum for political arguments or disputes. The legal requirements that Parliament determined should apply to the EU Referendum are those contained in the 2015 Act and the supporting 2016 Regulations (SI2016/219).

c. The purported analogy between the EU Referendum and Parliamentary or local elections involving candidates for public officers, upon which the claim relies heavily, is incorrect and unsustainable. As the PAP Response pointed out, the reasons of principle why such an analogy does not hold good were explained in detail by Lord Neuberger in ***Moohan***. As a matter of law, the distinction is reflected in the specific legal provisions that applied to the EU Referendum. As the SFG correctly note (at SFG, §7(20), footnote 7) in enacting the 2015 Act Parliament determined that the EU Referendum outcome should not be subject to legal challenge by way of electoral petition, cf. the different provision made in respect of local authority referendums by the Local Authorities (Conduct of Referendums)(England) Regulations 2012/323, where provision is made for a such a legal challenge to be brought.

d. Relatedly, the suggestion that the outcome of the EU Referendum could be quashed/declared unlawful simply on the basis that one or more campaigners committed a breach of campaign finance, or other requirements, during the campaign without it even being established that the outcome of the EU referendum was 'procured by fraud' is untenable. The Claimants' attempt (SFG, §21(3)) to argue that such an analysis is supported by the law on electoral petitions is also incorrect. It has already been explained why there is no analogy between a referendum and a representative election: see ***Moohan*** per Lord Neuberger.

e. As to the Claimants' suggested reliance on the Venice Commission's 'Code of Good Practice for Referendums' (SFG, §7(9)), as the title of that document indicates, it is not a legal instrument and it has no legal status or relevance to any issue raised in the claim.

f. Finally, the claim incorrectly defines the UK's 'constitutional requirements' in this context. This is the issue that was determined by ***Miller***. In summary, the holding of the Supreme Court was that in the particular context of the EU Treaty regime, the relevant constitutional requirements in UK law were approval by both Parliament and the Executive, as opposed to withdrawal being solely a matter for the Executive.

g. Finally, the Claimant's suggested analogy to public consultations is wholly inapt and adds nothing material to the central contentions advanced in the claim.

(4) The Claimants positively assert that they have a suitable alternative remedy

52. Insofar as the claim relates to the EU Referendum outcome, the Claimants have positively asserted that they have a suitable alternative remedy in the form of a Part 8 claim. This was asserted in the PAP Letter sent by 'Let's Take Back Control Limited' (aka the Fair Vote Project), and was adopted by the Claimants in their own PAP Letter. This point was specifically noted in §30 of the PAP Response, which was provided to the Claimants, but is addressed nowhere in the claim.

(5) Decision to leave the EU has now been approved by Parliament and any challenge to the decision must be pursued by political mechanisms

53. The decision that the UK will leave the EU in March 2019 has now been confirmed by Parliament, see in particular the terms of the 2017 Act and the 2018 Act. In the premises, the issues raised by the claim are: (a) academic, and (b) fundamentally of a political nature, and should therefore properly be regarded as non-justiciable.

D. CONCLUSION AND COSTS

54. In the premises it is submitted that the application for permission to apply for judicial review should be dismissed and that the Court's Order should record it as being totally without merit, pursuant to CPR r.23.12. If permission is refused the Defendant seeks its costs of preparing the Acknowledgment of Service and Summary Grounds on the usual basis. A schedule of costs will be provided within 3 working days.

55. If, contrary to the foregoing submissions, the Court determines that permission should be granted in respect of all or part of the claim and/or that a "rolled-up" hearing should take place, the Defendant would wish to have the opportunity to make submissions as to the appropriate timetable and directions before any Order is made.

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31 August 2018

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