IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2018] EWHC 3520 (Admin)

CO/3214/2018

Royal Courts of Justice

Monday, 10 December 2018

Before:

MR JUSTICE OUSELEY

B E T W E E N :

THE QUEEN

ON THE APPLICATION OF

SUSAN WILSON AND OTHERS — Claimants

- and -

THE PRIME MINISTER AND OTHERS — Defendants

J U D G M E N T

A P P E A R A N C E S

MS J SIMOR QC, MR P GREEN QC, MR P ELEFTHERIADIS, MR A WAGNER and MS R MacKENZIE (instructed by Croft Solicitors) appeared on behalf of the Claimant. (MR. P ELEFTHERIADIS appeared at the judgment read-out.)

SIR JAMES EADIE QC and MR J BARRETT (instructed by the Government Legal Department) appeared on behalf of the Defendants. (MR. J BARRETT appeared at the judgment read-out.)

MR JUSTICE OUSELEY:

1 For the reasons which I shall read out, and I do not think it is appropriate to keep people in suspense, I have decided to refuse permission for this application on the grounds of delay and want of merit.

2 On 23 June 2016, in a referendum provided for under the European Union Referendum Act 2015, the United Kingdom voted 51.89 per cent to 48.1 per cent; that is 17,410,742 votes against 1,6141,241 votes in favour of leaving the European Union. Article 50(1) of the Treaty on European Union provides that any member state may decide to withdraw from the Union "in accordance with its own Constitutional requirements". By Article 50(2), a member state which decides to withdraw shall notify the European Council of its intention. The Government announced its intention to give notice following the referendum result, as the Conservative Party Manifesto had said that the result would be honoured.

3 The proposed use of the prerogative power to give that notice was challenged. On 24 January 2017, the Supreme Court held in *R(Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5, [2018] AC 61, that the Prime Minister required statutory authority to give such notice. On 16 March 2017, so nearly nine months after the referendum result, Parliament enacted the European Union (Notification of Withdrawal) Act 2017 which by s.1(1) provided that the Prime Minister "may notify" the European Council of the UK's intention to leave the EU.

4 On 29 March 2017, the Prime Minister conveyed that notice by letter to the President of the European Council, President Tusk. In it she said:

> "Earlier this month, the United Kingdom Parliament confirmed the result of the referendum by voting with clear and convincing majorities in both of its Houses for the European Union (Notification of Withdrawal) Bill. The Bill was passed by Parliament on 13 March, and it received Royal Assent from Her Majesty the Queen and became an Act of Parliament on 16 March.
>
> 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."

5 On 26 June 2018, Parliament enacted the European Union (Withdrawal) Act 2018 repealing European Communities Act 1972 on "exit day" defined as 29 March 2019 at 11pm, subject to s.20(4) which permits the date to be amended by regulation "to ensure that the day and time specified in the definition are the day and time that the Treaties are to cease to apply to the United Kingdom."

6 The claimants are four individuals who, though UK nationals and EU citizens, were not entitled to vote in the referendum because they were disqualified by their period of residence abroad. They challenge the lawfulness of the referendum, and the lawfulness of the decision to give and the giving of the notice on 29 March 2017 under Article 50, on the grounds that each was vitiated because of illegal practices in the referendum by Leave campaigners, including Vote Leave Limited, the "official" body representing the Leave side.

They also challenge what they describe as the continuing decision or action of the Prime Minister, or her lack of action, in continuing with the negotiation and withdrawal process in the light of evidence drawn to her attention about those illegal practices. I should add that, although I am aware of the decision of the CJEU this morning, no challenge to the decision to give notice under Article 50 or to the continuing negotiations has been made on the basis that the Government had not understood a right of unilateral withdrawal to exist. Before turning to examine the relief more closely, I need to set out a little more of the legal background and facts.

7 The Referendum itself was conducted under an Act which made no provision for its outcome to have any consequences. It was in legal terms an advisory referendum and did not need to be acted on or acted on in any particular way. Of course, it had quite a different political effect with politicians, to varying degrees on each side of the debate, feeling politically bound, or not, by it to proceed with withdrawal.

8 The Referendum was described as part of the UK's constitutional requirements for the giving of notice of withdrawal for the purposes of Article 50; *Schindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469, [207] QB 226 at [13] and [19]. I confess to some difficulty in seeing that an advisory referendum was part of the UK's constitutional requirements, rather than being part of its chosen mode of proceeding. Be that as it may, I am bound by that decision.

9 In a permission decision, permission to cite which has not been given, in *R(Webster) v Secretary of State for Exiting the European Union* [2018] EWHC 1543 (Admin) a Divisional Court held that the 2017 Act gave the Prime Minister a discretion as to whether to give notice. Without that citation I would have come to precisely the same conclusion. Giving notice evidenced the decision. It is also plainly correct that that decision is judicially reviewable.

10 The 2017 Act was undoubtedly part of the UK's constitutional requirements for giving notice. What those constitutional requirements are is a matter of UK domestic law, and not EU law.

11 The 2016 Referendum, though advisory, was not unregulated. The 2015 Act provided a combination of specific regulatory provisions and incorporation, by virtue of ss.3 and 4 and subject to modification, of parts of the Political Parties, Elections and Referendums Act 2000 ("PPERA"). It also gave power for regulations to be made. Those provisions governed, materially, limits on campaign expenditure for designated participants, donations, grants, donations from abroad; they controlled expenditure in joint working by those in the same cause, along with provisions for reporting, returns and declarations as to expenditure and donations. Each side had an "official" or designated permitted participant. For the Leave campaign, this was Vote Leave Ltd, for whom the responsible person, in effect the agent, on whom various duties fell, was David Hassell. There were other permitted participants. Another body prominently supporting the Leave campaign was Leave.EU. These regulatory provisions provided for breaches of their requirements to be investigated and ruled on by the Electoral Commission, with rights of appeal now being exercised against its findings. It also made provision for criminal offences where regulations had been breached. Schedule 3, para.19(1) prevented a challenge being brought which questioned the number of ballot papers counted or votes cast unless it was brought within six weeks after the certification of the Referendum result. That is not what this case is about.

12 The 2015 Act with its incorporated regulatory requirements, made no provision for what effect, if any, there was to be on the outcome of the referendum in the event of a breach of

the expenditure controls or other requirements, or indeed for acts involving the bribing of voters. In the Representation of the People Act 1983, by contrast, two provisions deal with such issues. The significance of these provisions is helpfully explained by Mr Mawrey QC in his judgment as the election judge in an election court in *Erlam v Rahman* [2015] EWHC 1215 (QB) [25]-[38]. In very simple terms, if the candidate is guilty, personally or by his agent, of a corrupt or illegal practice, his election is void. It is also void where without his fault, corrupt or illegal practices or illegal payments have been so extensive that they may reasonably be supposed to have affected the result. See ss.159 and 164 of the 1983 Act.

13 Section 164(2) provides that an election shall not be liable to be voided "otherwise than under this section by reason of general corruption, bribery, treating or intimidation." These are words which indicate what the scope of the common law powers for avoiding elections were, or at least were thought to be.

14 The events upon which the claimants rely for their claim depend on the chronology and legal structure which is not wholly clear and in large part is dealt with rather cursorily, in their papers.

15 It appears from the claimants' reply to the summary grounds of defence at para.14 that the Electoral Commission opened an investigation into Vote Leave's spending shortly after the referendum because that investigation closed on 4 October 2016. It has also opened, at an unknown date, but closed a second one into Vote Leave spending on 21 March 2017, including an investigation into spending in connection with services provided by Aggregate iQ ("AiQ").. This second investigation also encompassed Mr Darren Grimes, of whom more anon. The Electoral Commission concluded that there were no reasonable grounds to suspect that there had been any incorrect reporting of campaign spending or donations. So, as at the date of the giving of notice under Article 50, both Electoral Commission investigations had closed and none were outstanding. (There was a suggestion in the claimants' statement of facts and grounds that, on 24 February 2017, the Electoral Commission had launched an investigation into the spending returns of both the Leave and Remain campaigns, but the only reference provided is to a BBC website, and no further documents in relation to it were provided. This may refer to a possible leak, but Ms Simor QC for the claimants confirmed that there was no Electoral Commission investigation open as at the date of the Article 50 notice. Besides, if there had been a decision by the Electoral Commission to which publicity had been given in February 2017, it would rather undermine her case on delay in respect of a number of her grounds).

16 However, a challenge by judicial review to the decision of the Electoral Commission to close the investigation and refusing to open a further investigation into Vote Leave's spending was launched in October 2017 by the Good Law Project. Before the challenge was heard, the Electoral Commission announced that it would re-open the investigation.

17 Its report was published, in relation to Vote Leave, on 17 July 2018. It found that there were breaches of the campaign finance rules by Vote Leave, but on an interpretation of the law which a Divisional Court found later was wrong; *R(The Good Law Project) v Electoral Commission* [2018] EWHC 2414 (Admin). But the correct interpretation of law would, as I understand it, still have led to the same outcome adverse to Vote Leave and others. The Electoral Commission is seeking permission to appeal to the Court of Appeal, which has not yet been resolved on paper, but it does not appear significant to the actual outcome of its decision. Vote Leave, however, has pursued its right of appeal to the Central London County Court. The claimants have not provided, or at least not drawn my attention to, the statutory provisions showing the grounds upon which an appeal can be brought, but it is likely that it is a challenge on fact and not merely a challenge on law. The claimants have

not indicated what the grounds of appeal are. There also appears likely to be an onward route of appeal from the County Court to the Court of Appeal. The County Court hearing does not appear to be fixed for several months. Vote Leave brought judicial review proceedings in respect of the Electoral Commission report and decision which was refused permission on paper on 21 November 2018.

18 (The Electoral Commission has been made an interested party to the judicial review proceedings with which I am concerned. It is difficult to see how they are directly affected. None of those whose conduct is criticised, notably Vote Leave and Leave.EU and related individuals, has been made an interested party, though it is upon both the Electoral Commission's findings as to their conduct and the conduct of others themselves, upon which the claimants rely).

19 I turn from the Electoral Commission and Vote Leave to the Electoral Commission and Leave.EU. On 21 April 2017, the Electoral Commission announced publicly that it had begun an investigation into Leave.EU's referendum spending return, following an assessment which concluded that there were reasonable grounds to suspect that potential offences under the law may have occurred. This would focus on whether one or more donations it accepted was impermissible and whether its spending return was complete. On 1 November 2017, the Electoral Commission announced that it had opened an investigation to establish whether or not Better for the Country Ltd and Mr Arron Banks had breached campaign finance rules in relation to donations. The public statement from the Electoral Commission added that there was already an ongoing separate Electoral Commission investigation into whether Leave.EU's acceptance of donations was permissible and its spending return complete, the details of which were available on the Electoral Commission website. Mr Posner, the Electoral Commission's Director of Political Finance and Regulation and its legal counsel, was reported in the press release as saying:

> "Interest in the funding of the EU Referendum campaign remains widespread. Questions over the legitimacy of funding provided to campaigners at the referendum risks causing harm to voters' confidence. It is therefore in the public interest that the Electoral Commission seeks to ascertain whether or not impermissible donations were give to referendum campaigners and if any other related offences have taken place."

These comments are relevant to the delay arguments.

20 On 11 May 2018, the Electoral Commission reached its conclusion and published its report on the 1 November 2017 investigation, adverse to Leave.EU and others. Again, as I understand what Ms Simor told me when I asked her, she understood those against whom findings had been made were also appealing to the Central London County Court and no hearing date was as yet known.

21 On 1 November 2018, the Electoral Commission published its most recent report on the second Leave.EU investigation which the claimants sent to the Prime Minister in furtherance of its judicial review claim. There had been no more than an acknowledgement of its receipt.

22 I turn now to the findings of the Electoral Commission, first in respect of Vote Leave. It made findings to the criminal standard of proof. I take what is set out in the claimants' argument as sufficient for this purpose.

23 Vote Leave should have declared expenditure of £675,000 more than it did, leading it to exceed its £7m spending limit by £450,000, using rounded numbers. This was because it had worked jointly with BeLeave, another group, whose name indicates its orientation, under a common plan, and so that money spent by BeLeave with Aggregate iQ should have been declared by Vote Leave. Darren Grimes was the person who spent that money for BeLeave, a permitted participant in the referendum campaign. In addition, according to the Divisional Court, the Electoral Commission had wrongly advised Vote Leave that it could donate goods and services which were referendum expenses to another campaign body without itself having to declare it as expenditure on those goods. This amounted to £100,000 spent on AiQ by their Vote Leave donations to Veterans for Britain.

24 Fines were levied up to the maximum available to the Electoral Commission against David Hassell or Vote Leave at £20,000 for failing to submit a complete return of expenditure; £1,000 for not including receipts for certain payments in the return; £20,000 for exceeding the spending limit; and £20,000 for non-production of required documents. Mr Grimes or BeLeave were fined £20,000 for exceeding the limit of expenditure for a non-registered participant. It was also found he had failed to deliver a complete statement of all his referendum expenditure. The responsible person for Veterans for Britain had failed to deliver an election expenditure return covering all donations it received.

25 On 11 May 2018, the Electoral Commission found that Leave.EU, a registered participant, failed to include at least £77,000 in its spending return, thereby exceeding its spending limit by more than 10 per cent. This was spent on fees paid for Better for the Country Ltd, as its campaign organiser. The Electoral Commission was satisfied that the actual overspend was in fact greater. Leave.EU had also failed correctly to report loans from Mr Banks totalling £6m or more and had failed to evidence payments totalling £80,000 and had failed to declare a proportion of the costs of services provided by US campaign strategy firm Goddard Gunster. Almost all of the details of the loans from Mr Banks had been incorrectly reported. A total of £77,000 in fines, the maximum available, was levied on Leave.EU.

26 These offences amounted to offences under the PPERA 2000, as incorporated and modified by the 2015 Act, of failing to submit an accurate return of regulated transactions, submitting an incomplete referendum spending return in respect of transactions, submitting returns without all the required invoices or receipts, and of exceeding the statutory expenditure limits, by Vote Leave, Leave.EU and their responsible persons and others.

27 Mr Green QC for the claimants, beside Ms Simor, submitted that if the RPA applied, the offences found by the Electoral Commission to have committed under PPERA would have been offences under various provisions of the RPA. The candidate would be the equivalent of Vote Leave and the responsible person, Mr Hassell, would be its election agent. I shall assume for present purposes that Mr Green's analysis is correct and that the offences found by the Electoral Commission under PPERA, as it applied to the referendum, would have amounted to offences under ss.75(5), 76(1B), 81 and 82 relating to expenditure and declarations, and would also have amounted to corrupt or illegal practices which would have brought into play the provisions of ss.159 or 164 of the RPA to the extent that the offences were offences by both Vote Leave and its agent. It is at least arguable, therefore, that they would have fallen within the scope of that which would have led to an election governed by the RPA being voided. But, of course, it needs to be recognised that the application of those provisions under the RPA relates to constituency or ward elections and does not apply to a nationwide referendum, as was the 2016 referendum. I also note that the time limit for lodging a petition under the RPA varied between three and four weeks from the certifying of the result. Mr Green says, and I accept, that very little detail is required from a petitioner in

the petition because once lodged, the Electoral Commission would then take over the investigation.

28 The claimants have also referred to events other than the Electoral Commission's reports, some occurring before and some occurring after the lodging of the claim on 13 August 2018, as relevant to the grounds of challenge. First, the Electoral Commission has referred Vote Leave and Mr Hassell and Mr Grimes to the Metropolitan Police in connection with false declarations. Others may be investigated too by the Metropolitan Police, especially as the Vote Leave board members include active politicians.

29 Next, the claimants assert that there is good evidence of illegal working between Vote Leave and the Democratic Unionist Party, based on a BBC programme transmitted on 6 June 2018. Further, the Information Commissioner's Office ("ICO") interim report of 10 July 2018 concerned its intention to fine Facebook £500,000 for misuse of data; its enforcement notices issued in relation to data processing by others during the referendum campaign, were relied on. There was a second ICO report of 11 July 2018 into AiQ and its relationship to Vote Leave. The House of Commons Select Committee on the Department for Digital, Culture, Media and Sport ("DCMS") produced an interim report of 24 July 2018 which, amongst other matters, referred to allegations of Russian use of social media to influence campaigns and to breaches of the law by certain Leave groups in the referendum campaign.

30 The skeleton argument raised the third Electoral Commission report of 1 November 2018 as producing a further decision by the Prime Minister, or her absence of response as evidencing a continuing decision, to continue the process of withdrawal begun by the Article 50 notice in March 2017. No application to amend the claim form has been made.

31 On 1 November 2018, the Electoral Commission referred to the National Crime Agency, Leave.EU, and Better for the Country, and others associated with Mr Banks and Leave.EU on the basis of suspected criminal offences. These allegations concerned the true source of campaign funds and whether the source was indeed Mr Banks; the use made of the campaign funds; the exceeding of spending limits; and the non-registration of Better for the Country as a participant. The details of this referral are largely undisclosed. On 24 November 2018, the House of Commons DCMS Committee produced a further report, referring to links between Mr Banks and Russia.

32 The skeleton argument also referred to other events before the decision, which were not in the statement of facts and grounds. One was an academic report of May 2018 suggesting Russian interference by social media in the referendum campaign. On 3 August 2018, the Electoral Commission decided not to investigate Democratic Unionist Party expenditure. The Good Law Project intends to challenge that decision by judicial review.

33 It is now necessary to consider the grounds a little more fully. The only decision to be judicially reviewed, according to s.3 of the claim form, is the decision of 29 March 2017. Clearly, that section does not refer to the referendum, or to subsequent decisions, or continuing decisions, or non-decisions, as the subject matter of the claim. But it is but a summary and incomplete at that. The grounds were rather reformulated in the skeleton argument.

34 Ground 1 is that the referendum campaign involved corrupt or illegal practices which, if the RPA had applied, would have been sufficient for the court to avoid the result, either under s.159 or s.164 of the RPA. Ground 1 is thus, as set out in the formal grounds, a claim for a declaration that the referendum was unlawful because it was vitiated by conduct which the Electoral Commission has found to the criminal standard to be a breach of provisions akin to

those of the RPA which would have led to the referendum being voided, or at least voided if the outcome had been significantly affected, had the RPA applied. Accordingly, the claimants seek a declaration that the referendum result is vitiated by corrupt and illegal practices. Ms Simor said that they did not seek a quashing of the outcome as well.

35 I next take together grounds 3 and 4. These logically come after ground 1 because they challenge the decision of the Prime Minister to give notice under Article 50 on the basis that in doing so she made a fundamental error of law and of fact, namely that the referendum had been conducted lawfully and therefore could be relied on as "the will of the people" when in fact it had not been so conducted. Again, the same corrupt and illegal practices found by the Electoral Commission were relied on.

36 Ms Simor did seek a quashing of the decision and notice under Article 50 because it was based on those flaws and therefore not in accordance with the UK's constitutional requirements. Ms Simor sought to rely on a report dated 30 November 2018 from Professor Philip Howard who is Director of the Oxford Internet Institute, a professor of internet studies and a fellow at Balliol College, Oxford. Ms Simor relies on this report in order to afford evidence that the overspend by Vote Leave and others did affect the outcome of the referendum, albeit that it appears substantially less in total was spent by the Leave campaign than that spent by the Remain campaign, the total figures for which are within the papers.

37 Ground 4 is related to ground 3 in that the claimants seek a quashing of the decision and notice on the basis that they were ultra vires because Parliament did not intend to confer power to take the decision and issue the notification on the basis of a referendum outcome procured by corrupt and illegal practices.

38 The formal grounds said that the decision and notice were unlawful because they depended solely upon the "flawed consultation," as the grounds describe the referendum. Promises to honour the outcome should not be construed as promises to honour an outcome vitiated by such practices. It would also be irrational for the Prime Minister to treat the result as binding.

39 Ground 2 of the reformulated grounds contends that it was unlawful for the Prime Minister to refuse to take any steps in response to the Electoral Commission's findings of corrupt and illegal practices, though that is not the language of the Electoral Commission, as I understand it, but rather of the attribution to the Electoral Commission of findings akin to such practices in the RPA. It was irrational and therefore unlawful, contend the grounds, for the Prime Minister to fail to take steps in response to those findings or to ignore them, as they were material to her continuing with the process begun by the Article 50 notice. This ground, particularly refers to a letter sent by Fair Vote on 5 July 2018, drawing the Prime Minister's attention, though I scarcely think she was otherwise unaware of it, to the Electoral Commission's findings and the fact of referrals to the Metropolitan Police and to the National Crime Agency (“NCA”). It was said she had ignored this as a material consideration.

40 At para.18 of the claimants' skeleton, the claimants said that they relied "on the fact that had the illegal conduct been found to have taken place in the context or a local or national election, such conduct would have constituted "corrupt and illegal practices [under the RPA 1983] and would have vitiated the results rendering them void". The relief sought in relation to this ground was an order requiring the Prime Minister:

> "(a) to give anxious scrutiny to the import of the findings of the Electoral Commission ...

(b) lawfully to reconsider her decision to do nothing in response to [them]

(c) lawfully to consider extending the date of the exit day ... and/or to take any other necessary steps to render such extension effective ..."

41 In argument, Ms Simor said that the steps or options which would follow from the quashing of an implied decision by the Prime Minister to do nothing would include revoking Article 50; looking at the illegalities when addressing Parliament; delaying negotiations until the facts were established; putting the question of whether the UK should remain in or leave the EU back to Parliament; to proceed on the basis of the withdrawal agreement; or to have a public inquiry.

42 I note that the Fair Vote letter of 5 July 2018 referred to Electoral Commission decisions; leaks of Electoral Commission decisions; evidence submitted to the Electoral Commission; and the BBC programme about Vote Leave and DUP spending. It is asserted by the claimants that all this would and should have affected the decision to notify the European Council if it had been known; and it should now be considered by the Prime Minister. Fair Vote's letter asked that the Prime Minister seek an extension of time from the EU 27 in which to hold another vote and to consider how best to hold another referendum. If no answer were given, Fair Vote would proceed on the basis that the Prime Minister was denying their request. The claimants adopted this letter and the letter before action from Fair Vote written by Deighton Pierce Glynn on behalf of Fair Vote. The response to the letter before action from the Government Legal Department was a root and branch rejection of the proposed claim, the terms of which letter were criticised by the claimants. The essence of them, including a recent response from the GLD, dated 3 December 2018, is that the law in relation to electoral practice and offences is taking its course, as is the investigation of others. Meanwhile, the process incepted by the Article 50 notice continues.

43 Permission was refused on paper by Supperstone J on the basis of delay, want of merit, and on the grounds that the claim was academic, in view of the Acts of 2017 and 2018. I heard a full day's argument, which was not a great deal less than if I had had full argument on a substantive hearing.

44 I am satisfied, though the position of Ms Simor and Mr Green on the nature and role of the challenge to the referendum on the basis that it was vitiated by corrupt and illegal practices, varied, that that challenge is at the heart of the case and not merely "not essential," as Mr Green submitted in closing.

45 In my judgment, the attack on the referendum and its outcome is at the heart of the case. It is clearly of itself the very basis of ground 1, whether as set out in the statement of facts and grounds or as to a degree reformulated in the claimants' skeleton argument. This is at the basis of the relief sought in the first declaration as to the vitiating of the referendum outcome. Ms Simor says that she is not seeking the quashing of the referendum, but that does not alter the substances of what the claimants seek and ignores the effect of the declaration she does seek. It would not be a mere fact-finding exercise undertaken by the court devoid of legal consequence apart from some icing on the claimants' cake. A declaration as to the law is expected to have more than academic effect. At best, the difference between a declaration without a quashing and a quashing merely leaves uncertain what the status of the referendum is, but leaves no doubt as to its unlawfulness.

46 I can think of few areas where such an outcome would be appropriate, and this most certainly is not one of them. The court should not leave such doubts. See, for example,

Her Majesty's Treasury v Ahmed [2010] UKSC 2, [2010] 2 AC 534. Moreover, the claimants rely on the declaration that the referendum was vitiated in order to attack and achieve the nullification of subsequent acts undertaken in reliance on its lawfulness. The subsequent acts cannot be unlawful unless the referendum is vitiated by unlawfulness. It is sufficient to vitiate it that it be declared unlawful, quashed or not. In so far as the claimants do not seek to quash it, because it is said that the referendum was simply advisory, the distinction drawn by the claimants in respect of those two forms of relief is a distinction without a difference; it is illusory in relation to its effect on subsequent actions. In any event, if the argument is that if the RPA applied, the referendum would be voided, or voided if the common law by analogy were to apply to it, as appears to be the claimants' case, a declaration to that effect cannot be different from a quashing.

47 However, relief in relation to the lawfulness of the referendum, even if only by a declaration to the effect that the referendum was vitiated by corrupt and illegal practices, which meant that it should be declared void or void because such practices affected its outcome, is crucial to the claimants' case on grounds 3 and 4. Grounds 3 and 4 seek to quash the decision and notice of 29 March 2017 because of what is said to be a fundamental error or law and fact. That error was that the referendum was conducted lawfully; Parliament legislated in 2017 to authorise the giving of the notice on the basis that the referendum was lawful and yet the court ought to hold that that was not so; in fact and in law, the outcome of the referendum was vitiated. It is said that the discretion to take the decision on 29 March 2017 was exercised on the same basis of fundamental error of law and fact. Those grounds go nowhere without a court decision that the referendum was unlawful on the basis contended for in ground 1. Without success on ground 1, grounds 3 and 4 fall. They are baseless without success on that ground and would be so even if ground 1 were not set out as a separate ground.

48 The same is true in respect of ground 2. Unless the referendum result is vitiated, there is no reason for the Prime Minister to "take steps" of whatever type asserted by the claimants. The claimants in their skeleton argument, as I have set out, specifically rely on "the fact" that the illegal conduct would have rendered the referendum void had it been a Parliamentary constituency election. The Electoral Commission findings are only findings which require consideration because they would void the election, on the claimants' case. It is on that basis that it is contended that the Prime Minister was wrong to treat herself as legally bound to give notice, according to the way the claimants put their case. The basis for an attack on the Prime Minister for ignoring a material consideration is that the material consideration ignored was the unlawfulness of the referendum. She is not taking steps to respond to the asserted vitiation of the outcome and she is ignoring its asserted voidness, as the claimants' skeleton argument makes clear, not only in para.18 but in para.97.

49 On that basis, the question of delay in relation to the challenge to the referendum outcome is central. It is that decision which must be attacked, and delay in relation to it is crucial and cannot be washed away by the claimants' approach. The problems of delay cannot be circumvented by challenging some later decision in the chain of events by reference to illegality alleged in an earlier challengeable decision, but which has not been challenged. This would otherwise circumvent the purpose of the requirement for action to be taken without undue delay and for the court's permission to be required for an extension of time, having regard to such matters as the prejudice to others and the effect on good public administration. This requirement means that a claimant must attack directly the true target of the claim and do so timeously, and cannot do so by means of a collateral attack on a later decision. The courts have set their face against stratagems or tactics or proceedings attacking a subsequent stage which depends upon successful attacks launched against an earlier stage with the aim or effect of circumventing time limits. All this is clear from, for

example, CPR 54.1.5 in the White Book. I also discuss this, but there is nothing new about it, in *TN(Vietnam) v Secretary of State for the Home Department* [2017] EWHC 59 (Admin), [2017] 1 WLR 2595 [104]-[110].

50 There is no question but that time under CPR 54.5(1) runs from when grounds to make the claim arose. Time does not run from when the general public discover grounds or when they could have done so using reasonable diligence. Still less does it do so on a basis varying with the knowledge or means of knowledge of individual claimants. A time limit in relation to judicially reviewable decisions by a public body could not possibly achieve the purpose of its relative shortness if the commencement date was so variable and uncertain. The grounds here arose by the time of the certification of the referendum outcome in relation to excess or unlawful expenditure, or by the time of filing of returns in so far as the challenge relates to unlawfulness based on the content of the returns. The claimants do not provide such dates, but it is clear that they were shortly after the referendum result itself.

51 The fact that the claimants are out of time and require an extension of time plainly means that there has been undue delay for the purposes of s.31(6)(a) of the Senior Courts Act 1981, as *R(Caswell) v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738 shows. Even if there were good reason for delay, a permission may still be refused where the grant of relief is likely to cause prejudice or to be detrimental to good public administration. So an extension of the order of two years is required to bring the claim that the referendum is vitiated, and good reason has to be shown for such an extension of time. I refuse the extension of time which is sought.

52 First, the time limits, both under the Referendum Act itself and under the RPA are short. No statutory provision contemplates anything remotely like this delay. The prejudice to others and the impact on good public administration is obvious and serious. Notice was given nine months after the outcome of the referendum and following an Act of Parliament authorising notice being given.

53 Negotiations with the EU 27 over a period of nearly two years and with the exit deadline nearing, have been undertaken at an international level plainly, with a competence, good faith, time and resources of the negotiators on both sides engaged. Arrangements for the consequences of an agreement or no agreement have been considered. Businesses, authorities and individuals, both in the UK and in the EU, have made or begun to make arrangements for the departure of the UK from the EU and have incurred expenditure in consequence.

54 It is difficult to see how Government could proceed if it had to wait before proceeding with Article 50 until the conclusion of an Electoral Commission investigation, keeping everyone, including the EU 27 on the hook whilst waiting to see what the United Kingdom was going to do, or had to wait until the conclusion of other investigations, even without allowing for appeals. Moreover, the claimants did not even move promptly after allegations surfaced about excess expenditure, co-working and return problems. It was on 2 August 2016 that Buzzfeed News, and indeed The Independent, reported that Darren Grimes had received over £625,000 from Vote Leave, reporting it with apparent incredulity. There must have been an announcement about the Electoral Commission investigation which concluded in October, and about the Commission investigation which had begun in time to conclude before 29 March 2017. None were running at the time notice was given, as I have said. The Electoral Commission started its investigation again in November 2017, and in its press notice of November 2017 referred to widespread public interest in issues concerning Vote Leave's referendum campaign expenditure.

55 On 20 March, 2018 counsel for the DCMS Committee provided a legal opinion which in para.176 referred to strong evidence of offences being committed by the Leave campaign under the PPERA. On 27 March 2018, there was a debate in the House of Commons about the alleged breach of electoral law in the referendum which included reference to four hours of testimony which had previously been given before the Digital, Culture, Media and Sport Committee talking of clear evidence of systemic law breaking by Vote Leave and others; the Government response was to say that the Electoral Commission's conclusions had to be awaited before anything was concluded. It stated that the Government would still be proceeding with the process. Even after the report by the Electoral Commission of 11 May 2018, proceedings were not commenced for more than three months.

56 The claimants have simply ignored the obligation to justify the grant of an extension of time, if they are doing so by reference to what was public knowledge and what knowledge was available. The fact that knowledge of the existence of grounds was not available, or not obtainable with reasonable diligence, may constitute good grounds for an extension of time. But that cannot be done without evidence as to the public state of knowledge on an issue as public as this. The evidence they did produce, cursory and patchy as it was, shows that there was widespread knowledge of the issue well before three months before they began these proceedings. And, indeed, they say nothing themselves about their own state of knowledge. So there is no ground for an extension of time by reference to the state of knowledge of the public or of the claimants.

57 The claimants contend that there was no undue delay because they had to wait until the Electoral Commission reports were produced before they had a case which would not be thrown out at the very outset. I do not accept that submission.

58 First, it is plain that the claimants never tried and tested the waters to see what would happen. Second, I am sceptical about such a contention when they waited more than three months after the first report. Given that delay, I would not extend time for the grounds on its own, even if they were in time in relation to the later reports. The rules in relation to undue delay may mean that some acts of public authorities are put beyond legal challenge anyway, and it is the consequential criminal or civil proceedings alone which can be pursued. Delay until satisfactory evidence is available may be a good reason for an extension in certain circumstances but it is not here, because of the prejudicial effect and the effect on good public administration. I emphasise that time does not begin to run from the moment of the discovery of what the claimants regard as sufficient evidence to proceed. I also note, as I shall come to, the nature of the evidence which the claimants clearly regard as sufficient for the purposes of pressing ground 2, as they call it.

59 It follows, in my judgment, that the claimants cannot challenge the outcome of the referendum under ground 1. If that is so, it follows as well, to my mind, that no further challenge can be brought under grounds 2 to 4 because the challenge to the referendum which was never made is an essential ingredient of the challenges under grounds 2 to 4. The referendum and it outcome must be treated as lawful even if there have been breaches of electoral law, and the criminal law, in the process.

60 However, even if time ran from the giving of the notice on 29 March 2017 for grounds 3 and 4, that is still over 16 months before the start of proceedings. The problems in the way of an extension of time in relation to public or personal knowledge are not altered. The prejudice to individuals and bodies and the harm to good administration are still just as potent, and I would refuse an extension of time even if that were where the time began to run.

61 Looking at ground 2 on its own, one cannot just treat the whole of the two-year process as continuing as a day-by-day decision so that proceedings would be on time even on 28 March 2018 or even possibly beyond. This is a paradigm example of how a claimant has to challenge what is the true focus of the complaint. The claimants rely on factors which, as set out in their skeleton argument, include referrals to the Metropolitan Police and to the NCA, a BBC programme, and other reports, none of which are final, to support ground 2. What they say the Prime Minister ought to have considered demonstrates that they regard investigation and other material, for example a DCMS report, as sufficient at any time to bring the challenge. Finality through Electoral Commission reports is not regarded as crucial in reality in their claim in relation to ground 2. Besides, if finality is what counts, there still is no finality in relation to the Electoral Commission decisions because of the appeals. But if the Electoral Commission finality is not crucial, there is no reason for the claimants not to have started these proceedings, on Ground 2 above, earlier.

62 Given the material upon which the claimants rely, in addition to the incomplete Electoral Commission process, the incompleteness of which and timetable in relation to which scarcely featured in its material, it does not lie in the claimants' mouth to say that they had to wait for the Electoral Commission even in relation to ground 2. Ground 2 is but a stratagem and there is no basis for the challenge under ground 2 not being brought much earlier. I do not accept the continuing decision analysis at all or the entitlement of the claimants to create further decisions whenever some new event occurs which they choose to send to the Prime Minister.

63 As I have said, once delay has been shown in relation to ground 1 or indeed for that matter, in relation to ground 3 and 4, and extension has been refused, the referendum and the decision and notice under Article 50 are valid and must be treated as such. They do not have a half-life, half vitiated and uncertain until the conclusion of events. The purpose of s.31(6) and the CPR is to give certainty to the lawfulness of acts which are no longer challengeable. Accordingly, I refuse the extension of time necessary for all grounds to be brought, and all grounds are dismissed on the grounds of delay; even if ground 2 is properly characterised as continuing, it fails because the very premise for it fails. The referendum outcome and the decision and notice are lawful.

64 I shall, however, say a few words in relation to the merits. I do not regard it as an unarguable proposition that a challenge to the referendum could have been launched on common law grounds. There is no provision for the common law being saved but there is no express exclusion of it either, and no statutory alternative exists. The fact that the statutory challenge grounds are limited to ballots counted and votes cast does not necessarily and unarguably of itself lead to the conclusion that the common law is excluded in all respects.

65 However, the common law would probably have to draw the line differently from that drawn by the Representation of the People Act because the RPA is not incorporated and deliberately not incorporated, and because this case deals with a referendum and not constituency based elections. It is striking that if Parliament had meant the common law to operate as a substitute for the RPA, that it did not say so and incorporate the RPA with adjustments to its language instead. But that it plainly did not do. However, whatever the arguable role of the common law might be, I consider it hugely improbable, to the extent of being unarguable, that the common law would in those circumstances operate so as to void a referendum on the basis upon which the RPA would void a constituency election, even if the electoral offences are equivalent to corrupt and illegal practices which under the RPA would have had that effect.

66 This is because, as I have indicated, such an approach would be in reality to incorporate the RPA and incorporate it for a referendum when Parliament has not done so. And it is obvious that the common law developed in relation to constituency or ward based elections is inapplicable without adjustment to a nationwide referendum. The decision in *Morgan v Simpson* [1974] 1 QB 151, which sets out the common law, relies on quite old cases, understandably in view of statutory interventions between them, but obviously none of which deal with a referendum, and which draw a distinction at para.164 E-H between acts which vitiate and acts which do not vitiate a result. *Moohan v The Lord Advocate* [2014] UKSC 67, [2015] AC 901 concerned the right of prisoners to vote in the Scottish independence referendum. The common law did not give a right to vote to them. The conclusion of Lord Hodge was that the right to vote was a fundamental or constitutional right but it was a right controlled by statute controlling "the modalities of the expression of democracy. It is not appropriate for the courts to develop the common law in order to supplement or override the statutory rules..."

67 If the common law is not excluded, though I think it exceeding unlikely but arguable, the extent to which the common law is operative is unclear. It is obviously that there are political issues that would be extremely difficult to be brought before the court. It is difficult to see that one would be able to substitute without some adaptation the terms of the RPA. But, in my judgment, were the common law to have a role to play in relation to avoiding elections or referenda because of an absence of statutory provision, the common law would require there to be some effect upon the outcome of the referendum no less demanding than, by way of example, soundly based grounds for believing that the outcome would have been different had the illegal acts not taken place. There is, however, no such evidence. The last minute introduction of Professor Howard's report on it is hopeless. The report was submitted so late that it would have been quite unfair for the defendant to be expected to deal with it. Accordingly, I refuse to admit it. I also point out that I do not see that it is arguably of any weight. There is too much unjustified and unexplained speculation in it. There are, in my judgment, serious and patent inadequacies upon which no arguable case could be based. It treats the number of Facebook users, 80 million, as it they were all individual voters, which is palpable nonsense, who actually voted, without any explanation as to how the conversion process that the professor does is justified by the underlying data he relies on. And then in turns by speculation upon speculation, he turns a yes or no vote into a different vote, a no or a yes vote, and does so as if voting was a compulsory binary option with no “did not vote” or change to or from “did not vote”, and ignoring all other factors which go to the make-up of a person's voting decision. It provides no proper evidential basis for what I consider would be the minimum role of the common law if it were applicable, which is there had to be a demonstration that the unlawful practices were of a nature such as reasonably to lead to a conclusion that the outcome would have been different without them.

68 In the upshot, it is my judgment that it is very unlikely that the common law did survive to play a role in vitiating the referendum, but if it did it would only do so where there was sound evidence for believing that the outcome would have been different without that unlawfulness. There is no such evidence, and it would not have been provided by the report of Professor Howard, even if admitted. This is a very difficult and contentious task which could itself reinforce the view that the common law did not intervene in these circumstances, leaving it to Parliament to evaluate all that in deciding what to do. These allegations have been around for a long time. Parliament decided to enact the authority required for Article 50 without imposing any conditions. I would refuse permission on the merits of ground 1.

69 Grounds 3 and 4. The arguments totally ignore the effect of the 2017 Act on the whole process. Parliament decided nine months after the referendum outcome, and with no investigations running, that it would authorise notice to be given. Parliamentary authority is what gave the giving of notice its lawfulness. Its legal authority derived from the Act, not from the lawfulness of the referendum. The Prime Minister was entitled to treat the referendum as valid whatever irregularities were alleged then or later in the light of that Act of Parliament. That, in my judgment, was in effect the end of it. It is not necessary to examine if the Act of Parliament was right or wrong. When the Prime Minister refers in the letter as to her being bound, she is clearly talking of political obligations which are not a matter for this court's judgment, rather than legal obligations. The decision and notice were a lawful exercise of the discretionary powers following what Parliament must be taken to have been satisfied was a sufficient outcome for it to pass the 2017 Act, enabling notice to be given and in the obvious expectation that it would be. It neither permitted nor required the discretion to be exercised nine months or more later by reference to a breach of expenditure or return controls. Parliament cannot simply have intended that; still less could have intended that, once given, the notice should be constantly reviewed against developing understanding of campaign expenditure and returns.

70 It is quite wrong to treat Parliament as giving such a discretionary power, for exercise subject to the Prime Minister judging whether the referendum was vitiated, through breach of expenditure controls or requiring or empowering her to await the results of enquiries not yet begun or unknown. In view of all that giving notice would entail, it is not arguable that her discretion in respect of the giving of the notice could be invalidated on a ground that the referendum was, or could later be, vitiated. Even if grounds 3 and 4 were in time, and even if ground 1 were in time, grounds 3 and 4 are bound to fail.

71 A constant theme of Ms Simor's arguments was that there was an error of fact amounting to an error of law. She relies on the jurisprudence in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044. I shall assume it is arguable in this context that such an error is available to vitiate a Decision. It needs to be established that the Prime Minister made a mistake as to an established fact uncontentious and objectively verifiable which played a material part in the decision. But it is clear that the fact has to be established as at the date of the decision and notice. On no view could any of the facts relied on be regarded as established fact as at 29 March 2017, nor could they be regarded as uncontentious and objectively verifiable. The investigation and outcome of the Electoral Commission process viewed as a whole is not remotely what the jurisprudence of fundamental error of fact becoming an error of law had in mind. Indeed, finality in the Electoral Commission process and finality in the ordinary criminal law process would not necessarily lead to finality for the purposes of judicial review.

72 Whilst proof of a criminal conviction is objectively and uncontentiously verifiable proof of the conviction, even under the Police and Criminal Evidence Act 1984 s74 the substance of the conviction can be contested, although the burdens of proof would be reversed. But even if it were uncontentious at some stage, it was not uncontentious as at 29 March 2017. Besides, I note that the claimants do not rely on such finality for ground 2, where the material is neither objective nor verified.

73 I turn to where they do rely on material which includes that which is plainly not objectively verified: the merits of ground 2. Some of the remarks I have made bear upon this ground as well. The claim amounts to an allegation that the Prime Minister ought to consider whether the referendum and decision and notification were vitiated and reach a conclusion on it as if she were a court, and do so when the court has decided not to do so, and to do so even if the

court had decided that it would not decide it. This has no merit whatsoever but illustrates instead how central is the attack on the referendum outcome to this ground.

74 Alternatively, it is a claim that she ought to consider those matters without reaching a conclusion that the referendum was vitiated, along with the decision and notice. But what possible conclusion can she come to, without resolving it, other than that these are issues which other bodies, to whom falls the statutory task of resolving them, may over time resolve. At present, the referendum decision and notice are lawful. This court has refused an extension of time in relation to the challenge to them. In effect, the Prime Minister would be required still to reach a judgment as to whether to treat the referendum decision and notice as valid for the time being or not.

75 The consequence would be that she would take steps on the assumption that the notice was not valid, leading to some kind of interim stay or interim relief on the whole Article 50 process, which would be in effect to treat the decision and notification as invalid for the time being, contrary to what this court has held. Her only alternative is to recognise that there are issues but to leave them to others through the statutory processes to resolve and carry on. In my judgment, that is the only rational thing she can do. And it is perfectly clear that that is what she has decided. Even the short response of 3 December by the GLD shows that she cannot be unaware of the challenges to the lawfulness of the referendum but she has decided to carry on with the consequences of notice being given. The impact of herself holding that the validity of something, which the court has declined to hold is invalid, can now be examined and could be treated as temporarily invalid, is offensive to legal certainty, offensive to the role of politicians who are not judges and would, in my judgment, be irrational. The Prime Minister has not ignored a material consideration in the form of unlawful conduct itself; she has left that properly to the relevant authorities in whose actions it is wrong for her to interfere in anyway.

76 Article 3 of Protocol 1 to the ECHR adds nothing in this context, nor does the thinking of the Venice Commission.

77 This application is therefore dismissed because of undue delay on each ground and in substance, and it is without arguable merit even if in time.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
admin@opus2.digital

This transcript has been approved by the Judge.