IN THE ADMINISTRATIVE COURT **CLAIM NO: CO/4201/18**

B E T W E E N:

THE QUEEN on the application of FAIR VOTE PROJECT

Claimant

- and -

THE PRIME MINISTER

Defendant

- and -

ELECTORAL COMMISSION

First Interested Party

- and -

THE COMMISSIONER OF POLICE OF THE METROPOLIS

Second Interested Party

SUPPLEMENTARY GROUNDS UPON WHICH THE CLAIMANT RELIES

(PB/*/*) = Permission Bundle, tab *, page *
Summary Grounds §* = Summary Grounds of Resistance dated 21 November 2018, paragraph *
Claimant's Reply = Claimant's Reply to Summary Grounds of Resistance and Application to Amend the Claim Form and Grounds dated 3 December 2018
Halford §* = witness statement of John Halford dated 3 December 2018, paragraph *
Taylor §* = witness statement of Kyle Taylor dated 3 December 2018, paragraph *

Essential reading:

Judicial review pre-action protocol letter, dated 24 September 2018 (PB/B/38-86)
Claim Form, dated 16 October 2018 (PB/A/1-6)
Defendant's Acknowledgment of Service and Summary Grounds (PB/A/14-23)
Claimant's Reply (PB/A/24-29)
These Supplementary Grounds upon which the Clamant Relies dated 4 December 2018 (PB/A/35-49)
Taylor (PB/A/50-58)
Halford (PB/A/92-03)

A. SUMMARY

1. The agreed issue for this judicial review is whether the Defendant, the Prime Minister, has acted unlawfully by not instigating a public inquiry into a series of matters concerning the conduct of the 2016 EU Referendum campaign ("the EU Referendum"). The scope of the issue under challenge has been acknowledged in correspondence,[1] and in the Defendant's Summary Grounds of Resistance ("Summary Grounds") (at §1 **(PB/A/18)**).[2]

2. It is not disputed that the irregular and unlawful conduct that the Claimant has brought to the Defendant's attention has led to *"public concern"* of the kind that triggers the power to establish a public inquiry under s.1 of the Inquiries Act 2005 ("the 2005 Act"). Her position is that there is no arguable basis for a positive response to the Claimant's request (Summary Grounds §§19-24 **(PB/A/22-23)**). Her reasons for adopting this position do not withstand scrutiny, however. They are based on a mischaracterisation of the basis for the Claimant's request for an inquiry, a misunderstanding of the nature and objectives of public inquiries, and a mischaracterisation of the Claimant's motivation in bringing this judicial review (see further §§17-21 below).

3. At the time that this claim was protectively filed,[3] it was understood that a decision had been taken, on 3 August 2018, to refuse to set up an inquiry because a letter of that date gave reasons for the position adopted on the Claimant's request and concluded "*in the circumstances, the Prime Minister will not be taking any of the steps demanded in your letter*".[4] If there had been a decision on that date, then the proper target would have been that decision. Despite detailed correspondence with the Defendant's legal representatives,[5] it was only explained for the first time in the Summary Grounds (at §11) **(PB/A/20)** that there had, in fact, been no decision. In these circumstances, by this judicial review the Claimant seeks: (i) an order requiring a decision to be made as to

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[1] See, e.g., GLD's letter dated 20 November 2018 ("*The letter simply explains why a claim for judicial review alleging that our client had acted unlawfully by not instigating such a public inquiry was unfounded and would be resisted*") **(PB/B/134)**.
[2] "*The Claimant contends that the Prime Minister has acted unlawfully by not instigating a public inquiry into a wide ranging series of matters concerning the conduct of the 2016 EU Referendum campaign*" **(PB/A/18)**.
[3] **(PB/A/1-13)**.
[4] **(PB/B/30).** See further Halford §8 **(PB/A/94)**.
[5] A summary of this correspondence is set out in Halford at §§10-26**(PB/A/94-99).**

whether to institute an independent public inquiry; alternatively (ii) an order that there be an independent public inquiry.

4. It is common ground that a request for an inquiry was properly made by the Claimant on 5 July 2018. It is also common ground that the Defendant has a power to set up an inquiry. In circumstances where there is a properly made request, and a power to grant or refuse it, there must be consideration of the request and a decision. The Claimant submits that what the Defendant ought to have done was to: (i) consider whether to have an inquiry; (ii) take a positive decision, giving reasons; and (iii) establish one, because that would have been the lawful course in the circumstances.

5. These Grounds address first, the basis upon which the Claimant submits that there should be an independent public inquiry (§§6-21); secondly, the legal relevance of the fact that no decision has been taken in response to the Claimant's request (§§22-24); thirdly, the issue of delay (§§25-29); and fourthly, relief (§§30-32). The Defendant's claim for her Acknowledgment of Service costs is addressed in the Claimant's Reply at §§18-21 **(PB/A/28-29)**.

B. THE PRIME MINISTER'S FAILURE TO INSTIGATE A PUBLIC INQUIRY

6. A public inquiry can be instigated using statutory or common law powers. Public inquiries are now commissioned almost exclusively under the 2005 Act which provides that "*A Minister may cause an inquiry to be held … in relation to a case where it appears to him that – (a) particular events have caused, or are capable of causing, public concern, or (b) there is public concern that particular events may have occurred*" (s.1(1)). The purpose of an inquiry is distinct from that of a regulatory or criminal investigation (s.1(2)). Its distinct purpose was made clear during the passage of what became the 2005 Act.[6] Six key functions have been identified: "*(1) establishing the facts; (2) learning from events; (3) catharsis or therapeutic exposure; (4) reassurance and rebuilding public confidence; (5) accountability, blame and retribution; (6) political considerations*": see *R*

[6] See, e.g., Hansard, HL 9 Dec 2004, Col 983: "*The aim is for the inquiry to establish the facts, to decide what, if anything, went wrong, and, if necessary, to make recommendations aimed at preventing recurrence*". See also; House of Commons, "*Briefing Paper: Statutory commissions in inquiry: The Inquiries Act 2005*" (24 September 2018), pp.8-9.

(Keyu) v SSFCA [2012] EWHC 2245 (Admin), §§157-169; *R (Keyu) v SSFCA* [2016] AC 1355, §306.

7. The public performance of these functions is significant. In *R v Secretary of State for Health ex parte Wagstaff* [2001] 1 WLR 292 at 312 Kennedy LJ and Jackson J endorsed the comments of Sheen J in his report into the capsizing of the Herald of Free Enterprise: "*in every formal investigation it is of great importance that the public should feel confident that a searching investigation has been held that nothing has been swept under the carpet and that no punches have been pulled*".

8. An inquiry is empowered to hold its proceedings in public, save where there is good reason to deal with particular evidence differently (ss.18-20). An inquiry can compel witnesses to attend or documents to be produced (s.21) and there are serious criminal sanctions for non-compliance (s.35). The ultimate product of an inquiry is a report that can prompt necessary change, including law reform.[7]

9. Following a request for a public inquiry, the first step for a Minister is to reach a view as to whether particular events "*appear to have caused, or are capable of causing, public concern*", or if there "*is public concern that particular events may have occurred*" (2005 Act, s.1(1) and see, e.g., *R (Litvinenko) v SSHD* [2014] HRLR 6,[8] §§37, 40). There must then be a balancing act to determine whether an inquiry is required. Relevant factors include: (i) whether the inquiry can establish the facts; (ii) whether it would be useful to learn from past events in order to prevent a re-occurrence; (iii) the benefits an inquiry could bring in terms of catharsis, and improving an understanding of what happened; (iv) the benefits an inquiry could bring in providing reassurance, ensuring accountability and rebuilding public confidence; (v) the importance of promoting good relations between persons of different racial groups (relevant here, as in *Keyu*, because of the

[7] See House of Commons Public Administration Select Committee, "*Government by Inquiry*" HC 51-I (3 February 2005), highlighting at pp 8-9 the views of the Government that inquiries have: *"helped restore public confidence through a thorough investigation of the facts and timely and effective recommendations to prevent reoccurrence*"; p.9: "*[a]t best they change attitudes, policies and practice*"; and p.61 "*the requirement is for ministers to respond to the findings of an inquiry by giving full explanations and, where appropriate, by taking remedial action to ensure that any mistakes identified are not repeated and recommendations are implemented.*"

[8] In this case, the Divisional Court concluded that the Secretary of State's refusal to establish a statutory inquiry into the death of a Russian national killed in London was irrational. The Court reached this conclusion notwithstanding the fact that the Court concluded that the procedural obligation under Article 2 was not engaged.

role of non-UK nationals and states); (vi) the extent to which the inquiry might address a continuing wrong; and (vii) the costs of an inquiry, and the form that the inquiry might take.[9]

10. The Defendant has accepted that if a decision not to set up an inquiry pursuant to s.1 of the 2005 Act is irrational, it will be susceptible to challenge (Summary Grounds §19).

11. On 5 July 2018, the Claimant wrote to the Prime Minister asking for conduct that had "*deeply compromised*" the EU Referendum to be investigated bearing in mind the "*need to maintain the people's faith in our democracy*" **(PB/B/1-4)** (see also Taylor §§12-14 **(PB/A/54)**). It gave examples of such conduct having come to light over the past seven weeks. As explained in more detail in the pre action letter of 24 September 2018 **(PB/B/38-39)**, the Claimant's request was based on the following:

    (1) The evidence of irregular and unlawful conduct indicates interference by a foreign state in the EU Referendum (i.e. Russia), the involvement of foreign and multinational companies, unprecedented use of social media to target and influence voters (using, in many cases, unlawfully processed data), use of untruthful campaign materials, a single individual making the largest ever donations to political campaigns, unlawful overspending on an unprecedented scale by several campaigning organisations (some of which involved common plans between them) and wilful non-cooperation with regulators, investigators and a Parliamentary Select Committee including by giving untruthful evidence to them.[10]

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[9] *R (Keyu) v SSFCA* [2012] EWHC 2245 (Admin), §157-175; *R (Keyu) v SSFCA* [2016] AC 1355, §§310-311 (Lady Hale). In her dissenting judgment in Keyu, Lady Hale concluded: "*If the Divisional Court had not set the bar to establishing the truth so high, it might well have concluded that the value of establishing the truth, which would serve all the beneficial purposes which it identified, was overwhelming. In my view, the Wednesbury test does have some meaning in a case such as this. The Secretaries of State did not take into account all the possible purposes and benefits of such an inquiry and reached a decision which was not one which a reasonable authority could reach*" (§313). Although the other Supreme Court Justices disagreed with Lady Hale's conclusion, they did not disagree with the principles that she applied. See also *Ali Zaki Mousa v Secretary of State for Defence (No* 2) [2013] EWHC 1412 (Admin) §143.

[10] See the detailed overview of the matters of serious public concern that have come to light since the EU Referendum took place on 23 June 2016 (much of which has only come to light very recently) in the pre-action letter dated 24 September 2018 ("PAP letter"), §§69-155 **(PB/B/54-74)**. The Claimant continues to rely on all of these matters.

(2) The EU Referendum itself concerned a question of profound constitutional importance and the consequences of irregular conduct are far-reaching but, to date, have not been assessed.

(3) Conventional regulatory, investigatory and oversight mechanisms would be unable to comprehensively assess the evidence, gather additional evidence as necessary, and reach conclusions about it in a way that would address and allay public concern.[11]

12. The Prime Minister did not respond to the Claimant's letter. On 20 July 2018, the Claimant's former solicitors, Deighton Pierce Glynn ("DPG") repeated Fair Vote's request **(PB/B/6 §5a)**. On 3 August 2018, the Government Legal Department ("GLD") responded, stating expressly "*[i]n the circumstances, the Prime Minister will not be taking any of the steps depending in [the DPG] letter*" **(PB/B/30)**.

13. In subsequent correspondence the Prime Minister has indicated that no decision in relation to the setting up of an independent public inquiry has been taken in response to Fair Vote's 5 July 2018 letter and, as noted above, the Summary Grounds add that there been no earlier decision.[12] The current position, therefore, is that, notwithstanding Fair Vote's request, there has been no decision as to whether to instigate a public inquiry. The terms of the Summary Grounds also suggest that, without the Court's intervention, a decision is unlikely to be forthcoming (there is, it is said, no more than an "*off-chance of some possible future decision relating to a public inquiry*" (emphasis added) (Summary Grounds §18(c), **(PB/A/22)**).

14. Fair Vote is not alone in its call for an independent public inquiry. The Deputy Leader of the Labour Party, Tom Watson MP, has repeatedly raised the question as to whether an inquiry was now needed.[13] On 28 November 2018, he asked the following written Parliamentary Question of the Cabinet Office: "*To ask the Minister for the Cabinet Office, if he will establish a public inquiry (a) to examine matters relating to campaigning and foreign influence in the EU referendum campaign that are not currently being examined by the police,*

[11] See PAP letter, §§69-155, 156-177 **(PB/B/54-79)**.
[12] See, e.g., Summary Grounds §11 ("*to date, no decision has been taken in respect of whether there should be a public inquiry into the conduct of the EU Referendum*") **(PB/A/20)**.
[13] See PAP letter, §150, 152 **(PB/B/72-73)**.

the National Crime Agency or the Information Commissioner; (b) to consider the consequences of potentially irregular and unlawful conduct during the EU referendum campaign; and (c) to make recommendations for appropriate action" **(PB/A/86)**. That question has not yet received an answer. Similar calls for an inquiry have been made by Damian Collins MP, the Conservative Chair of the Digital, Culture, Media and Sport Committee ("DCMS Committee").[14]

15. The following factors support the instigation of an independent public inquiry to address the public concern that has arisen from the way the EU Referendum campaign was conducted and the consequences.

    (1) An inquiry could reach conclusions about what is most likely to have happened in the EU Referendum campaign and the consequences to ensure the truth is known, lessons are learned for the future, and public confidence is restored.

    (2) An inquiry would be in a position to make factual findings on evidence that other bodies have been unable to secure because of the limits of their powers and investigatory remit, and their inability to require attendance, cross-examination and the production of documents.[15] The unwillingness of individuals and organisations to co-operate with investigations to date,[16] could be addressed by way of the inquiry panel's coercive investigatory powers (§8 above). No other body with such powers has an adequate investigatory remit.

    (3) An inquiry would be able to draw on the work undertaken by the DCMS Committee,[17] the Public Administration and Constitutional Affairs Committee, the Electoral Commission,[18] the Information Commissioner's Office ("ICO"),[19] and, in due course, the police and National Crime Agency ("NCA").[20]As a result

[14] PAP letter, §150 **(PB/B/73)**.
[15] An overview of the relevant investigatory and inquiry powers is set out at PAP letter, §§40-68 **(PB/B/48-54)**.
[16] See, e.g., PAP letter §90 **(PB/B/59)** (Electoral Commission noting the lack of cooperation from Arron Banks, Andy Wigmore and Goddar Gunster), §§137-143, 146 (the DCMS Committee noting the many difficulties it experienced when gathering evidence for the purposes of its inquiry into the phenomenon of fake news, including the lack of cooperation from Facebook) **(PB/B/69-72)**.
[17] PAP letter, §§133-149 **(PB/B/68-72)**.
[18] PAP letter, §§74-113 **(PB/55-64)**.
[19] PAP letter, §§124-132 **(PB/B/66-68)**.
[20] PAP letter, §§117-123 **(PB/B/65/66)** and §18 below.

of its broader powers, an inquiry could make more progress than the Electoral Commission has, for instance, on issues of foreign interference, and more than any other body has on issues of conduct that may be considered undemocratic and unethical, but not unlawful.

(4) An inquiry would allow the UK to take the lead on investigating issues of Russian interference in the EU Referendum. The Electoral Commission was told there had been such interference,[21] but did not investigate itself. According to the Chair of the Digital, Culture, Media and Sports Committee, what they have discovered on this issue to date "*is the tip of the iceberg*".[22] This would avoid the lead investigation by default being Robert Mueller's examination of the role of Russian influence in the US elections, which, evidence indicates, is peripherally touching upon the EU Referendum.[23]

(5) An inquiry would be able to draw lessons from events, and prevent re-occurrence in the future, by making recommendations including for law reform. The recommendations already made by the DCMS Committee, Electoral Commission and ICO could be considered and endorsed if appropriate, although the main purpose of the inquiry would be to make evidence-based recommendations based on its own investigations, rather than to duplicate the work of others.

(6) An inquiry would facilitate catharsis and assist in improving and rebuilding public confidence in the integrity of democratic process, and healing divisions (including those arising from one country having interfered in the domestic affairs and democratic processes of another country). An inquiry would allow an acknowledgment of what went wrong and ensure that the record is set straight. It would allow for a form of accountability for wrongs that are not crimes (or which may be but cannot practically be prosecuted). If information about the

[21] PAP letter, §102 **(PB/B/62)**.
[22] PAP letter, §134 **(PB/B/69)**.
[23] This was one of the concerns raised by the DCMS Committee: "*We note that the Mueller Inquiry into Russian interference in the United States is ongoing. It would be wrong for Robert Mueller's investigation to take the lead about related issues in the UK. We recommend that the Government makes a statement about how many investigations are currently being carried out into Russian interference in UK politics and ensures that a co-ordinated structure exists, involving the Electoral Commission and the Information Commissioner, as well as other relevant authorities*". See PAP letter §145 **(PB/B/71-72)**.

commission of crimes came to light as a result of an inquiry, this could be separately dealt with by the Electoral Commission, police, NCA or ICO as appropriate.

(7) The functional independence of the inquiry will allow it to address concerns about senior political figures. By way of illustration, a number of senior public figures, including Liam Fox MP, Michael Gove MP, Chris Grayling MP, Boris Johnson MP and Dominic Raab MP sat on the Vote Leave Board and/or the Vote Leave Campaign Committee., and Dominic Cummings, Vote Leave's Campaign Director. To date, only Mr Cummings has been asked about his role (by the DCMS Committee), and he refused outright to cooperate, leading to unprecedented, yet ineffective, action being taken in the form of a summons and a motion ordering him to appear.

(8) An inquiry would be held in public, with clear attendant transparency benefits. An inquiry will allow core participants to engage in the inquiry and, where permitted by the panel, to cross-examine witnesses in public and to examine documents. The media would be able to report fully on the steps taken in the investigation. Such a public process will help to restore trust and public confidence in democratic processes.

(9) Although cost is relevant, the cost of the inquiry sought will be reduced by the work already done by the Electoral Commission, ICO and DCMS Committee.

(10) The passage of time is not a significant factor weighing against an inquiry.

16. Factors (1) to (9) have been given no consideration by the Prime Minister. The Claimant submits that, having regard to all the possible purposes and benefits of such an independent public inquiry, a decision not to instigate an inquiry will so obviously be contrary to the public interest as to be irrational and/or disproportionate.[24] As to

[24] As to the latter, members of the Supreme Court have acknowledged that the introduction of a more structured and principled ground of challenge based on proportionality, is an issue that "*will have to be frankly addressed by this court sooner rather than later*": *R (Keyu) v SSFCA* [2016] AC 1355, §271 (Lord Kerr); see also §§131-133 (Lord Neuberger). Given what is at stake ("*We are facing nothing less than a crisis in our democracy*" (PAP letter, §134 **(PB/B/69)**), this case would provide an appropriate vehicle to consider this issue.

factor (10), it is said in the Summary Grounds that the matters Fair Vote has raised have been in the public domain since 2017 to early 2018 and, by implication, that an inquiry ought to have been sought sooner. This is factually incorrect, as explained on Halford §30 **(PB/A/100)** and Taylor §20 **(PB/A/56)** (the Defendant's timing point about this is addressed below at §26 to 29).

17. Notwithstanding the fact that the Prime Minister has refused to make a decision in relation to the instigation of an independent public inquiry, the Summary Grounds set out four reasons why, it is said, the Claimant's arguments for an inquiry have no merit. None of these reasons is sustainable.[25]

18. First, it is submitted that the "*principal matters raised by the Claimant concern allegations of conduct on the part of certain individuals and bodies involved in the EU Referendum campaign*", and that these are the subject of on-going criminal investigation, including by the NCA which launched an investigation into a number of individuals and entities on 1 November 2018, following a referral from the Electoral Commission (Summary Grounds §20 **(PB/A/22)**). This is based on a mischaracterisation of the basis for the Claimant's request. It is incorrect to assert that the "*principal matters*" raised by the Claimant concern criminal conduct. Nor is it correct to state that the Claimant's concerns can be addressed by the NCA and/or the police, in circumstances where many of these concerns do not correspond to criminal offences. These are set out in detail in the Claimant's 24 September 2018 PAP letter (at §§168-176 **(PB/B77-79)**): (i) Russian interference in the EU referendum; (ii) the involvement of foreign-based companies, including political strategy and data analytic companies; (iii) truthfulness during the campaign; (iv) the lack of effective sanctions and accountability for overspending and the lack of an effective deterrent to overspending within the existing legislation; (v) the scale of campaign donations in the EU Referendum made by a small number of individuals, leading them to have a potentially disproportionate impact contrary to Parliament's intention when enacting the Political Parties, Elections and Referendums Act 2011 ("PPERA"); (vi) the source of funds/secondary financing for campaigners in the EU Referendum; (vii) the exploitation of anomalous rules in PPERA relating to political loans and donations in Northern Ireland; and (viii) the use of psychographic targeting and the lack of oversight of these new methods of political

[25] In addition to the below, see Halford §§3--38 **(PB/A/100-102)**.

campaigning. The Claimant also sought an examination of the consequences of each of these factors on votes cast and for all of them to be examined in public. None of these matters are being considered by the Police or the NCA (see further Halford §§31-32 **(PB/A/100)**. This has been confirmed, in express terms, by the Police (**PB/D/1-4)**. The NCA gave a similar confirmation in response to a letter from MPs and peers pressing it to investigate **(PB/A/112**).

19. Secondly, it is submitted that an inquiry is not an appropriate forum for changes or developments to the law, as these are matters for the consideration of Parliament (Summary Grounds §21 **(PB/A/23)**). This misunderstands the functions of inquiries which, without exception, have a lesson-learning and recommendation making function (see the schedule to Halford of terms of reference of a number of recent inquiries that explicitly state this **(PB/A/105)**). What subsequently becomes of those recommendations is, of course, a matter for Parliament.

20. Thirdly, it is submitted that, insofar as the Claimant refers to alleged interference in the EU Referendum by foreign states, this is something that "*would naturally fall within the purview of the appropriate security and intelligence agencies*" (Summary Grounds §22 **(PB/A/23)**). However, no indication is given as to whether this is, in fact, something that is currently the subject of investigation by security and intelligence agencies. Nor do the Summary Grounds explain why public scrutiny would not be a better way of addressing public concern about these issues. The need for such scrutiny was one of Prime Minister's reasons for establishing a public inquiry into the killing of Alexander Litvinenko (the *"possible involvement of Russian state agencies in Alexander Litvinenko's death"* was amongst the terms of reference: see Halford §36 **(PB/A/101)**).

21. Fourthly, it is submitted that the Claimant "*is not in reality seeking a public inquiry as an end in itself*". It is said that "*[t]he ultimate aim of the Claimant appears to be to further its position that another referendum is needed*", and that this is "*a political judgment which would be non-justiciable*" (Summary Grounds §23 **(PB/A/23)**; see also at §17 **(PB/A/21)**). This is a further mischaracterisation of the Claimant's position. The Claimant has made it absolutely clear in pre-action correspondence that it is not seeking a second

referendum through this litigation. This was expressly acknowledged by the GLD.[26] The Claimant's sole target is the failure to instigate an independent public inquiry and/or the failure to make a decision (see further Halford §37 **(PB/A/102)**; Taylor §25 **(PB/A/57)**). The Defendant's attempt to characterise the target of the claim as in some way not justiciable is therefore not well founded.

C. THE ABSENCE OF A DECISION

22. At the time that this claim was protectively filed, it was understood that a decision had been taken to refuse to set up an inquiry, on 3 August 2018 (Halford §8 **(PB/A/94)**). A history of the correspondence is set out in Halford §§5-26 **(PB/A/93-99)**. As is apparent from that evidence, the Defendant's lawyers have repeatedly refused to provide clarification and information requested by the Claimant. Most significantly, despite sending a pre-action protocol letter on 24 September 2018, issuing protectively on 16 October 2018, and asking the question repeatedly (see, e.g., Halford §22 **(PB/A/22)**), the Defendant's lawyers only informed the Claimant on 15 November 2018 that no decision had been taken by the Defendant in response to the 5 July 2018 request **(PB/B/25)**. Further, on 21 November 2018 the Summary Grounds were served revealing (at §11) that no decision had been taken at all: "*to date, no decision has been taken in respect of whether there should be a public inquiry into the conduct of the EU Referendum*" **(PB/A/20)**.

23. It is therefore now clear, some weeks after the claim's issue, that the Defendant has never made a decision on the Claimant's 5 July 2018request, nor has she ever turned her mind to its substance.

24. The difficulty with the Defendant's position is that, given there was no decision, the Claimant's request should have prompted one. A failure to make a decision engages the principles of public law. A public body will *"almost always"* have a duty to consider whether it should exercise its discretionary powers: see *Stovin v Wise* [1996] AC 923, 950B *per* Lord Hoffmann. Where a decision maker is "*acting under a statute*" that places *a "clear responsibility"* upon them by providing a power that arises in particular

[26] See the letter dated 6 November 2018, where the GLD acknowledged that Fair Vote was "*abandoning the allegations*" made in their former solicitor's letter, and "*confining [itself*" to the "*inquiry grounds*" **(PB/B/114)**.

circumstances, they will be "*under a duty to give proper consideration*" to whether it should be exercise or not: see *Anns v Merton LBC* [1978] AC 728, 755A-C *per* Lord Wilberforce and *R v Hertfordshire County Council ex parte Cheung*, The Times, 4th April 1986 identifying the relationship between an express discretionary reconsideration power and an implied "*duty to consider exercising this power*".[27] Here that duty arose in the context of s.1 of the 2005 Act. It has not been discharged. That failure is unlawful.

D. TIMING

25. The Defendant's sole explanation for her failure to make a decision appears to be that the Claimant did not make its request in a timely way. It is said that "*[t]he principal matters said to give rise to the need for such a public inquiry have been in the public domain since 2017/early 2018*", that "*[t]ime started to run from those dates*", and that there "*is no proper basis for extending time in this case because, despite the considerable delay, the Claimant has provided no explanation … for its delay*" (Summary Grounds §§14-15 **(PB/A/21)**).

26. However, there remains a live issue, acknowledged by the Defendant, as to whether the Prime Minister has acted unlawfully by not instigating a public inquiry into a series of matters concerning the conduct of the EU Referendum campaign. In circumstances where there is an ongoing failure to make any decision in relation to whether to set up an inquiry, notwithstanding the Claimant's 5 July 2018 request, there can be no question of the claim being out of time.

27. There is no legal or factual support for the Defendant's contention that a request for an inquiry should have been made in 2017/early 2018. Neither the 2005 Act, nor the common law, imposes an obligation on concerned members of the public to seek an inquiry as soon as their concerns arise. In any event, with one exception, all of the examples of evidence coming to light that Fair Vote relied on its 5 July 2018 letter were from mid-May 2018 onwards (Halford §30 **(PB/A/100)**). The same is true of the matters

[27] See also *R v SSHD, ex p Fire Brigades Union* [1995] 2 AC 513, HL, 575-576 (per Lord Nicholls: "*although he is not under a legal duty to appoint a commencement day, the Secretary of State is under a legal duty to consider whether or not to exercise the power and appoint a day. That is inherent in the power Parliament has entrusted to him. He is under a duty to consider, in good faith, whether he should exercise the power.*"

highlighted in the PAP letter (see §§90-113 **(PB/B/59-64)**, §§18-123 **(PB/B/65-66)**, 129-132 **(PB/B/68)**, 133-155 **(PB/B/68-74)**, 168-177 **(PB/B/77-79)**). This provides a complete explanation for the timing of the Claimant's request (*contra* Summary Grounds §15 **(PB/A/21)**).

28. In any event, the matters at issue in the claim are of considerable importance. If the claim is arguable, it would be contrary to the public interest for the claim to fail because of delay. There is no prejudice to the Defendant. As to good administration, there is no reason why the timing of this claim, or its outcome, would impact on the work an inquiry would do. Contrary to what is said at Summary Grounds (at §17 **(PB/A/21)**) the inquiry's primary purpose is not to inform political decision making about establishing a second referendum or Brexit more generally, in the next few weeks, or at all. The primary purposes are those set out in the PAP letter at §§69-74 **(PB/B/54-55)**, §§168-192 **(PB/B/77-83)** and 199-201 **(PB/B/84-85)**.

29. In the event that a decision is prompted by this claim, or by the question put by Tom Watson MP (§14 above), the Claimant reserves the right to amend these grounds to address that decision and any reasons given. There is ample precedent for such an approach: see *R v SSHD ex parte Alabi* [1997] INLR 124 and *R v SSHD ex parte Turgut* [2001] 1 All ER 719, 735. The claim in *R (Keyu) v SSFCA* [2016] AC 1355 was amended in this way to take into account a new decision refusing a public inquiry that was made after the proceedings were issued (see Lord Neuberger's speech at §§61-62).

E. RELIEF

30. The relief the Claimant seeks is:

    (1) an order requiring a decision to be made as to whether to institute an independent public inquiry;

    (2) alternatively, an order that there be an independent public inquiry.

31. There is no detriment to good administration or other possible prejudice in the relief sought:

(1) the relief corresponds to the issue in the claim, which has been acknowledged by the Defendant in correspondence and in her Summary Grounds (§1 above);

(2) the fact that no decision has been made by the Defendant in response to the 5 July 2018 request, or at all, has only been elicited in correspondence subsequent to the protective filing of the claim on 16 October 2018;

(3) the remedies set out in section 7 of the claim form **(PB/A/3)** are wide enough to capture the relief sought ("*such other relief as the court considers appropriate*").

32. The Court is invited (by consent, if possible) to hear the case at a rolled-up hearing, with appropriate directions for pleadings, evidence and skeleton arguments. The Claimant is not seeking expedition – for the reasons given above, there is no need for the claim to be determined prior to 29 March 2019 (*contra* Summary Grounds §17 **(PB/A/21)**) – however, given the matters that are at stake, there are clear benefits in prompt resolution and efficient case-management.

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4 DECEMBER 2018