IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT, CLAIM NO. CO/3214/2018

MR JUSTICE OUSELEY

B E T W E E N :-

(1) SUSAN WILSON
(2) ELINORE GRAYSON
(3) CAROLE-ANN RICHARDS
(4) JOHN SHAW

Claimants

-and-

THE PRIME MINISTER

Defendant

CLAIMANTS' PERMISSION TO APPEAL SKELETON ARGUMENT
17 DECEMBER 2018

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*References are to the Core Bundle as **[CB/tab/page]***
A Chronology of Events is attached as Appendix I.
A transcript of the judgment
was not available at the time of filing this Skeleton Argument

Introduction

1. The European Union Referendum Act 2015 ("the 2015 Act") provided for an advisory referendum on the United Kingdom's membership of the European Union ("the EU referendum"). It did not specify: a) the legal effect of the referendum's result or b) the legal consequences, if any, of a breach of the rules regarding the conduct of the referendum campaign. These matters arise in this appeal.

2. The 2015 Act adopted (with necessary modifications) the existing regulatory framework for referendums set out in the Political Parties, Elections and Referendums Act 2010 ("PPERA"), which lays down rules regarding participation, spending limits and permissible donations, as well as rules on returns to be submitted to the Electoral Commission in relation to spending

and donations, the breach of which constitute civil and criminal offences. It did not however, provide for any wider consequences in relation to the 'validity' of the advice provided by the referendum result in circumstances of significant breaches of the relevant rules.

3. A series of investigations by the Electoral Commission established beyond reasonable doubt that Vote Leave, the designated campaign for leaving the EU and another organisation, Leave.EU committed serious breaches of the spending and donation rules governing the EU referendum. In addition, the Electoral Commission has referred individuals in Vote Leave and Leave.EU to the Metropolitan Police and in respect of Leave.EU (and Better for the Country and others) to the National Crime Agency for investigation of other offences that they have evidence to believe have been committed. Other official investigations, most notably by the Information Commissioner and the DCMS Select Committee, have confirmed and amplified those findings. The investigations are ongoing.

4. The 2015 Act provides for no statutory consequence of such findings. Parliament however, did not preclude the jurisdiction of the Court to apply the long established common law rules in such circumstances. Nor did the Minister choose to do so pursuant to her power under s. 4 of the 2015 Act by giving effect to s. 164(2) of the Representation of the Peoples Act 1983 ("RPA"), as she could have done. The Claimants submit that in the absence of precise legislative provisions and in circumstances where Parliament has not sought to oust the jurisdiction of the Court to apply the common law, it is for the Courts to ensure legality; a concomitant, indeed a prerequisite to democracy. The Prime Minister rejects this submission.

5. The High Court accepted that the Claimants case on the common law was arguable but rejected the claim largely on the basis of timing. The consequence of its decision (in this case and in any future referendum under similar provisions) is that irrespective of the seriousness of the illegality in the referendum process, the Defendant's refusal to have any regard to that illegality and to continue on the (fallacious) basis that the result constitutes 'the democratic will of the people' cannot be challenged before any Court. Put another way, those who commit illegal and corrupt practices, which are hidden, can be confident that even if those illegalities are extremely serious by the time they are discovered it will be

too late for a challenge to be brought to the legality of a decision to rely on the result of the vote as constituting 'the democratic will of the people'.

6. The Claimants submit that in this case, for the Defendant to refuse to have any regard to the illegalities during the referendum and to proceed on the basis that without doubt, the referendum result constitutes the 'democratic will of the people' is irrational. The High Court's position is that 'administrative convenience' means that no such challenge can be brought; that it is lawful for the Prime Minister to ignore the illegalities and other findings and investigations. The Claimants submit that this is not in line with the seriousness of the matters at issue, namely a fundamental change to the UK Constitution that removes rights of individuals and businesses across at least 27 countries, nor with the ability of the common law to ensure the protection of fundamental rights in the UK constitution, namely the right to vote according to the "modalities of the expression of democracy" that are laid down by Parliament: *Moohan v Lord Advocate* [2014] UKSC 67 per Lord Hodge §34. Indeed, the position of the High Court is unprecedented; however serious the illegality, whatever the potential effect on the result, the Courts will not intervene because the challenge was not brought within three months of the result, even though that could not have been done since the illegalities were not and could not have been known.

7. The claim raises new, difficult and extremely important questions concerning the application of the common law in upholding a fundamental requirement of democracy, namely that in a process of direct democracy, whereby the electorate is asked to vote on a matter as profound as changing the entire constitutional structure of the United Kingdom, the process is carried out lawfully, that is, free of corrupt and illegal practices.

8. It is submitted that this is an essential element of the right to free and fair elections, recognised in this country since the 18th century as a common law right. Legality is moreover, essential to legitimacy, without which the EU Referendum 2016 result cannot be considered 'democratic' in any true sense of the word. As stated in *Erlam v Rahman* [2015] EWHC 1215 "*if a candidate is elected in breach of the rules…, then he cannot be said to have been 'democratically elected.*"'

9. The learned judge wrongly refused permission and held that the Claimants' submissions are out of time and unarguable or have no realistic prospect of success. In making these findings the judge erred in law as set out below.

The Test for Permission at a Judicial Review

10. The applicable test for permission at a judicial review is set out in a joint judgment by Lord Bingham and Lord Walker in *Sharma v. Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)* [2006] UKPC 57, [2007] 1WLR 2849, as follows:

> *'The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy:* R v Legal Aid Board, Ex p Hughes *(1992) 5 Admin LR 623, 628; Fordham,* Judicial Review Handbook, *4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.'*

11. Permission should be granted, where a point exists which merits investigation on a full hearing, with both parties represented and with all the relevant evidence and arguments on the law (*R. v Secretary of State for the Home Department Ex p. Rukshanda Begum and Angur Begum* [1990] Imm. A.R. 1, [1990] C.O.D. 107).

Grounds

(a) The validity of the EU referendum is subject to the common law

12. The Claimants submit that the common law applies not only to the legality of any executive action pursuant to the result of the referendum (issue (b) below) but also to the validity of the referendum result itself. The applicability of the common law follows from the fact that Parliament did not lay down any statutory rules regarding the consequences of illegal conduct, however serious. Further, neither Parliament nor the Secretary of State chose to preclude the application of the common law (as it did, for example, in s. 164(2) RPA); instead

leaving the Courts to determine the consequences of illegalities in the conduct of the referendum. Accordingly, the common law rules on that question, apply here. Ouseley J accepted that this submission was not 'unarguable'.

13. The common law on the validity of elections derives from the fundamental constitutional nature of the right to vote. This right is to vote "*according to the modalities laid down by Parliament*", which are intended to ensure a free expression of the will of the people. Put shortly, if the process or conduct of the election or referendum is vitiated by illegality, the fundamental right to vote is undermined; the result of the referendum cannot therefore be said to represent a 'democratic' result and cannot be allowed to stand. This is hardly surprising. An election in which there is wide-scale over-spending or illegal funding is not an election that has been conducted lawfully and as such, its result cannot fairly be said to be 'democratic'; the right to vote is thus, negated.

14. In *Watkins v Secretary of State* [2006] 2 AC 395 at §25 Lord Bingham described the right to vote as: "*basic, fundamental or constitutional*" and at §61 Lord Rodger noted that "[*a]lthough embodied in a statute, in a system of universal suffrage today the right to vote would fall within everyone's notion of a "constitutional right"*." Further, he considered that "*the principle of legality would apply in construing any statutory provision which was said to have abrogated that right.*"

15. The modalities of the right to vote are laid down by Parliament and compliance with those modalities is what ensures that the result can fairly be said to be 'democratic'. Thus, as Lord Hodge stated: *"[t]he UK Parliament through its legislation has controlled and controls the modalities of the expression of democracy*" (emphasis added): *Moohan v Lord Advocate* [2014] UKSC 67 per Lord Hodge §34.

16. It is a longstanding principle of the common law that the right to vote includes a right to an actionable remedy where that right to vote is infringed, including by non-compliance with the rules applicable to the conduct of the election: *Ashby v White* (1703) 92 ER 126. In *Bradford Case (No 2)* (1869) 1 O'M & H 35, 19 LT 723, a case dating before electoral law became a matter for statute under the Ballot Act 1872 the court ruled as follows:

"It is the policy of the law that a man should exercise the franchise freely; and therefore, if undue pressure, whether it be bribery, treating or oppression, be brought to influence his vote the vote becomes bad. If this influence be widespread and general it vitiates the election by virtue of the common law, irrespective of particular Acts of Parliament."

17. The principle was established with regard to elections, but it must necessarily apply to referendums whenever they result 'in the making of laws.'

18. Accordingly, a referendum result may be declared by the Courts to be vitiated - invalid or ineffective – pursuant to the common law, if there are reasons to believe that the outcome was affected by corrupt or illegal practices (JR Ground (i), Claimants' JR Skeleton §§86-93).

19. The applicable test is laid down by Lord Denning in *Morgan v Simpson* [1974] Q.B. 344. That case concerned s. 37 of the Representation of the Peoples Act 1949[1] ("RPA 1949") which provided the test formulated in negative terms as to when a breach of the rules would be sufficient to invalidate the result. Thus, it prevented an election from being declared invalid where "*the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission [by the relevant officer in breach of the rules] did not affect its result*." The High Court held that for the result to be invalid it had to be shown both that there was non-compliance with the rules that affected the result and that the non-observance of the rules was so great as to amount to conducting the election in a manner contrary to the principle of an election by ballot. The Court overturned that analysis.

20. Lord Denning noted that neither the Ballot Act 1872 nor the RPA 1949 provided for when an election should be held to be void, both providing only for when that should not be the case. Accordingly, he examined the common law to determine that question, giving the following conclusion:

"I suggest that the law can be stated in these propositions: (1) If the election was conducted so badly that it was not substantially in accordance with the law as to

[1] The successor to the 1872 Ballot Act that had a similarly formulated rule as to when non-compliance with the rules did not invalidate the result.

elections, the election is vitiated, irrespective of whether the result was affected, or not. That is shown by the Hackney *case, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote. (2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election. That is shown by the Islington Case where 14 ballot papers were issued after 8 p.m. (3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated. That is shown by* Gunn v. Sharpe*, where the mistake in not stamping 102 ballot papers did affect the result."*

21. A similar conclusion, albeit under the architecture of a written constitution, was reached by the Supreme Court of Ireland in *Joanna Jordan v the Minister for Children and Youth Affairs, Government of Ireland, Ireland and the Attorney General* [2015] IESC 3. The Supreme Court of Ireland held that the relevant test for setting aside a referendum petition is whether "*a reasonable person could not have a doubt about, and would trust, the provisional outcome of the referendum*" (Denham C.J §136).

22. The Claimants submit that these principles apply in circumstances where Parliament has not expressly provided for any other rules, as is the case here. In that regard, the Claimants submit that the breaches of the spending and donation rules set out in PPERA 2000 and the 2015 Act and the incorrect application of spending rules as found in *R (Good Law Project) v Electoral Commission* are sufficient to vitiate the result.

23. Thus, applying the common law test set out by Lord Denning in *Morgan v Simpson*:

    a. The referendum was "conducted so badly that it was not substantially in accordance with the law as to" the referendum such that the referendum is vitiated, irrespective of whether the result was affected, or not; alternatively,
    b. there was a breach of the rules or mistake that did affect the result – such that the referendum is vitiated.

24. Alternatively, applying Lord Denham's approach in *Joanna Jordan v the Minister for Children and Youth Affairs* having regard to the relevant illegalities, it cannot be said that a reasonable person could trust or have faith in the outcome of the referendum

25. In so far as the learned judge concluded that the common law did not apply, the learned judge erred in law.

26. The learned judge also erred in holding without any argument on the issue that the Claimants could not show that the result would have been affected by the relevant illegalities. In this regard, the learned judge dismissed a report by Professor Philip Howard, which the Claimants had applied to include as an expert report. The learned judge wrongly considered that no application had been made and further, went on to dismiss the content of the report without having heard any argument on the issues raised in it. Those issues were matters to be considered after permission; prima facie the report was sufficient to meet the arguability threshold. The Claimants also submitted the various findings of the Electoral Commission, the Information Commissioner's Reports, the Reports of the DCMS Select Committee and the blog posts of Dominic Cummings showing that the excess spending permitted Vote Leave to reach millions of households in the United Kingdom. The learned judge did not (nor could he have in the context of a permission hearing) sufficiently take into account this evidence.

27. It was wrong for the learned judge to dismiss this evidence at the permission stage, without allowing the claimants the opportunity to make full submissions at a full substantive hearing. In *The Queen v The Legal Aid Board ex parte Gina Marie Hughes* (1992) 24 HLR 698, (which was cited approvingly by Lords Bingham and Walker in *Sharma*, above) the Master of the Rolls (Lord Donaldson) criticised the legal aid board which refused legal aid and the judge below who refused permission for judicial review, for making assumptions about the evidence without 'proper information' because they seem to:

> *'… have been looking too far into the future – to the prospects for the ultimate outcome of the substantive application at a time when they had inadequate information. Their verdict was that "the Applicant's case was an extremely weak one" and "the prospects [of success] in this case were very small indeed." I really do not know how they knew.'*

(b) The PM's Continuing refusal to act in response to the established illegalities and further investigations

28. The Claimants submit that the Prime Minister's refusal in July 2018 to take any steps in response to the illegal and corrupt practices established by the Electoral Commission in relation to the referendum was unlawful as irrational and involved a failure to take into account relevant considerations.

29. The Defendant's subsequent and continuing refusal to respond in any way to further findings of wrongdoing and especially the referral for investigation to the National Crime Agency in November 2018 of further potentially extremely serious offences is also unlawful as irrational (JR Ground (ii), Claimants' JR Skeleton, §§94-98).

30. The Prime Minister has a statutory power to notify the EU of the UK's intention to withdraw and to negotiate a Withdrawal Agreement, under s.1(1) of the European Union (Notification of Withdrawal Act) 2017 ("the 2017 Act"). Section 1 is headed: "Power to notify withdrawal from the EU" and, s.1(1) reads as follows:

> *"The Prime Minister may notify, under Art.50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU."*

31. The 2017 Act does not require that UK to withdraw from the EU after notification has taken place. This is something left by Parliament to a future political process, in light of the negotiation. The same position is evident in the European Union (Withdrawal) Act 2018, which at s.13 provides that the government ought to take the outcome of the negotiations back to Parliament for a vote, both in case there is an agreement and in case there is none. Further, a new act of parliament is required before any Withdrawal Agreement is ratified.

32. The 2018 Act also provides that 'exit day', i.e. the date on which the European Communities Act 1972 stops having effect in the UK, can be postponed by a Minister of the Crown: sections 20(2) and 20(4). The Act does not require that the United Kingdom should leave the EU at any particular point.

33. That the UK may unilaterally revoke the notification has now been accepted by the Court of Justice of the European Union in Case C-621/18, *Wightman v Secretary of State for Exiting the European Union (*CJEU, Full Court), ECLI:EU:C:2018:999 (judgment of 10 December 2018).

34. The Prime Minister has a wide discretion on the way in which the United Kingdom ought to conclude the negotiations, ranging from withdrawing after two years without any agreement, to the conclusion and ratification of a withdrawal agreement with a transitional period, as well as revocation of the notification. All such options are legally possible under the 2017 and 2018 Acts and European Union law.

35. The result of the referendum is, however, an integral part of the question as to whether or not the UK should withdraw. Thus, in *Shindler and another v Chancellor of the Duchy of Lancaster and another* [2016] EWCA Civ 469, [2017] QB 226, the Master of the Rolls (Lord Dyson) at §19 said:

> *"I accept that Parliament is sovereign and that it does not need the mandate of a referendum to give it the power to withdraw from the European Union. But by passing the 2015 Act, Parliament has decided that it will not withdraw from the European Union unless a withdrawal is supported by referendum. In theory, Parliament could decide to withdraw without waiting for the result of the referendum despite the passing of the 2015 Act. But this is no more than a theoretical possibility. The reality is that it has decided that it will withdraw only if that course is sanctioned by the referendum that it has set in train. In other words, the referendum (if it supports a withdrawal) is an integral part of the process of deciding to withdraw from the European Union. In short, by passing the 2015 Act, Parliament decided that one of the constitutional requirements that had to be satisfied as a condition of a withdrawal from the European Union was a referendum."*

36. The Prime Minister took her decision to withdraw the UK from the EU and to notify the EU of that decision by reference to two factors. First, that the result of the referendum constituted the expression of the democratic will of the people and secondly, that the Government had made a manifesto commitment to give effect to the result of the referendum.

37. That being so, for the Prime Minister to refuse to take into account the illegal and corrupt practices established beyond reasonable doubt by the Electoral Commission and the matters referred to the Metropolitan Police and the National Crime Agency as well as the matters revealed by the DCMS and established by the ICO, all of which undermine the claim that the result reflects 'the democratic expression of the will of the people', was unlawful as irrational and as constituting a failure to have regard to a relevant consideration.

38. In that regard, the assessment of the weight to be afforded to the result of referendum in determining whether or not the UK should leave the EU depends on the legality of the referendum campaigns. That is so irrespective of whether the relevant illegalities could found an action to vitiate the result of the referendum (ground (a) above).

39. In that regard, the Claimants submit that for the Defendant to refuse even to consider or evaluate the consequences of the illegalities and other matters mentioned above is irrational also having regard to the fact that under the RPA 1983, had the illegal conduct been found to have taken place in the context of a local or national election or indeed local referendum, such conduct would have constituted 'corrupt and illegal practices' and would have vitiated the result, rendering them void. To refuse to have any regard to that fact in deciding how to proceed, despite the enormous implications of the decision taken, is astonishing and a decision that no reasonable person could take.

40. The Claimants accordingly, seek a declaration that the Prime Minister's consistent refusal since July 2018 to take any steps in response to the illegalities established by the Electoral Commission, the referrals to the Metropolitan Police and National Crime Agency and other matters found by the ICO and DCMS was unlawful and irrational. The learned judge erred in holding that this submission is unarguable or has no realistic prospect of success. Further, he erred in considering that it required the Claimants to succeed on ground (a) above and (c) below; it did not. The Defendant's refusal to have any regard to recently established illegalities and ongoing investigations of serious criminality, possibly involving £8 million foreign (possibly Russian) funding on the leave side is a separate and separable decision from the decision to notify under Article 50.

(c) The Decision to Notify under Art 50 was unlawful

41. The Prime Minister's decision to notify the EU of the UK's intention to leave, pursuant to her powers under Section 1(1) of the 2017 Act, was based on a fundamental error of law and fact, namely that the referendum had been conducted lawfully and democratically and that its result could be relied upon as constituting the legitimate and democratic 'will of the people'. (JR Ground (iii), Claimants' JR Skeleton, §§99-103).

42. Having regard to the relevant illegalities, the result of the referendum is open to significant doubt. That is supported by the analysis carried out by Professor Howard as to the likely consequences of the significant undeclared over-spend by Vote Leave on AIQ during the last 10 days of the referendum. As he explains this expenditure was important to the social media campaign of Vote Leave. The possible reach of the expenditure, taking the figures provided by Vote Leave, is likely to have had the consequence of changing the result, which required only a swing of 634,751 votes.

43. To that should be added the fact that Professor Howard did not take into account the additional £100,000 that Vote Leave spent on AIQ, but which it declared as a 'non-cash' donation to Veterans for Britain, in exactly the same way as had taken place in relation to the payment to AIQ declared by Vote Leave to Darren Grimes. In both cases, as found by the Divisional Court the expenditure was that of Vote Leave: see *R (Good Law Project) v Electoral Commission and Vote Leave* [2018] EWHC 2414. Nor did Professor Howard take into account the significant over-spend by Leave. EU.

44. In so far as the Defendant says that she was aware of the illegalities [SGD §§44-45], the Claimants sought further information in relation to that claim by way of a request for further information, to which the Defendant has refused to respond. If the Defendant's position is that she knew of the nature and scale of the illegalities, then this is something that requires to be examined by the Court and will presumably be disclosed pursuant to the duty of candour – as yet no disclosure at all has been provided. It should be noted however, that at the time that the Defendant took her decision to notify, the Electoral Commission had closed its investigation into Vote Leave.

45. The discovery of the error of fact on which basis a decision was taken after the decision, does not a fortiori render the original decision lawful; a court is entitled to review an error of fact taking into account new evidence: *R (A) v Croydon LBC* [2009] UKSC 8.

46. In such circumstances the Court has held that four tests apply in order for the Court to hold that the decision was unlawful: 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: *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] Q.B. 1044). All of these apply in this case.

47. The learned judge erred in holding that this submission is unarguable or has no realistic prospect of success.

(d) The Decision to Notify under Article 50 was Ultra Vires

48. The Prime Minister's decision to take the United Kingdom out of the EU and to notify the EU to that effect pursuant to Section1 of the 2017 Act was *ultra-vires* (JR Ground iv, Claimants' JR Skeleton §§ 104-105).

49. Parliament empowered the Prime Minister to take that decision only on the basis of a lawful and legitimate referendum result but not on the basis of a referendum result that was procured by an unlawful process. The learned judge erred in holding that this submission is unarguable or has no realistic prospect of success.

50. Finally, the Claimants submit that the power conferred by Section 1 of the 2017 Act was not given to the Prime Minister to enable her to take the United Kingdom out of the EU on the basis of a referendum result based on a process that involved serious illegalities, including significant over-spend by one of the designated campaigns. Parliament must be taken to have intended that the Prime Minister act only on the basis of a lawful and democratic referendum result.

51. It follows that notification and to notify the EU to that effect pursuant to Section 1 of the 2017 Act was ultra-vires.

(e) No Delay in Relation to Failure to Act (JR Ground (ii))

52. The learned judge erred in holding that the challenge to the Defendant's refusal to act in response to the letter sent by Fair Vote on 5 July 2018 and by her continuing refusal to do so (most recently on 3 December 2018), was not made promptly or within three months.

53. The Decision under review was made in response to the Fair Vote letter and thus materialised on 12 July 2018. The Claimants issued their claim on 13 August 2018 within four weeks of that decision following an exchange of pre-action protocol correspondence. Accordingly, it was made extremely promptly and in any event within three months of that decision.

54. The learned judge's position was that the challenge to the Defendant's recent and continuing decisions not to take any steps in response to the relevant illegalities is out of time because the underlying challenge to the referendum's validity is out of time. In so holding, the learned judge conflated different decisions, which are entirely separate and challenged on different legal bases. The referendum, result was declared by the Chief Counting Officer for the EU Referendum, Jenny Watson (also the Chair of the Electoral Commission) on 24 June 2016[2]. The challenge here is to a different decision of the Prime Minister, namely her decision to refuse to evaluate or take any steps in relation to the advisory referendum under the terms of the EU Referendum Act 2015, which was taken in July 2018.

(f) Extension of Time in Relation to JR Grounds (i), (iii), (iv)

55. The learned judge erred in ruling that the claim was out of time and refusing to extend time in relation to JR Grounds (i), (iii) and (iv), which relate to the EU Referendum of 2016 and the decision to take the UK out of the EU and notify the EU on 29 March 2017,

[2] https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/referendums-to-keep/official-result-of-the-eu-referendum-is-declared-by-electoral-commission-in-manchester

given the emergence of the relevant findings in May and July 2018 and the constitutional significance of the issues involved.

56. No challenge could have been brought to these decisions until the Electoral Commission had made its findings. The Claimants brought the claim within three weeks of the Electoral Commission report finding that Vote Leave had committed serious offences including over-spending of around £449,000. That report either read alone or with the Electoral Commission report in relation to Leave.EU of 11 May 2018 provided sufficient basis for the submission that the referendum was vitiated by illegality. Until the Electoral Commission made those findings no such claim could have been made. Accordingly, not only was there was no 'undue' delay; the claim could not feasibly have been brought at an earlier date.

57. The learned judge refused an extension primarily on the basis this would be detrimental to good administration. In *Lichfield* [2001] EWCA Civ 304 the Court of Appeal (obiter) stated as follows (at §39):

> *"But a further reason for the relative infrequency of decisions based on good administration is in our view that it can come into play only (a) where undue delay has occurred, and (b) — in practice — where the consequent hardship or prejudice to others is insufficient by itself to cause relief to be refused. In such a situation it can rarely, if ever, be in the interests of good administration to leave an abuse of public power uncorrected. Indeed Fordham records the decision of May J in R v Mid–Warwickshire Licensing Justices, ex parte Patel [1994] COD 251 that, despite undue delay, the interests of good administration were served not by withholding but by granting relief."*

58. The Claimants submit that this is a surprising decision. Far from there being 'hardship' or 'prejudice' to others by the requirement that the Prime Minister ensure and respect the rules of a democratic election, such a requirement is at the heart of respect for the democratic process. What follows from the finding of the learned judge on time limits is that serious unlawful conduct, capable of affecting the outcome of a referendum can be committed with impunity – a fine may be levied ("the cost of doing business") but the

flawed result will be left undisturbed. The issues raised in this claim are of genuine public importance. They should be ventilated at a full hearing.

(g) Costs at the Permission Hearing

59. The learned judge imposed an order requiring the Claimants to pay all of the Defendant's costs of both the Grounds of Defence and the oral permission hearing. In doing so, he misdirected himself in relation to the test of 'exceptional circumstances' as outlined in *Mount Cook* for the award of costs to the defendant at a permission hearing (see *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2017] P.T.S.R. 1166) and ignored the position adopted by the Divisional Court in *R (Webster) v Prime Minister*. The serious public interest issues raised by the Claimants on behalf of potentially millions of people concerned by the significant and serious illegalities that took place during the referendum process provide a further reason for no costs award to be made in this case. Accordingly, the Claimants also seek permission to appeal the costs order made below.

60. The learned judge misunderstood the factors involved by the test of 'exceptional circumstances' as outlined by the Court of Appeal.

PATRICK GREEN QC
JESSICA SIMOR QC
PROFESSOR PAVLOS ELEFTHERIADIS
ADAM WAGNER
REANNE MACKENZIE

17 December 2018

APPENDIX I

CHRONOLOGY

Date	Event
23 June 2016	EU Referendum held. The United Kingdom holds a referendum on whether the UK should 'remain' a member of, or 'leave', the EU. The turnout was 46,500,001 (72.21% of the electorate).
24 June 2016	The official result is declared by the Chief Counting Officer for the EU referendum, Jenny Watson who was also the Chair of the Electoral Commission[3]: "The total number of ballot papers counted was 33,577,342. The declaration has confirmed that 48.1% of votes (16,141,241) were cast in favour of REMAIN and 51.9% of votes (17,410,742) were cast in favour of LEAVE.This means that the UK has voted to LEAVE the European Union"
30 June 2016	Spending return filed with the Electoral Commission (**EC**) by Darren Grimes[4].
"Before 23 September 2016"	Spending return filed with the EC by Veterans for Britain[5].
23 December 2016	Spending return filed with the EC by Vote Leave[6].
16 March 2017	The European Union (Notification of Withdrawal) Act 2017 receives royal assent.
21 March 2017	EC decide no further action required with regard to Vote Leave/Darren Grimes and concludes its assessment[7].
29 March 2017	The Prime Minister's Article 50 letter to the European Council President Donald Tusk notifying the United Kingdom's intention to leave the EU pursuant to Article 50(2) of the Treaty on European Union (**TEU**).
21 April 2017	EC issues a statement that it has begun an investigation into Leave.EU's 2016 Referendum spending return[8].

[3] https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/referendums-to-keep/official-result-of-the-eu-referendum-is-declared-by-electoral-commission-in-manchester

[4] Electoral Commission, 17 July 2018, *Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave, Veterans for Britain*, paragraph 1.9.

[5] Electoral Commission, 17 July 2018, *Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave, Veterans for Britain*, paragraph 1.11.

[6] Electoral Commission, 17 July 2018, *Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave, Veterans for Britain*, paragraph 1.8.

[7] A letter from the Electoral Commission to the Good Law Project dated 12 October 2017, para. 32, available here: https://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/236589/Good-Law-Project-v-Electoral-Commission-pre-action-response-letter-12-Oct-2017.pdf.

[8] https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/referendums-to-keep/electoral-commission-statement-on-investigation-into-leave.eu

Date	Event
November 2017	EC re-opens investigation into Darren Grimes/Veterans for Britain and Vote Leave[9].
1 November 2017	EC issues a statement that it has begun an investigation into Better for the Country Limited and Arron Banks[10] regarding possible offences committed by them under Political Parties, Elections and Referendums Act 2000 (**PPERA**) and the European Union Referendum Act 2015 (**EURA**).
27 March 2018	Parliamentary Emergency Debate on the EU referendum and alleged breaches of electoral law.
11 May 2018	EC publishes its report, *Report on an investigation in respect of the Leave.EU Group Limited*, which finds multiple breaches of PPERA and EURA by Leave.EU. Elizabeth Bilney, Leave.EU's 'responsible person', is referred to the Metropolitan Police for further investigation.
3 June 2018	Priti Patel MP writes to the EC providing additional evidence that certain 'Remain campaigns' worked to a common plan in their campaigning during the 2016 Referendum.
26 June 2018	BBC Spotlight Northern Ireland programme *Dark Money and the DUP* is broadcast.
3 July 2018	A draft of the EC's report, *Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave, Veterans for Britain*, is "leaked".
5 July 2018	Fair Vote Project writes to The Prime Minister requesting that, in light of the recent and expected findings made by the EC and referrals to the police for further investigation, she should reconsider her decision to notify the EU of the UK's intention to withdraw from the EU pursuant to Article 50 TEU. Fair Vote Project invites the Prime Minister's response within 7 days.
10 July 2018	Information Commissioner's Office publishes an update to its *Investigation into the use of Data Analytics in Political Campaigns*
11 July 2018	Information Commissioner's Office publishes its report: *Democracy disrupted?*
17 July 2018	EC publishes its report, *Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave, Veterans for Britain*, which finds multiple offences under PPERA. Messrs Grimes and Halsall (Vote Leave's responsible person) are referred to the Metropolitan Police.

[9] Electoral Commission, 17 July 2018, *Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave, Veterans for Britain*, paragraph 2.7.

[10] https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/party-and-election-finance-to-keep/electoral-commission-statement-regarding-better-for-the-country-limited-and-mr-arron-banks

Date	Event
20 July 2018	DPG Solicitors write a pre-action letter to the Prime Minister intimating intended judicial review proceedings in light of the Prime Minister's refusal to respond to Fair Vote Project's letter dated 5 July 2018.
24 July 2018	Digital, Culture, Media & Sport Committee, House of Commons, publishes its interim report on *Disinformation and 'fake news'*
31 July 2018	Croft Solicitors (for the Appellants/Claimants) write a pre-action letter to the Prime Minister adopting the pre-action letter sent by DPG Solicitors (above) and including challenges to the Prime Minister's exercise of her power to decide to withdraw the UK from the EU.
1 August 2018	Government response to Petition "*Rescind Art.50 if Vote Leave has broken Electoral Laws regarding 2016 Referendum*" (sic). The Government's response contains no acknowledgment of the EC's findings.
3 August 2018	EC publishes a statement regarding allegations made by Priti Patel MP regarding certain Remain campaigns and, in the *Spotlight* programme, the Democratic Unionist Party. The EC announces that it will not open investigations into most of the campaigns. It opens an investigation into 'Wake Up and Vote' and DDB Ltd regarding possible joint spending by these campaigns.
10 August 2018	Government Legal Department writes to Bindmans LLP and Croft Solicitors resisting the claims made in the pre-action letters (above).
13 August 2018	The Appellants/Claimants issue their claim in the Administrative Court, Queen's Bench Division, High Court.
16 August 2018	Order of Warby J, making directions for expeditious determination of the Appellants'/Claimants' application for permission to seek judicial review
31 August 2018	Respondent/Defendant files Acknowledgment of Service and Summary Grounds of Resistance.
5 September 2018	In giving oral evidence to the European Scrutiny Committee, Dominic Raab MP, then Secretary of State for Exiting the EU, states that, notwithstanding the seriousness of the impropriety found by the Electoral Commission, he does not consider that the "*decision of the British people*" has been vitiated or invalidated by those findings.
7 September 2018	Appellants/Claimants file Reply to Summary Grounds of Resistance and Part 18 Request for Further Information.
14 September 2018	Divisional Court finds that EC wrongly advised Vote Leave that it could donate goods and services (*R (The Good Law Project) v Electoral Commission & Vote Leave* [2018] EWHC 2414 (Admin))

Date	Event
21 September 2018	Order of Supperstone J, refusing permission on the papers
28 September 2018	Appellants/Claimants file Grounds for reconsideration at an oral hearing of their application for permission to proceed to judicial review.
1 November 2018	EC publishes its report, *Report on investigation into payments made to Better for the Country and Leave.EU* concluding that a total of £8 million in funding was provided to these entities for campaign expenses during the 2016 Referendum, that Mr Arron Banks was not the true source of this funding, that the parties to the transactions were not permitted donors, among other offences. The EC confirms referral to National Crime Agency for investigation into suspected criminal offences committed by these entities and associated persons. The NCA separately confirms that it has opened investigations following the referral.
6 November 2018	Information Commissioner's Office publishes its report *Investigation into the use of Data Analytics in Political Campaigns*. It finds, among other things, that Leave.EU and Eldon Insurance breached data protection laws and issued fines to these entities.
6 November 2018	Croft Solicitors writes to Government Legal Department following the EC report into Better for the Country Limited and Leave.EU and referral of those entities to the NCA for further investigation, inviting the Prime Minister, again, to reconsider her position.
3 December 2018	Government Legal Department writes to Croft Solicitors in response to their letter dated 6 November 2018, refusing to answer the substantive points raised in that letter.
7 December 2018	Renewed hearing before Ouseley J of the Appellants'/Claimants' application for permission to proceed to judicial review.
10 December 2018	Ouseley J delivers his decision in relation to the Appellants'/Claimants' renewed application for permission to seek judicial review, refusing permission.