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

1st Defendant

-and-
THE ELECTORAL COMMISSION

2nd Defendant

SKELETON ARGUMENT ON BEHALF OF THE DEFENDANT
For hearing 7 December 2018

INTRODUCTION

1. These are the Prime Minister's ("**the Defendant**") submissions in response to the grounds of renewal ("**the GfR**") **[1/A/100-109]** filed by the Claimants in support of their renewed application for permission to apply for judicial review in respect of the giving of Article 50 notification by the Defendant on 29 March 2017 ("**the Notice**") **[1/B/110-115]**. Permission was refused by Supperstone J pursuant to an order dated 21 September 2018 **[1/A/97-99]**. The Defendant submits that permission should be refused for the reasons explained by Supperstone J, and for the further reasons set out in the SGRs and in these brief written submissions.

2. As the Claim Form and the Grounds make clear, the issued, pleaded claim challenges the giving of the Notice by the Defendant on 29 March 2017 (and also purports, as a necessary staging post, to challenge the outcome of the EU Referendum in 2016).

    a. Section 3 of the Claim Form defined the *"Details of the decision to be judicially reviewed"* in the following terms **[1/A/2]**:

    "Prime Minister's notification to the European Council of the United Kingdom's intention to withdraw from the European Union pursuant to Article 50 of the Treaty on European Union"

The date of the decision subject to challenge was expressly stated to be *"29 March 2017"*.

b. §5 of the Claimants' Grounds summarised the pleaded claim in the following terms **[1/A/10]**:

"The Claimants seek declarations <u>*that both the Decision and Notification, on behalf of Her Majesty's Government, were unlawful*</u> *on established electoral and public law principles and/or not in accordance with the constitutional requirements of the United Kingdom ("UK")."* (emphasis added)

c. This is reflected §6 of the Grounds, which sets out the relief sought **[1/A/11-12]**: (i) the declaratory relief sought in §6(1) is directed to the outcome of the Referendum or the giving of the Notice, and (ii) the quashing relief sought in §6(2) is solely directed to the giving of the Notice. §6(3) of the Grounds did not particularise any grounds of challenge to any decision other than the giving of the Notice.

3. After hours on 4 December 2018 (ie 2 days before the oral renewal hearing) the Claimants served by email a 47 page skeleton argument ('**the Skeleton**'). It sought to recast the Claimants' case. The Skeleton now attempts to present the Claimants' pleaded challenge to the giving of the Notice as an ancillary or peripheral element of claim; and proceeds on the footing that the claim is actually directed to various 'decisions' which are not challenged in either the Claim Form and Grounds, including 'decisions' that post-date the issue of the claim. The Court is invited to read the Claimants' Claim Form and Grounds, alongside the Skeleton.

4. This approach is, to put it as mildly as possible, unfortunate. No application to amend the Claim Form or Grounds has been issued or approved by the Court. In any event, seeking fundamentally to reposition a case in this manner at such short notice before a hearing is neither helpful, nor fair, nor consistent with the overriding objective or the way in which properly represented claimants are expected to behave. It is submitted that the claim (in whatever form) should be refused permission, with appropriate costs orders.

SUBMISSIONS

1. The claim is out of time

5. The only pleaded grounds of challenge advanced in the Claim Form and Grounds – namely the proposed challenges to the giving of the Notice in March 2017 (and, indirectly, the Referendum outcome in 2016) – are out of time.

6. Under CPR 54.5(1) a judicial review claim form must be filed: (a) promptly and (b) in any event, not later than three months after the grounds to make the claim first arose. Moreover, s.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"*.

7. There is also a special limitation period of relevance. In Schedule 3, §19 of the 2015 Act Parliament provided that any judicial review challenge to the Referendum outcome must be brought within 6 weeks. That, extremely short, limitation period reflects the need for the utmost promptitude in respect of any challenge of this sort. Parliament 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.[1] It follows that the Claimants' contention that a challenge to the outcome of the EU Referendum could or should be entertained by the Court at this stage, **more than two years** after the event, is hopeless.

8. The CPR 54 promptitude requirement was of particular importance in the present case, due to (*inter alia*): (a) the nature of the decision in issue (ie a matter of the utmost national importance), (b) the effect of the Notice being issued (with wide-ranging and significant consequences for the UK, other EU member states and many millions of individuals affected by the decision), and (c) the obvious (disruptive) impact of any Court ruling on the on-going UK-EU27 negotiations in respect of a Withdrawal Treaty.

9. The Claim Form was not issued until 13 August 2018: (a) more than two years after the EU Referendum outcome was declared, and (b) approximately 16 months after the giving of the Notice.

10. The Claimants argue that the pleaded claim is not out of time because, so it is said, the relevant grounds 'first arose' when reports of the Electoral Commission were published in May and July 2018. This is incorrect and does not assist them anyway.

11. The pleaded claim is directed to the decision to give the Notice (and indirectly, the Referendum outcome). The grounds in respect of those two matters 'first arose' on 29 March 2017 (and/or 24 June 2016 in respect of the Referendum outcome). They are the

[1] Similarly, in respect of election petitions challenging Parliamentary elections, on which the Claimants rely 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: ss. 121-129 of the Representation of the People Act 1983. These strict, very short, time limits cannot be extended: see ***Ahmed v Kennedy*** [2002] EWCA Civ 1793 [2003] 1WLR 1820.

matters said to be tainted by unlawfulness with the grounds on which the unlawfulness arose necessarily having preceded both.

12. In any event, 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 a very considerable period of time.
    a. The relevant factual matters were in the public domain since 2017/early 2018, with press reporting to that effect in that period.[S/B/118-124 & 133-135]
    b. Specifically, there was then an emergency debate in Parliament in March 2018 on the 'EU referendum and alleged breaches of electoral law' [S/A/51-117] that addressed a significant 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. Thus, by March 2018 at the very latest it was well known that there had or might have been misconduct in the Referendum campaign.

13. If the Claimants wished to challenge either the Referendum outcome or the giving of the Notice on the basis that they now advance – namely that the Referendum outcome was "*procured by criminal conduct*" **[1/A/36/§62]** - they were well able to do so at any time during 2017 and March 2018. The Electoral Commission reports are simply further evidence on which the Claimants wish to rely to support their grounds.

14. In any event, even if 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 **[1/C/224]**. On this analysis, the Claimants are either: (i) out of time, or (ii) have waited until the very end of the 3 month limitation period to issue proceedings. For the reasons explained above, in the context of this case, that cannot satisfy the requirement of promptitude. Given the nature of Article 50 notification decision, the imperative need for legal certainty and the obvious implications of a challenge to its validity, the Claimants' (self-serving) assertion that such a claim would have been rejected by the Court as 'premature' is misconceived.

15. The Skeleton now attempts to get around the fundamental limitation difficulty by recasting the claim as being principally concerned with *"recent decisions"* (Skeleton, §107.1) to "*do nothing"* and/or not revoke the Notice. This is no answer to the fact that the claim as pleaded in the Claim Form and Grounds is out of time.

16. In any event, the same essential answer applies. The arguments appear to be that it should have been clear to the Defendant by a certain date that circumstances had arisen in which: (a) the Defendant needed to make a decision about an attempt to revoke the Notice, (b) the only rational decision, in the light of those circumstances, was to take such action; and (c) the Defendant has not done so, despite those circumstances having arisen; or

alternatively, the Claimants had a right to have the Notice revoked. In the context of the Skeleton complaints, the 'time' question is thus at what point those circumstances, leading (on the Claimants' case) to that conclusion, arose. The principal matters said to give rise to the requirement, as the only and immediately necessary rational decision, to seek to revoke the Notice have been in the public domain since 2017/early 2018: see, by way of illustration and in particular, the emergency debate in Parliament on 28 March 2018. Time started to run from those dates (it matters not at what precise point during that period given that the claim was not filed until 13 August 2018).

17. The Claimants then seek an extension of time. The GfR (§12) seek to derive assistance from the supposed *"constitutional importance"* of the claim: **[1/A/103]**. However, this does not help the Claimants:
    a. The fact that the general context of the claim concerns significant political matters is no reason at all, still less good reason, to justify such an extension. On the contrary, it operates powerfully against such an extension. If there was to have been a challenge of the kind now mounted, it needed to be brought very promptly indeed. Any reference to constitutional importance is thus a point against the Claimants in this case; not a point in their favour.
    b. Moreover, events have moved on, as the Court will be well aware. The Referendum was followed by Parliament resolving to authorise and approve the giving of the Notice (after *Miller*) in the 2017 Act. That Notice was then given; and there have been many developments in terms of both negotiations with the EU and Parliamentary scrutiny (and indeed primary legislation predicated upon the Notice and the withdrawal process it commenced, namely the 2018 Act) since then.

18. 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 (see section 31 cited above). Whether the grant of particular relief would be detrimental to good administration depends on the facts and context (see eg ***R v Dairy Produce Quota Tribunal for England and Wales, ex p Caswell*** [1990] AC 738). The remedies sought by the Claimants are set out at Grounds, §6 **[1/A/11-12]**. In summary, the Claimants seek orders quashing and/or declaring unlawful the Referendum outcome and the giving of the Notice. The Court will need no reminding of the most recent events. For the Court to grant the relief in the terms sought at this stage (even if it would even conceive of doing so given the current state of play in relation to the withdrawal) would obviously involve a detriment to good administration of the most serious sort.

<u>The arguability of the claim</u>

(a) The claim pleaded in the Claim Form and Grounds – challenge to the decision to give the Notice in March 2017

19. As Supperstone J observed **[1/A/97/§4(c)]**, the basis of the Claimants' pleaded attack on the decision to give the Notice is (and was) the contention that the decision was predicated on a (factually erroneous) belief on the part of the Defendant that there had been universal compliance with campaign finance and other requirements during the Referendum campaign: see eg **[1/A/29/§60]**. However, and inconsistently, the Grounds also specifically noted that the fact the Electoral Commission had commenced investigations into alleged breaches of campaign requirements was in the public domain and well known to the Defendant before the decision to give the Notice was taken: see eg **[1/A/18/§7(18)(c)]** and **[1/A/34/§54]**. Consequently, the 'error of fact' argument on which the Claim Form and Grounds are predicated simply does not (and could not) get off the ground.

20. The Claimants now seek to muddy the waters by incorrectly asserting that the Defendant's position is that she had knowledge of the relevant breaches of campaign requirements before giving the Notice (Skeleton, §117). This is incorrect. The Defendant's SGRs simply pointed out the express admission in the Claimants' Grounds that the Electoral Commission's investigations were a matter of public record at the relevant time, and that the Claimants' contention that the Defendant was proceeding on a factual premise that there must have been universal compliance with campaign requirements was therefore untenable: see **[1/A/70-71/§§44-45]**.

21. None of the evidence accompanying the claim as issued suggests, still less establishes, that any breaches of campaign requirements by campaigners had any causal effect on the outcome. The Claimants now attempt to say (§118 of the Skeleton) that it was not its pleaded case that breaches of campaign requirements had such causal effect. However:
    a. This is factually inaccurate. The Claimants' pleaded case was (and is) that the Referendum outcome was *"…procured by criminal conduct"* (emphasis added) (see Grounds, §62) **[1/A/36/§62]**.
    b. That was in any event an obviously necessary plea. The claim could not be upheld, and no relief of the kind sought would be granted, without the Claimants establishing that the result of the Referendum was in fact *"procured"* (ie caused) by the breaches of campaign finance requirements on which the Claimants rely.
    c. That they are unable to do so is made plain by the fact that the Grounds and supporting evidence did not even attempt to mount such a case.

22. Finally, in relation to the pleaded claim, it is to be noted 2017 Act authorised and approved the giving of the Notice ie the decision that is subject to challenge pleaded in the claim. The 2018 Act reflects and confirms the fact that the effect of the giving of the Notice is that the UK will leave the EU in March 2018. If Parliament at this stage wishes to do or require more, that is a matter for Parliament; not the Courts.

(b) The contentions now advanced in the Skeleton of 4 December 2018

23. The contentions advanced in the Skeleton are directed to what the Claimants attempt to characterise (incorrectly) as a decision by the Defendant to *"do nothing"* in respect of the facts and matters referred to in the Electoral Commission reports of May and July 2018. This set of contentions is untenable.

24. It is evident, and public, that such allegations are under active consideration and investigation on a number of fronts by independent bodies with proper constitutional responsibility for doing so. For example:

    a. The Electoral Commission investigation and reports are one aspect, including an ongoing appeal by Vote Leave and Mr Grimes in the Central London County Court.

    b. On 1 November 2018, the NCA released a public statement in the following terms **[1/D/934]**:

    > *"NCA initiates investigation following Electoral Commission referral*
    > *The NCA has initiated an investigation concerning the entities Better for the Country (BFTC) and Leave.EU; as well as Arron Banks, Elizabeth Bilney and other individuals. This follows our acceptance of a referral of material from the Electoral Commission.*
    > *Our investigation relates to suspected electoral law offences covered by that referral, as well as any associated offences.*
    > *While electoral law offences would not routinely fall within the NCA's remit, the nature of the necessary inquiries and the potential for offences to have been committed other than under electoral law lead us to consider an NCA investigation appropriate in this instance.*
    > *This is now a live investigation, and we are unable to discuss any operational detail."*

    c. Other allegations of criminal activity, including in relation to Vote Leave are being considered by the Police and Financial Conduct Authority.

25. The Claimants contend that the Defendant is proceeding on the basis that "*the referendum had been conducted lawfully and democratically"* (Skeleton title above §99). That some misconduct associated with the Referendum campaign has been the subject of consideration by the bodies mentioned above is evident and well, and publicly, known. That fact undermines the contentious title quoted above at its base. However, that fact does not lead to the inferences or indeed the legal conclusions that the Claimants seek to draw – in particular that the Referendum and the Notice cannot stand and that any other outcome is unlawful – whether as a matter of right or as a matter of rational decision making by the Defendant.

26. There is no statutory process or provision that would permit the Referendum to be 'voided'. The Referendum was advisory only (a fact which was essential to the reasoning in *Miller*). It was followed by the 2017 Act which provided the Parliamentary authority and approval for the giving of the Notice. Moreover, in the myriad ways of which the Court will be aware, the world has now moved many miles on. There is no legally

enforceable right in the Claimants or anyone else to void the Referendum or require the Notice to be revoked. No such right has been recognised in any case. Any such right would cut across the legislative, and other Parliamentary intervention, in relation to the process of withdrawal to date. It would also cut across governmental and Prime Ministerial decision making in that area. It is in any event inconceivable, especially given the non-case on causation, that the Court would grant any such remedy in any event.

27. There is no arguable basis for contending that the Defendant has a single rational option open to her in the light of the Electoral Commission's reports – namely to revoke the Article 50 Notice, and to do so now (or to have done so prior to the claim now being advanced). That is an absurd contention. It would be plainly rational to conclude for example that other action is being taken and considered by a range of bodies into possible misconduct in the Referendum campaign; and that, in any event, the world and the debate has moved on with all of the ongoing Parliamentary scrutiny of the issues involved.

28. Nor is there any basis for suggesting that the Defendant has been operating under a mistake of law. She has no power to 'void' the Referendum. It is on no arguable view a mistake of law for her to consider that she should proceed on the basis that the Referendum reached the decision that it did; that allegations of misconduct in the Referendum campaign continue to be investigated and considered; and to continue to operate on the basis that Parliament authorised the giving of the Notice and thus that the UK is leaving the EU. In addition, it is plain that Parliament continues to be very actively engaged in these issues.

29. It is therefore submitted that the contentions advanced in the Skeleton are substantively unarguable.

CONCLUSION

30. It is submitted that the renewed application for permission to apply for judicial review should be dismissed.

JAMES EADIE QC
JOSEPH BARRETT

6 December 2018