

**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**

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**GROUND OF APPEAL**

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**Introduction**

1. The learned judge erred in refusing permission for judicial review and in awarding the defendant its costs for the permission hearing, for the following grounds.

**Grounds**

**(a) The Referendum is subject to the common law**

2. A referendum may be declared invalid or ineffective under 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).
3. It is a longstanding principle of the common law that a right to vote has consequences in law that entail actionable remedies. The principle was established

with regard to elections, but it must necessarily apply to referenda whenever they result ‘in the making of laws’ (see *Ashbey v Whyte* (1703) 92 ER 126, *Bradford Case* (No 2) (1869) 1 OM & H 35, 19 LT 723).

4. The Claimants are therefore seeking a declaration to the effect that the EU referendum was vitiated by corrupt and illegal practices and was therefore invalid or ineffective (Grounds 6(1)(a)). The learned judge erred in holding that this submission is unarguable or has no realistic prospect of success.

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

5. By their second ground the Claimants are seeking to quash or declare unlawful the Defendant’s refusal to take any steps in response to Fair Vote’s letter of 5 July 2018, in light of the findings of the Electoral Commission of serious offences in the course of the EU Referendum Campaign of 2016 and its referral for investigation to the Metropolitan Police and the National Crime Agency of further potential offences (JR Ground (ii), Claimants’ JR Skeleton, §§94-98).
6. The referendum was advisory. The Prime Minister must consider what to make of the relevant advice or the fact that ‘Leave’ secured more votes than ‘Remain’ by taking into account all relevant considerations of law and fact. The Claimants rely on the common law principles of the rule of law and the right to vote in free and fair elections. The continuing relevance of the substance of these principles is shown by the fact that under the Representation of the People Act 1983 (“RPA”), had the illegal conduct taken place in the context of a local or national election, such conduct would have constituted ‘corrupt and illegal practices’ and would have vitiated the results, rendering them void. The common law requires that the PM considers the same principles in her assessment of an advisory referendum.
7. The Prime Minister’s refusal to take any action in relation to these findings and her refusal to give any weight to the unfairness between the designated campaigns, one

of which complied with spending limits while the other manifestly did not, is unlawful under the common law. It is also *Wednesbury* unreasonable.

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

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

9. 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).

10. 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**

11. The Prime Minister's decision to take the United Kingdom out of the EU and to notify the EU to that effect pursuant to Section 1 of the 2017 Act was *ultra-vires* (JR Ground iv, Claimants' JR Skeleton §§ 104-105).

12. 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.

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

13. The learned judge erred in holding that the challenge to the Defendant's failure to act in response to the letter sent by Fair Vote on 5 July 2018 and by continuing

failures to act, the most recent of which was on 3 December 2018, was not made promptly or within three months.

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

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

**(g) Costs at the Permission Hearing**

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

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17 December 2018