In the High Court of Justice
Queen's Bench Division
Administrative Court

CO Ref no: CO/3214/2018

In the matter of a claim for Judicial Review

The Queen on the application of

WILSON and Others

versus PRIME MINISTER

Notice of RENEWAL of claim for permission to apply for Judicial Review (C P R 54. 12)

1. *This notice must be lodged in the Administrative Court Office, by post or in person and be served upon the defendant (and interested parties who were served with the claim form) within 7 days of the service on the claimant or his solicitor of the notice that the claim for permission has been refused.*

2. *If the claim was issued on or after 7 October 2013, a fee is payable on submission of Form 86B. Failure to pay the fee or lodge a certified Application for Fee remission may result in the claim being struck out. The form for Application for Remission of a Fee is obtainable from the Justice website http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do*

3. *If this form has not been lodged within 7 days of service (para 1 above) please set out below the* ***reasons for delay:***

4. *Set out below the grounds for seeking reconsideration:*

Please see attached Grounds for seeking reconsideration.

5. *Please supply*

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COUNSEL'TELEPHONE NUMBER: Patrick Green QC, Henderson Chambers 0207 583 9020; Jessica Simor QC, Matrix Chambers, 0207 404 3447

Signed (Rory Solicitors.) Dated 28 September 2018

Claimant's Ref No. EXP001/0003 Tel.No. 01242 285855 Fax No. 01242 285856

To the Administrative Court Office, Royal Courts of Justice, Strand, London, WC2A 2LL

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' GROUNDS FOR SEEKING RECONSIDERATION

Introduction

1. The claim was issued on 13 August 2018. Permission was refused by Supperstone J on 21 September 2018. The claim is renewed on all grounds save for the ground relating to Article 3 of the First Protocol to the ECHR, which is no longer pursued. It is submitted that all grounds are arguable and permission should be granted.

2. The Defendant's Summary Grounds of Resistance ('SGR') mischaracterise the claim. Unfortunately, the Order refusing permission appears to fall into the same error, focusing solely on the challenge to the Defendant's decision of 29 March 2017. As stated in both the Claimants' Grounds and their Reply, the Claimants do not challenge merely the original decision by the Prime Minister, taken on 29 March 2017. They also challenge the recent decisions by which the Defendant has refused and continues to refuse to take any steps in light of the Electoral Commission Reports, ICO Reports and DCMS Reports.

The claim is not out of time

3. The Claimants challenge both the 2017 Decision as well as the recent decisions by which the Defendant has refused to take any steps in light of the Electoral Commission Reports, ICO Reports and DCMS Reports (see **Grounds** § (6) at (3)(a) – (c), and **Reply**, §5-9).

4. 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*."

5. The Prime Minister refused to do either of the above. On 12 July 2018, the Prime Minister stated in the White Paper on the future relationship with the EU that the Referendum was '*the largest ever democratic exercise in the United Kingdom'* (**Grounds**, §61).

6. Accordingly, this challenge addresses not only the Decision and Notification under Article 50 of March 2017, but also all 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 in the exercise of her powers under the 2017 Act (**Grounds** §6(3)(b)).

Extension of time

7. The Claimants have sought an extension of time regarding the challenge to the 2017 Decision (**Grounds**, §§10-15).

8. The facts of electoral misconduct in respect of Vote Leave and Leave.EU were not established in law before the Electoral Commission issued its findings in May 2018.

9. The Claimants could not reasonably have brought this claim at a time before the Electoral Commission reached its findings. Such a claim would have been rejected as being premature, academic and/or for failure to pursue an alternative remedy (**Reply** § 11-17).

10. The fact that the Electoral Commission took two years to issue its conclusions is not something for which the Claimants bear any responsibility. Moreover, the Electoral Commission twice closed its investigations into Vote Leave spending. The first time was on 4 October 2016 and the second on 21 March 2017.

11. 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 (**Reply** § 14).

12. Given the constitutional importance of this claim, the Court should grant an extension of time as may be necessary to ensure that there is an effective remedy and access to justice, in the light of the irregularities recently discovered by the Electoral Commission (**Grounds** §15)

No undue delay

13. The claim is premised on factual discoveries made recently by the Electoral Commission (**Grounds,** §48-53). The claim was 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 were published (**Reply,** §14-17)

14. Furthermore, a core part of the Claimants' case is that the failure of the 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' (**Reply**, §17).

15. This claim in no way impinges on negotiations with the EU27. It is a domestic political matter and within the Prime Minister's discretion to decide how to respond to findings that the Referendum was vitiated by corrupt and illegal practices.

The claim is arguable

a) Unlawful practices not known at the time

16. The learned Judge's Order states (par. 4(b)) that the Prime Minister cannot be said to have acted unlawfully in making the decision to give notification on 29 March 2017 because of the findings of the Electoral Commission were not made or published until May/July 2018.

17. However, it *is* possible for a public authority to act unlawfully because of an error of fact, even though the error was impossible to know at the relevant time (see **Reply**, §21). 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) (**Reply**, §21).

18. Moreover, the claim is not merely to the 2017 Decision, but also to recent decisions as explained above (at §2-5).

b) Unlawful practices known at the time

19. The learned Judge also notes (Order, par. 4(c)) that the Claimants' contention that the Decision to give Article 50 notice was founded on a premise that there been compliance

with campaign finance requirements is incorrect, since '*the Claimants acknowledge that at the date of the Prime Minister's decision allegations that there had been breaches of campaign finance limits during the Referendum campaign had been in the public domain for some time, and that such allegations were being investigated by the Electoral Commission*'.

20. This inference is incorrect. The Claimants submit that the findings by the Electoral Commission in May and July 2018 were highly significant because they were reached after a thorough investigation by the appointed regulator under the applicable statutory scheme.

21. The categorical findings of wrongdoing reached to the criminal standard of proof, coming at the end of a thorough investigation by Parliament's appointed regulator, cannot be rationally compared with mere allegations.

c) The test of fraud

22. The learned Judge held (Order, §4(d)) that the Electoral Commission's reports do not establish that 'the *breaches of campaign finance or other requirements identified in the reports mean that the result of the Referendum was 'procured by fraud', or that the outcome of the Referendum was affected by wrongdoing or unlawful conduct'*.

23. The learned Judge fails to note that Parliament created a special framework for the regulation of referendums in PPERA 2000 by providing for 'designated campaigners' whose spending was strictly limited. Underlying the creation of this special category, which allowed for additional spending and other privileges, was the assumption that the conduct of designated campaigners was central to the legitimacy of a referendum. The Electoral Commission found on 17 July 2018 that Vote Leave, the official designated campaign for leaving the EU, had breached the relevant rules and it imposed maximum fines in respect of several offences (see **Facts,** §13). This finding of around 6% overspend is at least arguably sufficient to question the authority of the Referendum result. Further and in any event, Parliament did not give the Electoral Commission any legal authority to make a finding that the Referendum was affected by wrongdoing or unlawful conduct.

24. Had the Electoral Commission been given the power to reach a finding of 'corrupt practices', it arguably would have done so in this instance. In an ordinary election, false declarations as to election expenses that are made knowingly constitute *'corrupt practices'*: section 82 of the Representation of the Peoples Act 1983 (**Grounds**, §7(10)).

25. 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"*).

26. Accordingly, under s. 159 of the Act, where a candidate is *personally* guilty or guilty by his agents of any corrupt or illegal practice, his election shall be void. There is no need to show that the corrupt practice affected the outcome. Whereas an advisory referendum cannot be 'voided' in the same way, its democratic *legitimacy* is vitiated in exactly the same way, whenever a spending breach by the designated campaign is established.

27. Whether an election is vitiated by offences of 'general corruption' on the other hand, is set out in Section 164 of the 1983 Act which provides for the avoidance of an election result for general corruption, where it is shown that corrupt or illegal practices or illegal payments, employments or hirings committed in reference to the election for the purpose of promoting or procuring the election of any person at that election have so extensively prevailed that they *may be reasonably supposed to have affected the result.*

28. There is therefore no legal basis for the Judge's view that the applicable test is whether the corrupt practice actually 'affected' the Referendum result. Whether the

Referendum's legitimacy was vitiated by fraud is not the same question as whether the result was the *result* of fraud. Only in cases where the candidate or campaigner was not directly or indirectly involved in corrupt practices, the statutory scheme for elections considers it sufficient that the general corruption '*may be reasonably supposed to have affected the result*'. The Electoral Commission findings easily surpass this threshold.

29. 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 categories of offence set out above (**Reply**, §27).

30. It is therefore not reasonable for the Prime Minister to have relied on the result of a referendum vitiated by corrupt and illegal practices as the basis for taking the UK out of the EU (**Reply**, §27). Similarly, her decision to take no action at all in response to the findings of corrupt and illegal practices is unlawful having regard to the original basis for her decision.

D) Approval by Parliament

31. The learned Judge notes (**Order**, §4(e)) that the decision to leave the EU has now been approved by Parliament so that 'the issues raised by this claim are therefore academic'.

32. This conclusion does not accord with the European Union (Notification of Withdrawal) Act 2017 Act or the European Union (Withdrawal) Act 2018 (see **Reply**, §§34-36).

33. The 2017 Act gives the Prime Minister the power to make the notification and to negotiate under Article 50 TEU. It does not determine that that the UK should depart the EU at any particular time.

34. Similarly, the 2018 Act does not address the lawfulness or not of the Decision or Notification. The Act merely sets out the changes in the law that ought to take place

if the UK withdraws. The date of withdrawal remains a discretionary matter for the Government. As is evident from the complex processes of s.13 of the Act, whether the United Kingdom will depart from the European Union or not, will be determined by Parliament in a series of votes, in a constitutionally unique parliamentary process set out in detail in the Act (see **Reply**, §§34-36).

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ADAM WAGNER

REANNE MACKENZIE

28 September 2018

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