CO/3214/2018

IN HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N

SUSAN WILSON & OTHERS

Claimants

- and-

THE PRIME MINISTER

Defendant

GROUNDS FOR JUDICIAL REVIEW

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I. INTRODUCTION

1. Underlying the principal issue in this claim is a simple question: whether or not a lawful, free and fair vote is one of the constitutional requirements of the United Kingdom ("the UK")[1]. The Claimants submit such a question admits of only one answer: Yes.

2. Facts recently revealed since the Prime Minister exercised her power under s. 1 of the European Union (Notification of Withdrawal) Act 2017("the 2017 Act") to notify the European Union ("EU") of the UK's intention to leave the EU show that the 2016 referendum ("the Referendum") on whether the UK should remain a member of the European Union ("the EU") was vitiated by illegality and/or unlawful misconduct. More particularly, the Electoral Commission has recently found (to the criminal standard of proof) that serious offences were committed by the designated campaign for leaving the EU and by others, in breach of the statutory framework established by Parliament for the Referendum.

3. Therefore, the Prime Minister's decision that the UK should withdraw from the EU ("the Decision") and the notification of that decision ("the Notification"), was premised on a fundamental error of fact and was not made in accordance with the UK's constitutional requirements as required by Article 50 of the Treaty on European Union ("TEU") and/or are vitiated by those matters.

4. It was unnecessary for the European Union Referendum Act 2015 ("the 2015 Act") to make provision for the annulment of the referendum result in the case of illegality because the Referendum was advisory (and therefore did not have an automatic consequence equivalent to that in elections, for example).

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1 See: *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469.

However, it is uncontentious that the common law principles of legality and constitutionality apply. Thus, in considering whether, how and when to exercise her statutory power under Section 1(1) the 2017 Act the Prime Minister was required to act lawfully, that is act in accordance with established public law and constitutional principles.

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

II. GROUNDS

(1) The Prime Minister's Decision and Notification under Section 1(1) of the 2017 Act were not, or should not be treated as, lawful and/or in accordance with the UK's constitutional requirements.

(2) They are vitiated by conduct which would fall within the definition of *'corrupt and illegal practices'* in the Representation of the People Act 1983 and similar legislation, which the Electoral Commission has found to have taken place, to the criminal standard of proof, in breach of the statutory requirements established by and under the Referendum Act 2015, as well as other conduct, including that identified by the Information Commissioner, regarding personal data.

(3) The Referendum in 2016 was advisory or consultative (as opposed to binding) and the Decision and Notification are vitiated:

    (a) by depending solely upon the flawed consultation in the Referendum;

(b) to the extent that they are also based upon promises to honour and implement the result of the Referendum, by construing such a promise to include honouring and implementing a Referendum result vitiated as aforesaid.

(4) By reason of the aforesaid conduct, it is irrational for the Prime Minister to treat as binding the result of a Referendum which, had it been binding, would be void, and/or the result of which may have been affected thereby. Alternatively, to do so is not lawful or in accordance with the UK's constitutional requirements (including section 6 of the HRA and A3P1, below). Parliament should not be taken to have disapplied principles of legality and constitutionality in conferring the said power on the Prime Minister.

(5) The Decision and Notification are, in any event, in breach of section 6 of the HRA and the requirements of Article 3 of the First Protocol.

(6) Further or in the further alternative, it is not constitutionally open to the Prime Minister to ignore the findings of the Electoral Commission and to take no material steps to give anxious scrutiny to their import or otherwise in response to them.

III. RELIEF SOUGHT

6. In the light of recent revelations as to the corrupt and illegal practices in the conduct of the Referendum and, secondarily, in the light of the Prime Minister's decision to refuse to accede to the requests set out in Fair Vote Project's letter of 5 July 2018, the Claimants seek the following relief:

(1) **Declaration:** A declaration that:

(a) the Referendum result is vitiated by reason of corrupt and illegal practices;

(b) the Decision and Notification are vitiated by reason of corrupt and illegal practices in the Referendum;

(c) are in breach of the UK's constitutional requirements and/or section 6 of the HRA and Article 3 of the First Protocol; or

(d) such other declaratory relief as the Court may think fit.

(2) **Quashing Order:** By reason of the above, an order:

(a) quashing the Decision, namely the Prime Minister's decision pursuant to section 1 of the 2017 Act to that the UK should leave the EU, implicit in her decision notify the European Council of the UK's intention to leave the EU, under Article 50(2); and

(b) quashing the Notification, namely the notice by which such notification was given, on the basis that it was not in accordance with the UK's own constitutional requirements, as required by section 1 of the 2017 Act, the HRA and/or Article 50.

(3) **Further or other relief:** An order requiring the Prime Minister:

(a) to give anxious scrutiny to the import of the findings of the Electoral Commission and the offences committed;

(b) lawfully to re-consider her decision to do nothing in response to the said findings;

(c) lawfully to consider extending the date of the 'exit day' under section 20(4) of the European Union (Withdrawal) Act 2018 and/or

to take any other necessary steps to render such extension effective; and/or

(d) such further other relief as the court may think fit.

IV. BASIS OF THE CLAIMANTS' CLAIM

7. The basis of the Claimants' claim is as follows:-

(1) Article 50 TEU provides the mechanism in EU law for a Member State to withdraw from the EU and for the EU Treaties to cease to apply to that State.

> ***Article 50***
> *1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
>
> *2. A Member State which decides to withdraw shall notify the European Council of its intention.*

(2) Under Article 50, notification under Article 50.2, is dependent upon a decision to withdraw from the EU *"in accordance"* with the Member State's *"own constitutional requirements"*. The Referendum was only a part of those requirements (see: *Shindler v Chancellor of the Duchy of Lancaster*[2]; and *R (on the applicant of Miller and another) v Secretary of State for Exiting the European Union*[3]).

(3) Whether or not the Prime Minister's decision and/or notification is in accordance with the UK's own constitutional requirements is a question of purely domestic, not EU, law (see: *Shindler* and *Miller,* above; and by

[2] [2016] EWCA Civ 469, at paragraphs 13 and 19.

[3] [2017] UKSC 5, [2018] AC 61, at paragraphs 16, 104, 116-124.

analogy Case-158/91 *Tribunal de Police, Metz v Levy* and *Micula v Romania* [2018] EWCA Civ 1801).

(4) Section 1(1) the 2017 Act, conferred an express statutory power upon the Prime Minister to notify the European Council of the United Kingdom's intention to leave the EU:

> ***1 Power to notify withdrawal from the EU***
>
> *(1) The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.*

(5) The conferral of that power to notify under Article 50(2), plainly contemplated and encompassed the power to take a decision to withdraw and conferred that power expressly on the Prime Minister (see: *R (on the application of Webster) v Secretary of State for Exiting the EU* [2018] EWHC 1543, at [13]).

(6) The Prime Minister is obliged to exercise the power:

(a) for the purpose for which it was conferred;

(b) lawfully and rationally, on public law principles, in accordance with:

(i) the principle of legality;

(ii) common law principles of constitutionality; and/or

(iii) section 6 of the HRA (particularly Article 3 of the First Protocol);

(c) in any event, in accordance with the UK's constitutional requirements.

(7) The UK's constitutional requirements include well established principles which value and seek to preserve the integrity of democracy, including the voting process, as well as lawful decision-making. The right to vote is a fundamental constitutional right (see: R (Preston) v Wandsworth London BC [2012] 2 WLR 1134 at [40] *per* Elias LJ). The integrity of the democratic process is one of the common law's fundamental values which underlie the UK's constitutional requirements in this case (see: by analogy *Wainwright v Home Office* [2004] 2 AC 406 at [31] *per* Lord Hoffman). The principle of legality is a relevant constitutional requirement in this case, protecting democratic values recognised by the common law and applying principles of constitutionality.

(8) As Richard Mawrey QC, sitting as the Election Commissioner, stated in *Erlam v Rahman* [2015] EWHC 1215 (at [20]):

> *"...If a candidate is elected in breach of the rules for elections laid down in the legislation, then he cannot be said to have been 'democratically elected'. In elections, as in sport, those who win by cheating have not properly won and are disqualified. Nor is it of any avail for the candidate to say 'I would have won anyway' because cheating leads to disqualification whether it was necessary for the victory or not. In recent election cases, for example, it has been proved that candidates were elected by the use of hundreds (in Birmingham, thousands) of forged votes: would anyone seriously claim that those candidates had been 'democratically elected'?"*

(9) The explicit guidance set out in the Venice Commission's Code of Good Practice for Referendums of 19 March 2007 ('the Code')[4], states that:

> *"24. National rules on both public and private funding of political parties and election campaigns must be applicable to*

[4] http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008-e

referendum campaigns (point II.3.4.a). As in the case of elections, funding must be transparent, particularly when it comes to campaign accounts. In the event of a failure to abide by the statutory requirements, for instance if the cap on spending is exceeded by a significant margin, the vote must be annulled" (emphasis added)[5]

(10) The UK constitutional requirements for binding referendums and elections are entirely consistent with the Code. In an election, false declarations as to election expenses that are made knowingly constitute '*corrupt practices*': section 82 of the Representation of the Peoples Act 1983 ("1983 Act"). Further, under s. 159 where a candidate is personally guilty or guilty by his agents of any corrupt or illegal practice, his election shall be void. Section 164 further 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. There is therefore no foundation for a view that the UK's constitutional requirements would allow or condone the practices identified below.

(11) Article 3 of Protocol 1 to the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, applied so as to require that the Referendum was conducted lawfully, fairly and under conditions that would ensure the expression of the opinion of the people[6], since the

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[5] In this regard, the Venice Commission cross referred to the analogous rule set out in its Code of Good Practice for the Conduct of Elections Strasbourg, 23 May 2003 Opinion no. 190/2002; http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e

[6] See in particular the dissenting opinions of Lords Kerr and Wilson in *Moohan v The Lord Advocate* [2014] UKSC 67 at paras 65-105; the ECtHR admissibility decision in *Moohan and Gillon v UK* (Applications nos. 22962/15 and 23345/15) at para 42 and Lester, Pannick &

Referendum affected the legislature given the increase in powers of the European Parliament and/or the undertaking by the Prime Minister and the government to treat it as binding. Further or alternatively, it applied to the making of the Decision and/or Notification. In any event, in each case, there were underlying common law constitutional requirements to similar effect.

(12) In the case of the Referendum, it is now clear that it was not conducted in accordance with the UK's constitutional requirements, including the express statutory provisions regulating campaigning in the Referendum.

(13) The Prime Minister has repeatedly emphasised that her Decision that the UK should withdraw from the EU is based solely upon the outcome of the Referendum; alternatively, that it relies upon the outcome, coupled with the promises to respect the outcome.

(14) The factual premise(s) upon which the Prime Minister has relied can now be seen to be flawed by reason of the said corrupt and illegal practices.

(15) In the premises, the Prime Minister's Decision was not taken in accordance with the UK's constitutional requirements because of the illegal and corrupt conduct in the Referendum (addressed below and in the Statement of Facts Relied Upon, annexed to these Grounds).

(16) The Referendum was advisory and was therefore analogous to a consultation. The Prime Minister's Decision is vitiated by the flaws in the

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Herberg: Human Rights Law and Practice: *"The Commission has held that referenda do not fall within the scope of art 3: Application 6742/74: X v Germany 3 DR 98 (1975); Application 7096/75: X v United Kingdom 3 DR 165 (1975). However, it is submitted that this is too restrictive an approach where a referendum is closely connected with the enactment of legislation."*

Referendum, constituted by the said corrupt and illegal practices, in the same way as any other decision taken by a Minister, based upon a flawed consultation.

(17) The Prime Minister's decision should in any event be quashed (see: *Regina (C (A Minor)) v Secretary of State for Justice* [2009] QB 657 esp. at 675G-H and 684E-G).

(18) Further or alternatively, it is unlawful because:

(a) it is irrational, *Wednesbury* unreasonable and/or contrary to UK's constitutional requirements to rely upon the Referendum result, in the light of the said illegal and corrupt conduct;

(b) ignoring such conduct impermissibly fails to take into account a plainly relevant factor to which the Prime Minister is bound to give due consideration; and/or

(c) by having taken the decision when the Prime Minister was on notice of the real possibility of such illegal and corrupt conduct (the Electoral Commission having begun an investigation before the Decision), the Prime Minister acted unlawfully in precluding herself from having regard to the same by taking her decision as and when she did;

(d) to the extent that the Prime Minister relies upon the promises to honour, respect or implement the outcome of the Referendum, no proper construction of such a promise could admit an obligation to honour, respect or implement an outcome vitiated by illegal or corrupt conduct and it is irrational and/or

unreasonable to rely upon the said promise in that way. Nor could any legitimate expectation arise to create such an obligation.

(19) Consideration of corrupt and illegal conduct in the Referendum cannot be precluded; alternatively (and *a fortiori*), not without clear words in legislation.

(20) The constitutional importance of the Decision and Notification accentuate the relevance of the above to the Prime Minister exercise of her statutory power and the need to take such matters into account and pay them proper heed, since the advisory nature of the Referendum meant that no election petition could be brought to annul the result.[7] The duty to consider them therefore falls upon the Prime Minister. She has not done so and made the Decision on a premise which can now be seen to be false.

(21) In any event, both the Decision and the (dependent) Notification are thereby each vitiated and a nullity.

(22) The rule of law requires a determination of those matters, being of significant constitutional importance.

(23) Both those wishing to leave and those wishing to remain are entitled to an expression of popular will which is not tainted by corrupt and illegal practices.

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[7] Parliament did not provide for election petitions for the Referendum, in the EU Referendum Act or in secondary legislation (the EU (Conduct) Regulations 2016 SI 2016/219) ("the Regulations"), Cf. Local Authorities (Conduct of Referendums) (England) Regulations 2012/323, paragraph 15, which imports the relevant grounds for a referendum petition from the 1983 Act (including those in section 164 – *"corrupt or illegal practices"*) and the consequences of questioning a referendum mirror those on questioning of a local election, under the Local Government Act.

V. THE PRIME MINISTER'S RESPONSE

8. The GLD responded on behalf of the Prime Minister to DPG's pre-action letter[8] on Friday, 3 August 2018, and to the Claimants' pre-action letter on Friday, 10 August 2018. The letters rejected the basis of claims advanced. The Claimants contend that they were wrong to do so, for the following reasons.

9. The GLD made two specific points arising on the Claimants' pre-action letter:

> *"(a) Any such claim is substantially out of time; and*
>
> *(b) This issue was specifically considered by the Court in R (Webster) v Secretary of State for Exiting the EU [2018] EWHC 1543 and was rejected."*

(a) Time

10. The GLD asserts that *"Any such claim is substantially out of time"*.

11. The relevant findings of the Electoral Commission were made in May and July 2018. The Claimants have acted promptly. This claim has been brought within 3 months of the Commission's Report of 11 May 2018 and in less than 4 weeks from the Commission's Report of 17 July 2018 (see paragraph 50, below). Absent the findings in those Reports, judicial review would not have been available to the Claimants on the basis advanced in this claim. Nor would this Court have been the appropriate forum to resolve disputed issues of fact as to the corrupt and illegal practices in issue, given that Parliament expressly vested the Commission with the responsibility for such enquiries.

12. It would therefore have been impossible to have brought these proceedings prior to such findings by the Commission.

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8 The Prime Minister declined to take any of the steps requested by DPG.

13. The clear public interest underpinning s. 31 of the Senior Courts Act 1981 and CPR 54.5, was explained by Carnwath LJ in _Trim v North Dorset District Council_ [2010] EWCA Civ 1446 at [23] as follows:

> *'…it is in the public interest that the legality of the formal acts of a public authority should be established without delay.'*

14. There has been no delay in the present case, save for the inevitable passage of time in the Electoral Commission investigating matters which had not been made public (or had been concealed) as Parliament required it to. Certainly, there has been no delay which ought as a matter of justice to preclude the Claimants' access to this Court.

15. In those circumstances, these proceedings should not be treated as being out of time.[9] Alternatively, an appropriate extension of time should be granted. The Claimants respectfully ask the Court to grant any such extension as may be necessary to ensure that there is an effective remedy and access to justice, in the light of the matters now known and in the light of their constitutional importance.

(b) <u>Issue in *Webster*</u>

16. The GLD asserts that *"This issue was specifically considered by the Court in _R (Webster) v Secretary of State for Exiting the EU_ [2018] EWHC 1543 and was rejected."*

17. That is simply not correct. The issue in _Webster_ was whether or not any decision had been taken at all. The Court decided that such a decision had been taken. The Claimants agree with that decision and indeed rely upon that judgment in these grounds.

[9] If necessary, CPR 54.5 should be read down, under the HRA.

18. However, the present case raises a quite different point: whether the Decision is vitiated by corrupt and illegal practices in the Referendum or otherwise not in accordance with the UK's constitutional requirements by reason of those practices. Neither Report of the Commission was available when the claim in *Webster* was commenced and the Commission's second Report postdated the judgment in *Webster* by over a month. In short, *Webster* did not consider the matters upon which this claim relies.

19. The target in *Webster* was the ongoing negotiations, on the premise that there had been no decision at all. This claim proceeds on the opposite (and correct) premise: the target is the Decision taken by the Prime Minister under a statutory power conferred upon her by Parliament, and the Notification which depends upon it.

20. Had Parliament wished to confer upon the exercise of that power an immunity in respect of judicial review or made special provision circumscribing the Court's powers of review, it could have done so. It did not.

(c) Other points

21. The GLD also advanced the following key points, in its response to DPG's letter, which are briefly addressed as follows:-

    (1) **Non-justiciable:** The GLD contends that the complaints raised by DPG are non-justiciable. In so far as that point is pursued against the Claimants, it is not supported by authority. There is good reason why the Prime Minister's exercise of her statutory power should not be beyond the reach of the rule of law or the jurisdiction of this court. This is not a political matter (Cf. *Webster*); it is a legal one, as reliance upon the law and the principle of legality emphasise. The distinction is illustrated by relevant analogy, in the decision of Divisional Court in *R (Woolas) v Parliamentary*

Election Court [2012] QB 1, DC.[10] In that case, the Divisional Court (Thomas LJ, Tugendhat, Nicola Davies JJ) considered the jurisdiction of the Election Court under section 123 of the Representation of the People Act 1983 ("the 1983 Act") to try a parliamentary election petition and whether its decision was amenable to judicial review. It held that the Election Court's decision was so amenable. Parliament had conferred upon the Election Court the express statutory powers under the 1983 Act, including to declare an election void, by reason of corrupt and illegal practices. There were two facets to the Court's reasoning. First, the status of the Election Court and the function which it was discharging. Second, the exercise which the Divisional Court would be called upon to undertake.

(a) The Divisional Court distinguished its function (reviewing the decision as to whether Mr Woolas had been elected in a free and fair election) from the electorate's function in such an election (at [10]):

"The Courts therefore do no more than to discharge these limited functions; it is for the electorate to determine whom it wishes to elect in a free and fair election."

(b) The Divisional Court also stressed that its function of review was consistent with constitutional principles (at [52]):

"This is entirely consistent with the constitutional principles derived from the separation of powers and the rule of law that it is for the courts to determine the meaning of the law enacted by Parliament. Whilst it may be possible to characterise the fact-finding role of the election court as a role it carries out in discharging a limited function for the House of Commons, the provisions relating to the stating of a special case are consistent only with the constitutional principle that it has

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10 See also the observations of Richard Mawrey QC, at [17]-[20], rebutting criticisms of the decision in Woolas in Rahman.

> *always been the role of the High Court and the appellate courts to determine the meaning of the law as enacted by Parliament. In our view, the provisions in respect of the stating of a special case are consistent only with Parliament's clear acknowledgement of that principle. Review by the courts of an issue of law arising out of a determination of an election court, in our judgment, far from being in any way inconsistent with the constitutional relationship between Parliament and the High Court, is what Parliament plainly regarded as entirely appropriate, as the rule of law requires interpretation of the law by the ordinary courts."*

(c) The lawfulness of the Prime Minister's exercise of her statutory power under section 1 of the 2017 Act is equally amenable to judicial review, on the basis of the same underlying constitutional principles.

(2) **Six week time limit:** The GLD contends that any challenge to the Referendum should have been brought within 6 weeks. This is a bad point. The quotation set out by the GLD at paragraph 12.c. was materially incomplete in its citation of paragraph 133 of the explanatory notes to the Referendum Act 2015. The full paragraph reflects the actual terms of paragraph 19 (with omitted words underlined for emphasis) as follows:

> *133. Paragraph 19 relates to how the result of the referendum may be challenged in legal proceedings. <u>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)).</u> 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.*

(3) **Not procured by fraud:** The GLD's response to DPG's pre-action letter importantly regarded the following as dispositive:

> *"The key and dispositive point is that neither the reports of the Electoral Commission, nor any of the material referred to in your letter, support your central contention that the outcome of the Referendum was "procured by fraud"."*

However, the Electoral Commission's Reports are replete with findings of offences that would constitute *"corrupt and illegal practices"* in an election or binding referendum so as to render the result void. Such practices are sometimes referred to as electoral fraud. There are generally two species of conduct rendering an outcome void: 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 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"*). The findings of the Electoral Commission more than satisfy the conditions under which an election, or binding referendum, would have been void. The GLD is wrong to repose any confidence in its reasoning set out above.

(4) **'Remain' findings also:** The GLD points out that there have been findings also against those campaigning for 'Remain'. That does not improve the standing of the Referendum, nor answer the findings relied upon by the Claimants. On the contrary, it is a further reason why the decision of the Prime Minister was vitiated by illegality.

(5) **Analogy with elections:** The GLD challenges the analogy with elections. The GLD is wrong as a matter of law and the correct basis of that analogy is set out herein and *Moohan v Lord Advocate* expressly considered. In any

event, the distinction between a binding vote (whether referendum or election) and an advisory one does not assist the Prime Minister in defending her Decision to treat the Referendum result as binding.

(6) **Standing:** The GLD questions the standing of DPG's client. By reason of being UK citizens living and/or working in the EU, the Claimants in this claim clearly have standing. Individuals with the same status were acknowledged as having a direct interest in *Miller*. The Claimants note that this point was not repeated against the Claimants in the GLD's letter response to them.

(7) **Relief sought by DPG:** The GLD criticises the steps sought by DPG. The Claimants would be content with a declaration that it is not open to the Prime Minister simply to ignore matters of such seriousness, having in turn such serious constitutional implications.

VI. THE REFERENDUM

(a) Promises made about the Referendum

22. The Conservative Party Manifesto 2015 promised (pp.30 and 72-3) to hold a *"straight in-out referendum by the end of 2017"*. This promise was kept.

23. It also promised to *"complete the electoral register, by working to include more of the five million Britons who live abroad"* and to *"introduce votes for life, scrapping the rule that bars British citizens who have lived abroad for more than 15 years from voting."* This did not happen; but despite this, the result of the Referendum was still close.

24. Her Majesty's government, and the Prime Minister herself, have repeatedly promised to respect and implement the result of the Referendum, before and

after it took place. Indeed, the 2015 Manifesto, above, had promised (p.73): *"We will honour the result of the referendum, whatever the outcome."* (As noted above, the Claimants contend that this cannot be construed as a promise to honour an outcome vitiated by corrupt and illegal practices that would have rendered a binding referendum or the election of an MP void.)

25. The Prime Minister has since repeatedly stated that she is bound to implement the Referendum result and emphasised the Referendum's status as a democratic exercise. It is her Decision and Notification on this express basis, that is challenged in this claim.

(b) The Referendum

26. The 2015 Act was enacted to make provision for the holding of a referendum in the United Kingdom and Gibraltar on whether the United Kingdom should remain a member of the European Union.

27. The EU Referendum Act did not prescribe any consequences to follow from the result. It was, as a matter of UK domestic law, an advisory referendum. By way of contrast, the Parliamentary Voting System and Constituencies Act 2011 provided, in section 8, that in the event of a specified result the Prime Minister was to give effect to certain legal provisions scheduled to that Act. The EU Referendum Act, in clear contrast, did not state that if more than half of the votes cast were to withdraw from the EU the Prime Minister was to give notification under Article 50 TEU.

28. The 2015 Act and Article 50 were considered in *Shindler*. In that case, the Court of Appeal held that the EU Referendum "*contains part*" of the United Kingdom's "*constitutional requirements*" for the purposes of Article 50 TEU for leaving the UK (at [13]).

29. The conduct and effect of the EU referendum was governed by the Political Parties Elections and Referendum Act 2000 ("PPERA") 2000, the 2015 Act, the HRA (A3P1) and the common law.

30. Section 3 of the 2015 Act established that Part 7 of the 2000 Act, as well as Schedule 1 (Campaigning and Financial Controls), Schedule 2 (Control of loans etc. to permitted participants) and Schedule 3 (Conduct of the referendum) to the Act apply to the Referendum.

31. As an advisory Referendum, its result had no automatic legal consequences but required further decisions to be taken: *Miller* (above). It was therefore distinct from a vote for the election of a candidate for office, where the automatic consequence of the candidate achieving the majority of the votes is that that the candidate is elected, subject only to a successful election petition. As established in *Miller*,[11] Parliament did not, by the 2015 Act, confer upon the Prime Minister (or the government) the power to decide that the UK should leave the EU, nor the power to notify the EU of such an intention.

32. However, the Referendum was no less subject to the rule of law by virtue of being advisory only. Its advisory nature did not diminish the need for participants to act lawfully or to comply with the primary and secondary legislative requirements governing it. Parliament enacted detailed rules to ensure that the advisory result of the Referendum was a real and fair reflection of the views of the electorate. Further, those rules were put in place by Parliament to ensure transparency and public confidence in the democratic processes. Thus it set out rules to control and limit expenditure, to require participants spending more than £10k to register and declare expenses and donations received, to designate two 'lead' campaigns which would have special

[11] Paragraphs 116-124

status and entitlements, to control co-ordination between campaigns and to prohibit certain donors, including foreign donors so as to avoid foreign interference. Compliance with these laws was the means by which Parliament sought to ensure that the result of the Referendum would represent the legitimate and fair expression of the views of those permitted to vote or, put more simply, a *free and fair vote*.

(c) The Referendum result

33. Although the Referendum was advisory, the Government had stated that it would abide by the result (above). That has been and remains the Prime Minister's position.

34. The integrity of the Referendum is therefore of acute constitutional importance.

35. On 23 June 2016, 51.89% of those voting in the referendum, voted in favour of the United Kingdom leaving the EU. 48.1% voted in favour of the United Kingdom remaining in the EU.[12] It was a close result.

36. Following the result, the Government stated that it intended to notify the EU Council of its decision to abide by the result, that is, that the UK should leave EU and to do so using its prerogative power to make international treaties.

37. As noted above, that decision was subject to legal challenge, which was upheld. In *Miller* the Supreme Court (upholding a three judge Divisional Court) held that the executive had no prerogative power to notify the EU Council of the United Kingdom's intention to leave the EU. Legislation was therefore required.

[12] https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information

(d) The 2017 Act

38. Accordingly, as noted above, the Government laid legislation before Parliament which gave the Prime Minister a statutory power to notify the EU under Article 50 of the TEU of the UK's intention to withdraw from the EU: s.1 of the 2017 Act.

39. On 31 January 2017, at the bill's second reading in the House of Commons the then Secretary of State for Exiting the European Union, Mr David Davis MP, introduced it as follows:

> *I beg to move, that the Bill be now read a Second time. … The Bill responds directly to the Supreme Court judgment of 24 January, and seeks to honour the commitment the Government gave to respect the outcome of the referendum held on 23 June 2016. It is not a Bill about whether the UK should leave the European Union or, indeed, about how it should do so; it is simply about Parliament empowering the Government to implement a decision already made—a point of no return already passed. We asked the people of the UK whether they wanted to leave the European Union, and they decided they did. At the core of this Bill lies a very simple question: do we trust the people or not? The democratic mandate is clear: the electorate voted for a Government to give them a referendum. Parliament voted to hold the referendum, the people voted in that referendum, and we are now honouring the result of that referendum, as we said we would…*
>
> *This Bill provides the power for the Prime Minister to begin that process and honour the decision made by the people of the United Kingdom on 23 June last year, and I commend it to the House. Trust the people."* (emphasis added)

40. Royal Assent was given on 16 March 2017.

41. The Long Title of the Act makes explicit that the object and purpose of the Act was to "*confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU*".

42. In *Webster*, referred to above, the Divisional Court held that:

> "*13.... Its authorisation to the Prime Minister to notify under Art.50(2), plainly contemplated and encompassed the power to take a decision to withdraw and conferred that power expressly on the Prime Minister; there would indeed be no point in notifying under Art.50(2), absent a decision to withdraw under Art.50(1).*" (emphasis added)

43. A question of construction for this Court is whether Parliament intended to empower the Prime Minister to take the UK out of the EU on the basis (and only on the basis) of the result of a Referendum, which was vitiated by corrupt and illegal conduct which would have nullified any binding Referendum or election. It clearly did not.

44. That question falls to be answered in the light of the context and purpose of the 2017 Act and the express reference to domestic constitutional requirements in Article 50, to which section 1 of the 2017 Act expressly refers.

45. There is nothing in the 2017 Act to suggest that Parliament intended to condone corrupt or illegal practices, or to put consideration of their consequences beyond the reach of this Court.

(e) The 2018 Act

46. The European Union (Withdrawal) Act 2018 ('the 2018 Act') was enacted to make provision for the UK to leave the EU, in the light of the Prime Minister's Decision and Notification.

47. It was enacted on 26 June 2018, prior to the Electoral Commission's Report of 17 July 2018 into Vote Leave Limited ('Vote Leave') and others. The significance of this Report is that Vote Leave was the official designated campaign to leave the EU (analogous to the candidate in an election) and the Report made the serious findings of offences set out below.

VII. RECENT DEVELOPMENTS – FACTS RELIED UPON

48. It has recently become clear that the Referendum was tainted by significant breaches of the 2015 Act, amounting to corrupt and illegal practices in election law. Those breaches were committed by participants campaigning for the UK to leave the EU, including Vote Leave, which the Electoral Commission ('the Commission') designated as the lead campaign for 'Leave' on 13 April 2016.

49. The Commission found, in short summary:

 49.1 Vote Leave, the official designated campaign, was found on a standard of beyond reasonable doubt to have committed serious offences, including joint working between the lead campaigner, Vote Leave and another campaign group BeLeave. BeLeave was found to have spent £675,315.18 with Aggregate IQ under a common plan with Vote Leave. This spending should have been declared by Vote Leave. It means Vote Leave exceeded its legal spending limit of £7 million by £449,079, around 6%.

 49.2 Leave.EU, a registered participant, failed to include at least £77,380 in its spending return, thereby exceeding its spending limit by more than 10%, being fees paid to the company Better for the Country Limited as its campaign organiser. The Commission stated that it was satisfied that the actual figure of overspend was in fact greater, given the failure to report an appropriate proportion of the cost of services provided by Goddard

Gunster (see below). It also failed correctly to report three loans from Arron Banks totalling £6m , failed to evidence 97 payments totalling £80,224 and failing to declare a proportion of the costs of services provided by US campaign strategy firm Goddard Gunster.

50. The full detail is set out in two Reports by the Electoral Commission (further particularised in Annex A to these grounds):

50.1 **Report on an investigation in respect of the Leave.EU Group Limited** (Concerning pre-poll transaction reports and the campaign spending return for the 2016 referendum on the UK's membership of the European Union) dated 11 May 2018 ("the Leave.EU Report").

50.2 **Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave, Veterans for Britain** (Concerning campaign funding and spending for the 2016 referendum on the UK's membership of the EU), dated 17 July 2018 ("the Vote Leave & Others Report").

51. The misconduct in those Reports is compounded by other matters referred to in the Annex to these grounds including the findings of the Information Commissioner in relation to Facebook, Cambridge Analytica and others.

52. The Electoral Commission has imposed the following fines:

52.1 £61,000 imposed on Vote Leave, the official designated campaign to leave the EU (analogous to the candidate in an election), in respect of three offences[13].

[13] The conduct in question including serious offences, including joint working between Vote Leave and another campaign group BeLeave. BeLeave was found to have spent more than £675,000 with Aggregate IQ under a common plan with Vote Leave.

52.2 £20,000 imposed on Mr Darren Grimes, the founder and responsible person for BeLeave, in respect of two offences.

52.3 £250 imposed on Mr David Banks, the responsible person for Veterans for Britain, because the Commission determined that he had committed an offence.[14] under section 122(4)(b) PPERA in that he failed, without reasonable excuse, to deliver a referendum spending return that included an accurate report of relevant donations received.

52.4 fines of £70,000 imposed on Leave.EU, in respect of four offences – a total sum which was constrained by the cap on the Commission's fines.

53. These matters fall to be considered in the context of the UK's constitutional requirements to which Article 50 expressly refers.

VIII. THE PRIME MINISTER'S DECISION

54. On 24 February 2017, shortly prior to the Prime Minister's decision, the Electoral Commission launched an investigation into the spending returns of both the Leave and Remain campaigns[15].

55. In exercise of that power, on 29 March 2017, the Prime Minister took a decision to withdraw the UK from the EU and Euratom and to notify the EU of that decision by way of a letter to that effect sent to the President of the European Council.

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14 There was reasonable doubt as to whether £100,000 that Vote Leave had paid to Aggregate IQ on 20 June 2016 (declared as a donation to Veterans for Britain on 20 May 2016) took the same form as the donation to Darren Grimes, i.e. expenditure by Vote Leave – subject to further investigation.

15 https://www.bbc.co.uk/news/uk-politics-39075244

56. The Prime Minister expressly stated that the reason for her decision to withdraw the UK from the EU and to notify the EU of that decision was the voting result of the referendum of 23 June 2016. The letter set out her reasons in the following way:

> *On 23 June last year, the people of the United Kingdom voted to leave the European Union…Today, therefore, I am writing to give effect to the democratic decision of the people of the United Kingdom. I hereby notify the European Council in accordance with Article 50(2) of the Treaty on European Union of the United Kingdom's intention to withdraw from the European Union.*
> (emphasis added)

57. The Divisional Court in *Webster* held that:

> *"Even putting the Referendum to one side, this is the language of decision not of notification alone, in vacuo, so to speak. The Prime Minister's letter itself contains a decision; backed by the authority of the 2017 Act, that decision complies with the requirements of Miller."*
> (emphasis added)

58. This finding accorded with the submission of the Secretary of State in the *Webster* case that it was the Prime Minister who had taken the decision to withdraw the UK from the EU because *"[u]nquestionably the notification is a decision to withdraw"*.[16]

(a) Referendum result as the sole basis for the decision

59. The Prime Minister and the Secretary of State have repeatedly stated the basis for the Prime Minister's decision to withdraw the UK from the EU was that a

[16] Transcript of hearing on 12 June 2018, at page 33B

majority of those who voted in the referendum voted in favour of leaving the EU and the Government had promised to honour the result of the referendum.

60. It follows that the basis for the Prime Minister's decision to withdraw and notify was her understanding that there had been a lawful, free and fair vote which had produced a result of 51.89% of those voting, voting in favour of the UK leaving the EU (or 34.73% of the voting public, turnout according to the Electoral Commission).

61. On 12 July 2018, Her Majesty's Government reiterated this in its white paper *'The Future Relationship Between the United Kingdom and the European Union'*. The Prime Minister introduced the paper as follows:

> *In the referendum on 23 June 2016 – the largest ever democratic exercise in the United Kingdom – the British people voted to leave the European Union. And that is what we will do – leaving the Single Market and the Customs Union, ending free movement and the jurisdiction of the European Court of Justice in this country, leaving the Common Agricultural Policy and the Common Fisheries Policy, and ending the days of sending vast sums of money to the EU every year. We will take back control of our money, laws, and borders, and begin a new exciting chapter in our nation's history.*

(b) Factual basis flawed

62. For the reasons set out below, the factual basis upon which the Prime Minister made her decision was not correct; had she known what is known now, namely that the referendum result was procured by criminal conduct, she could not confidently have proceeded on the basis that 51.89% of those who voted and 34.73% of the electorate were in favour of the UK leaving the EU or that she should or could be bound by a promise to honour or respect a result obtained in that way. Indeed, the significance of the matters set out above is such the

result cannot lawfully or rationally be characterised as *'democratic'*, binding or in accordance with the UK's constitutional requirements.

(c) Post notification matters

63. The UK Government is currently involved in negotiations with the European Commission (acting on behalf of the European Union) regarding the terms of withdrawal. The process of withdrawal is subject to Article 50 of the Treaty on European Union (TEU) ('Article 50').

64. Under Article 50, the Withdrawal Agreement must be passed by a special majority of the member states within two years of notification of the intention to withdraw, i.e. by 29 March 2019, unless the period of negotiation is extended by unanimous vote, absent which the UK exits without any agreement.

65. It is generally accepted that the Withdrawal Agreement can only include matters that relate to a member state's withdrawal. This can include a set of transitional arrangements, but not the future trade agreement, albeit that it will *'tak[e] account of the framework for [the UK's'] future relationship with the Union'*. A future trade agreement(s) may be concluded between the EU and the UK after the UK becomes a third country.

IX. JUSTICIABLE ISSUE

66. The principal issue in this case goes directly to the validity of the Prime Minister's decision that this country should leave the EU and her notification given to the European Council of that decision under Article 50.[17]

67. This is a justiciable issue:

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[17] The facts underpinning the principal issue give rise to further or alternative claims for relief (above, at paragraph 6).

(1) It is trite that the exercise of a statutory power is subject to judicial review: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (*per* Lord Diplock at 409C)

(2) It rests on two related questions which are pure questions of law:

(a) the proper construction of the 2017 Act (including its express reference to Article 50);

(b) the UK's constitutional requirements.

(3) As noted above, in *Shindler* the Court of Appeal addressed the issue of what constitutes the "*constitutional requirements*" in the United Kingdom for the country to decide to leave the EU.

(4) The issue is not academic. Its practical impact could scarcely be more important. The Government is committed to withdrawal from the EU, having given notice, purportedly in accordance with Article 50 and in accordance with the UK's constitutional requirements. It is undesirable for the legality of that position to be left in doubt or to be tested only after it is too late. The rule of law requires an answer to be given on the legality of the decision and of notification as soon as possible and before it is practically too late. Urgent listing is therefore appropriate, as in *Miller*.

68. As to the further or additional relief, in relation to the steps requested of the Prime Minister by DPG's letters, a threatened decision is justiciable. Even if the Prime Minister has not yet decided whether or not to take any of the steps requested by DPG, it is an established and proper exercise of the court's jurisdiction to grant, in an appropriate case, a declaration as to the legality of a threatened decision: e.g. *Oxfordshire CC v Oxford City Council* [2006] 2 AC 674 at [45] (Lord Hoffmann) [97] (Lord Scott) [133] (Baroness Hale).

69. The issues raised by this claim are therefore appropriate for the court to determine.

X. CONCLUSION

70. For the reasons set out above, a notification under Article 50 of the TEU may only lawfully be made in accordance with the 2017 Act, the UK's constitutional requirements and the rule of law.

71. By reason of the matters now known, the Referendum result is vitiated by corrupt and illegal practices, and the basis of the decision made by Prime Minister thereby fundamentally undermined. Neither the decision nor notification under Article 50 was in accordance with the UK's constitutional requirements. The court is respectfully invited to grant the relief sought or such relief as it may think fit.

PATRICK GREEN QC

JESSICA SIMOR QC

PAVLOS ELEFTHERIADIS

ADAM WAGNER

REANNE MACKENZIE

13 August 2018

CO/3214/2018

IN HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N

SUSAN WILSON & OTHERS

Claimant

- and-

THE PRIME MINISTER

Defendant

GROUNDS FOR JUDICIAL REVIEW

PATRICK GREEN QC

JESSICA SIMOR QC

PAVLOS ELEFTHERIADIS

ADAM WAGNER

REANNE MACKENZIE

Croft Solicitors
19 Imperial Square
Cheltenham
GL50 1QZ
T 01242 285 855
F 01242 285 856
DX 7445 Cheltenham

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STATEMENT OF FACTS RELIED UPON

A. BACKGROUND TO THE ELECTORAL COMMISSION'S RECENT FINDINGS

1. The Electoral Commission ('the Commission') is the statutory regulator that sets and enforces standards in relation to elections and referendums. It derives its authority from the Political Parties, Elections and Referendums Act 2000 ('PPERA') as amended by the EU Referendum Act 2015 ('the 2015 Act'). It has a duty under s.145 of PPERA to monitor and take all reasonable steps to secure compliance with the restrictions and other requirements relating to political campaign finance.

2. Under PPERA, individuals or organisations who wished to spend more than £10,000 campaigning in the Referendum had to notify the Commission so they

could be designated as *'permitted participants'*[18]. Those giving notice had to meet certain eligibility criteria. For example, they had to tell the Commission the name of a *'responsible person'* who would be legally responsible for meeting the reporting obligations set out in PPERA and which outcome they were campaigning for. The Commission published a register of permitted participants.

3. Designation as a permitted participant has important effects. For example, it is an offence under PPERA for a an individual or body which was not permitted participant during the referendum period to incur, during the Referendum period, expense in excess of £10,000[19].

4. Permitted participants were obliged to report their campaign donations and spending. In the run up to the referendum they had to report donations of over £7,500. After the Referendum, they had either three or six months to deliver spending returns depending on whether they spent less or more than £250,000. If they were not a political party, the spending return had to include a report on all donations received as well.

5. The Commission was permitted under s.108 PPERA to designate two umbrella organisations, one from each side of the question being considered, as participants to whom assistance was available. This assistance included a grant of up to £600,000, the use of public rooms free of charge, the sending of a referendum address free to every household or elector and the right to make referendum campaign broadcasts[20]. The two designated campaigns were Vote Leave and Stronger in Europe.

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[18] A registered party in a referendum: see ss.105-107 of PPERA as amended by the European Union Referendum Act 2015 Sch. 5

[19] s.117 of PPERA

[20] ss. 108-110 of PPERA

6. A person or body designated under s.108 PPERA may not incur expenses of more than £7,000,000 during the referendum period.[21] It is an offence to incur expenses in exces of that limit during the referendum period.[22]

7. On 24 February 2017, shortly prior to the Prime Minister's decision, the Electoral Commission launched an investigation into the spending returns of both the Leave and Remain campaigns (https://www.bbc.co.uk/news/uk-politics-39075244).

8. The Commission has recently completed two investigations which are relevant to this Claim.

B. INVESTIGATION INTO VOTE LEAVE, DARREN GRIMES, BELEAVE AND VETERANS FOR BRITAIN

9. On 17 July 2018 the Commission published a report in respect of:

   9.1 Vote Leave Limited, a permitted participant in the EU Referendum (‘Vote Leave’);

   9.2 David Halsall, in his capacity as the responsible person of Vote Leave;

   9.3 Darren Grimes in his capacity as a permitted participant and the founder of ‘BeLeave’, an unincorporated association he set up to campaign for the EU Referendum. BeLeave was not a permitted participant in the EU Referendum and therefore was not permitted to incur expenses of over £10,000 during the referendum period;

   9.4 David Banks in his capacity as the responsible person for Veterans for Britain, a permitted participant in the EU Referendum.

[21] para 1, Schedule 14 of PPERA

[22] s.118 of PPERA

10. The Investigation focussed on five payments made in June 2016 to a Canadian data analytics firm called Aggregate IQ. The payments were for services provided to campaigners in the EU Referendum. Three of the payments, totalling £675,315.18, were reported by Mr Grimes as donations from Vote Leave, and as spending by him on services from Aggregate IQ. Another payment of £50,000 from Mr Anthony Clake was reported by Mr Grimes as a donation from Mr Clake, and as spending by Mr Grimes on services from Aggregate IQ. The final payment of £100,000 was reported by Veterans for Britain as a donation from Vote Leave and as spending on services from Aggregate IQ.

(a) **Vote Leave**

11. As regards Vote Leave, the official designated campaign, on 17 July 2018 the Commission imposed maximum fines in respect of several offences.

12. In summary, Vote Leave, the official designated campaign, was found on a standard of beyond reasonable doubt to have committed serious offences, including joint working between the lead campaigner, Vote Leave and another campaign group BeLeave. BeLeave was found to have spent £675,315.18 with Aggregate IQ under a common plan with Vote Leave. This spending should have been declared by Vote Leave. It means Vote Leave exceeded its legal spending limit of £7 million by £449,079. Not only did the Electoral Commission issue Vote Leave the maximum fines available to it in respect of that conduct, it also made references to the police as set out below.

13. As is set out in the Commission's Report[23], the relevant offences and fines were as follows. In each case, the finding was made to the criminal standard of proof:

[23] *Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave , Veterans for Britain Concerning campaign funding and spending for the 2016 referendum on the UK's membership of the EU,* 17 July 2018 http://www.electoralcommission.org.uk/

13.1 An offence under section 122(4)(b) of the PPERA in that Mr David Allan Halsall, Vote Leave's registered 'responsible person' before the Electoral Commission failed, without reasonable excuse, to deliver a referendum spending return for Vote Leave that was a complete statement of all payments made. The Commission has fined Vote Leave £20,000 for this offence.

13.2 Mr Halsall committed a further offence under section 122(4)(b) PPERA by failing, without reasonable excuse, to include required invoices and receipts for eight payments. The Commission has fined Vote Leave £1,000 for this offence.

13.3 An offence under section 118(2)(c)(i) of the PPERA in that Mr Halsall incurred spending which he knew or ought reasonably to have known was in excess of the statutory spending limit for Vote Leave. Vote Leave also committed an offence under section 118(2)(c)(ii). The Commission has fined Vote Leave £20,000 for this offence.

13.4 An offence under Schedule 19B paragraph 13(1) PPERA in that it failed, without reasonable excuse, to comply with a requirement imposed by the Commission to produce documents by a specified date. The Commission has fined Vote Leave £20,000 for this offence.

(b) **Mr Grimes and BeLeave**

14. Mr Darren Grimes was found to have committed two offences and has also been fined the maximum fine, of £20,000. Mr Grimes spent £675,315.18 on behalf of BeLeave, a non-registered campaigner that had a spending limit of £10,000. Further, he wrongly reported that same spending as his own.

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data/assets/pdf_file/0019/244900/Report-of-an- investigation-in-respect-of-Vote-Leave-Limited-Mr-Darren-Grimes-BeLeave-and-Veterans-for- Britain.pdf

15. The Commission determined, again on a beyond reasonable doubt standard, that Mr Darren Grimes committed:

    15.1 An offence under section 117(3) PPERA in that Mr Grimes incurred spending on behalf of BeLeave that exceeded the statutory limit for a nonregistered campaigner. BeLeave also committed an offence under section 117(4). The Commission has fined Mr Grimes £20,000 for this.

    15.2 An offence under section 122(4)(b) PPERA in that Mr Grimes failed, without reasonable excuse, to deliver a referendum spending return as an individual registered campaigner that was a complete statement of all his referendum spending. In light of its decision to impose a fine on Mr Grimes for his offence under section 117(3) PPERA.

(c) **Veterans for Britain**

16. As regards Veterans for Britain, the Commission determined that its responsible person had committed an offence under section 122(4)(b) PPERA in that it failed, without reasonable excuse, to deliver a referendum spending return that included an accurate report of relevant donations received. The Electoral Commission was unable to establish beyond reasonable doubt that the £100,000 that Vote Leave had paid to Aggregate IQ on 20 June 2016 (declared as a donation to Veterans for Britain on 20 May 2016) took the same form as the donation to Darren Grimes (i.e. that it was in fact expenditure by Vote Leave). Further investigations by the Metropolitan Police and the ICO may shed further light on this.

C. INVESTIGATION INTO LEAVE.EU

17. On 11 May 2018 the Commission published a report concerning the pre-poll transaction reports and campaign spending of Leave.EU Group Limited, a

permitted participant and 'registered party' under s.106 PPERA whose spending limited was £700,000. It reported spending £693,094.

18. Leave.EU was found to have committed offences including:

18.1 Failing to include at least £77,380 in its spending return, thereby exceeding its spending limit by more than 10%, being fees paid to the company Better for the Country Limited as its campaign organiser. The Commission stated that it was satisfied that the actual figure of overspend was in fact greater, given the failure to report an appropriate proportion of the cost of services provided by Goddard Gunster (see below).

18.2 Not correctly reporting the receipt of three loans from Mr Arron Banks, totalling £6million. The dates the transactions were entered into, the repayment date, the interest rate and the provider of the transactions were all incorrectly reported.

18.3 Failing to provide the required invoice or receipt for 97 payments of over £200, cumulatively totalling £80,224.

18.4 Failing to declare a proportion of costs of services Leave.EU paid for from US campaign strategy firm Goddard Gunster. These should have been included as although they were paid for before the before the regulated period started on 15 April 2016, Leave.EU made use of them during the regulated period.

19. The Report[24] summarises the offences as follows:

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[24] https://www.electoralcommission.org.uk/ data/assets/pdf_file/0018/243009/Report-on-Investigation-Leave.EU.pdf

19.1 An offence under Schedule 2 paragraph 5(9)(b) of the 2015 Act in failing, without reasonable excuse, to submit a pre-poll regulated transaction report that was complete and accurate.

19.2 An offence under section 122(4)(b) PPERA in failing, without reasonable excuse, to deliver a referendum campaign spending return that was complete and accurate in respect of the transactions and payments reported.

19.3 A further offence under section 122(4)(b) PPERA in failing, without reasonable excuse, to deliver a referendum campaign spending return that was complete in respect of the required invoices or receipts for all payments over £200.

19.4 An offence under section 118(2)(c)(i) PPERA for incurring spending on referendum activity that exceeded the statutory limit, and that the responsible person knew or ought to have known when incurred was in excess of that limit.

19.5 In addition, Leave.EU committed an offence under section 118(2)(c)(ii) in respect of the same spending that exceeded the statutory limit.

20. The Commission imposed the following penalties on Leave.EU:

20.1 In respect of the offence under Schedule 2 paragraph 5(9)(b) of EURA – a penalty of £10,000.

20.2 In respect of the offence under section 122(4)(b) of PPERA relating to the completeness of the spending return – a penalty of £20,000.

21. In respect of the offence under section 122(4)(b) of PPERA relating to the failure to include invoices or receipts – a penalty of £20,000.

21.1 In respect of the offence under section 118(2)(c)(i) and (ii) of PPERA – a penalty of £20,000.

21.2 The Commission explicitly stated that the total value of the penalties imposed on Leave.EU is £70,000, which was constrained by the cap on the Commission's fines.

D. RELATED MATTERS

22. As noted above, the Commission has referred both Mr David Halsall the responsible person for Vote Leave, and Mr Grimes to the Metropolitan Police in relation to false declarations of campaign spending.

23. The Commission has also shared its investigation files with the Metropolitan Police in relation to whether any other persons have committed related offences which lie outside the Commission's regulatory remit; these may include members of the Vote Leave Board who include Ministers, former Ministers and MPs.

24. In addition to the findings set out above, the Claimants note that there is good evidence of illegal working together between Vote Leave and the DUP, involving further over-spending by Vote Leave: see the BBC spotlight programme aired on 26 June 2018 which raised real issues as to the legality of Vote Leave/DUP spending.

E. FACEBOOK AND OTHERS

25. In addition, the Information Commissioner's Office has served Facebook with a notice of intent to impose the maximum fine available to it: £500,000. It issued an interim update report on 10 July 2018 concerning data usage during the

campaign.[25] In the course of this initial phase of its investigation it noted that it had taken the following regulatory action:

25.1 11 warning letters requiring action by the main political parties backed by Assessment Notices for audits later this year.

25.2 An Enforcement Notice for SCL Elections Ltd to deal properly with Professor Carroll's subject access request.

25.3 A criminal prosecution for SCL Elections Ltd for failing to properly deal with the ICO's Enforcement Notice.

25.4 An Enforcement Notice for AiQ to stop processing retained UK Citizen data.

25.5 40 Notices of Intent to take regulatory action for a data broker Emma's Diary (Lifecycle Marketing (Mother and Baby) Ltd), and Facebook Group of companies.

25.6 Audits of the main credit reference companies and Cambridge University Psychometric centre.

26. The ICO Interim Report notes that:

> *"A key strand of our investigation is the link between CA, its parent company SCL Elections Ltd, Aggregate IQ and allegations that data that may have been misused by both sides in the UK referendum on membership of the EU..... In addition to the potential links between CA and Leave.EU, which initiated our investigation, we found a number of lines of enquiry, including their relationship with a Canadian firm, Aggregate IQ and its work with Vote Leave, BeLeave, Veterans for Britain and the Democratic and Unionist Party's Vote to*

[25] https://ico.org.uk/media/action-weve-taken/2259371/investigation-into-data-analytics-for-political-purposes- update.pdf

Leave campaign. We have identified information during our investigation that confirmed a relationship between Aggregate IQ (AIQ) and CA / SCL. To the extent this relationship involved the acquisition and use of personal data, we have also considered their interactions during our investigation....
Our investigation also considered the use of personal data by the Remain campaign group, Britain Stronger in Europe, in particular their use of services provided by the Messina Group, amongst others."[26]

27. The Information Commissioner , Elizabeth Denham, stated:

> *'We are at a crossroads. Trust and confidence in the integrity of our democratic processes risk being disrupted because the average voter has little idea of what is going on behind the scenes,' ... 'New technologies that use data analytics to micro-target people give campaign groups the ability to connect with individual voters. But this cannot be at the expense of transparency, fairness and compliance with the law. Fines and prosecutions punish the bad actors, but my real goal is to effect change and restore trust and confidence in our democratic system.'*

28. In its 'policy report' of 10 July 2018 entitled 'Democracy Disrupted: Personal Information and Political Influence' the Information Commissioner asked if democracy had been disrupted by the use of data analytics and new technologies.[27]

29. The Report concluded expressing concern as to the possibility that the current use of personal information by data companies may have already undermined the democratic process:

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26 At page 8

27 https://ico.org.uk/media/action-weve-taken/2259369/democracy-disrupted-110718.pdf

4.4 So has democracy been disrupted?

This is a complex and rapidly evolving area of activity, and the level of awareness amongst the public about how data analytics works and how their personal information is collected, shared and used through such tools is low. What is clear is that these tools have a significant impact on individuals' privacy. It is important that there is a greater and genuine transparency about the use of such techniques to ensure that people have control over their own data and the law is upheld.

We opened this report by asking whether democracy has been disrupted by the use of data analytics and new technologies. Throughout this investigation, we have seen evidence that it is beginning to have a profound effect whereby information asymmetry between different groups of voters is beginning to emerge. We are a now at a crucial juncture where trust and confidence in the integrity of our democratic process risks being undermined if an ethical pause is not taken. The recommendations made in this report – if effectively implemented – will change the behaviour and compliance of all the actors in the political campaigning space.

30. Ms Denham called for an 'ethical pause' to allow Government, Parliament, regulators, political parties, online platforms and the public to reflect on their responsibilities in the era of big data before there is a greater expansion in the use of new technologies.

31. The Commissioner published second 'update report' on her investigation on the activities of Cambridge Analytica, a company related to Aggregate IQ, and Facebook.

32. The Report, titled: '*Investigation into the use of data analytics in political campaigns*' refers to the ICO's intention to fine Facebook a maximum £500,000 for two breaches of the Data Protection Act 1998. The ICO's investigation

reached the interim conclusion that Facebook contravened the law by failing to safeguard people's information. It found that the company failed to be transparent about how people's data was harvested by others.

33. The Report noted that Cambridge Analytica had 'harvested' the data of at least 50 million (estimated by Facebook themselves to be up to 87 million) global Facebook users, including 1 million Facebook users in the UK. The Report notes that the Commissioner has 'seized significant volumes of evidence and several servers, including servers that had been disconnected' from Cambridge Analytica systems and 'continue to analyse that evidence'.

34. The Report had this to say by way of interim conclusion about the relationship between Aggregate IQ, VoteLeave and other leave campaigns:

> *4.9 The relationship between Aggregate IQ, Vote Leave and other Leave campaigns*
>
> *In response to information requested by the ICO from Facebook they confirmed on 18th May 2018 that AIQ created and, in some cases, placed advertisements ('ads') on behalf of the DUP Vote to Leave campaign, Vote Leave, BeLeave and Veterans for Britain. The majority of the ads – 2,529 out of a total of 2,823, were created on behalf of Vote Leave. In the run-up to the referendum vote on 23rd June 2016, AIQ ran 218 ads solely on behalf of Vote Leave and directed at email addresses on Facebook. Facebook believe the email addresses originated from a different source than the data collected through the GSR app. Facebook confirmed that Vote Leave and BeLeave used the same data set to identify audiences and select targeting criteria for ads.*
>
> *However, BeLeave <u>did not then go on</u> to run any ads, albeit their electoral return indicates that they committed expenditure to this. Vote Leave ran 1,034 ads between 19th April 2016 and 20th June 2016. Payment for all of these*

Facebook ads was made by AIQ, and amounted to around $2 million (approximately £1.5 million) between 15th April 2016 and 23rd June 2016. Our regulatory concern is therefore whether, and on what basis, the two groups have shared data between themselves and others [...]

We have established that AIQ had access to UK voter personal data provided from the Vote Leave campaign. We are currently working to establish where they accessed that personal data, and whether they still hold personal data made available to them by Vote Leave. We are engaging with our regulatory colleagues in Canada, including the federal Office of the Privacy Commissioner and the Office of the Information and Privacy Commissioner, British Columbia." (emphasis added)

35. The investigation remains ongoing and is reported as *'pursuing active lines of enquiry and reviewing a considerable amount of material retrieved from servers and equipment'*. The next phase of the ICO's work is expected to be concluded by the end of October 2018.

36. The Information Commissioner commissioned research from the Centre for the Analysis of Social Media at the independent think tank DEMOS. Its report, also published on 10 July, examined current and emerging trends in how data is used in political campaigns, how use of technology is changing and how it may evolve in the next two to five years.

F. FOREIGN INTERFERENCE

37. Finally, evidence of Russian government interference in the EU referendum is being considered and may emerge in the course of the ongoing investigations by the DCMS committee, the ICO and possibly the investigation by Robert S. Mueller III, who has been appointed to serve as Special Counsel for the United States Department of Justice, on possible Russian government interference in

the US election of 2016. Such foreign interference may give rise to further criminal prosecutions and further vitiate the result of the Referendum, by itself or taken together with other matters.

G. HOUSE OF COMMONS DCMS REPORT: "DISINFORMATION AND 'FAKE NEWS': INTERIM REPORT

38. On 24 July 2018, the House of Commons Digital, Culture, Media and Sport Committee published its interim report: "Disinformation and 'Fake News'"[28]. The Committee's summary of its report was as follows:

> *There are many potential threats to our democracy and our values. One such threat arises from what has been coined 'fake news', created for profit or other gain, disseminated through state-sponsored programmes, or spread through the deliberate distortion of facts, by groups with a particular agenda, including the desire to affect political elections.*
>
> *Such has been the impact of this agenda, the focus of our inquiry moved from understanding the phenomenon of 'fake news', distributed largely through social media, to issues concerning the very future of democracy. Arguably, more invasive than obviously false information is the relentless targeting of hyper-partisan views, which play to the fears and prejudices of people, in order to influence their voting plans and their behaviour. We are faced with a crisis concerning the use of data, the manipulation of our data, and the targeting of pernicious views. In particular, we heard evidence of Russian state-sponsored attempts to influence elections in the US and the UK through social media, of the efforts of private companies to*

[28] https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/363/363.pdf

do the same, and of law-breaking by certain Leave campaign groups in the UK's EU Referendum in their use of social media.

In this rapidly changing digital world, our existing legal framework is no longer fit for purpose. This is very much an interim Report, following an extensive inquiry. A further, substantive Report will follow in the autumn of 2018. We have highlighted significant concerns, following recent revelations regarding, in particular, political manipulation and set we out areas where urgent action needs to be taken by the Government and other regulatory agencies to build resilience against misinformation and disinformation into our democratic system. Our democracy is at risk, and now is the time to act, to protect our shared values and the integrity of our democratic institutions.

H. THE PRIME MINISTER'S RESPONSE

39. The Prime Minister has responded to both DPG's letter of 20 July 2018 (and the Claimant's pre-action letter) and has declined to take any of the steps requested in that letter or subsequent correspondence.

40. Further, the Government has declined requests made on 17 July 2018 in Parliament by numerous MPs including Sarah Woollaston, Anna Soubry, David Lammy, Caroline Lucas, Chris Giles, Amber Rudd, Sir Nicolas Soames and Chuka Ummuna for the Prime Minister to take steps to respond to the discovery of the said corrupt and illegal practices in the Referendum and in particular, the serious offences committed by Vote Leave. Some MPs demanded the referendum be 'invalidated' and re-run, others that an inquiry be set up. Those requests have so far been declined.

41. Accordingly, 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 and was flawed both factually and legally, and the consultation by way of advisory referendum, upon which it was based, also vitiated as aforesaid and (b) that her current decision to continue with the withdrawal of the UK from the EU on the basis that it is the democratic will of the British people is without factual or legal basis and not in accordance with the UK's constitutional requirements.

I. THE CLAIMANTS

42. The consequences of the Decision and Notification are serious for the Claimants, namely the departure of the UK from the EU and the loss of important rights for citizens such as the Claimants who live and/or work in EU countries. There is no alternative remedy available to them.

43. All of the Claimants are British citizens residing in other Member States of the European Union. In addition:

    43.1 Susan Wilson, the First Claimant, is Chair of *Bremain in Spain*, an association of British citizens residing in Spain, and is authorised by the board of that association to be a claimant in these proceedings;

    43.2 Elinore Grayson, the Second Claimant, and John Shaw, the Fourth Claimant, are members of *Fair Deal Forum*, a Facebook group and discussion forum for issues relating to the UK's withdrawal from the EU. The Second Claimant is also a member of *Bremain in Spain*; and

    43.3 Carole-Anne Richards, the Third Claimant, is a member of *Bremain*, *British in Italy*, and *Brexpats*, each being voluntary associations seeking to represent British expatriates.

Statement of truth

The Claimants believe the facts stated in this statement of facts relied upon are true. I am authorised by them to sign this statement of truth.

....
Rupert Croft
Managing Director
Croft Solicitors
Solicitors for the Claimants

Dated 13 August 2018

CO/3214/2018

IN HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N

SUSAN WILSON & OTHERS

Claimant

- and-

THE PRIME MINISTER

Defendant

STATEMENT OF FACTS RELIED UPON

Croft Solicitors
19 Imperial Square
Cheltenham
GL50 1QZ
T 01242 285 855
F 01242 285 856
DX 7445 Cheltenham