**IN THE ADMINISTRATIVE COURT** **CLAIM NO: CO/4201/2018**

**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**

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**CLAIMANT'S NOTE ON *WILSON v PRIME MINISTER* [2018] EWHC 3520 (ADMIN)**

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**(PB/*/*)** = Permission Bundle, tab *, page
Supplementary Grounds §* = Supplementary Grounds dated 3 December 2018, paragraph *
Defendant's Note §* = Defendant's Note on *Wilson* dated 2 January 2019, paragraph *

This Note addresses the judgment in *Wilson v Prime Minister* [2018] EWHC 3520, per the order of Lang J dated 19 December 2018.

1. The Defendant submits that the decision in *Wilson* provides a knock-out blow to the Claimant's claim. That submission is unsustainable. The claim in *Wilson* had a different target, sought different relief, and had nothing to do with the instigation of a public inquiry. By contrast, it is common ground that the relevant issue in *this* claim is whether the Defendant, the Prime Minister, has acted unlawfully by not instigating a public inquiry (see e.g. D's own Summary Grounds §1 **(PB/A/18)**). The Claimant challenges both the failure to instigate an inquiry (Supplementary Grounds §§11, 15, 18-21 **(PB/A/39-46)**) and the failure to make a decision (Supplementary Grounds §§2, 11, 24 **(PB/A/36, 39-40, 46-47)**). Neither of these issues were addressed *to any extent* in *Wilson*. The Defendant's submission that the judgment in *Wilson*, "*covered the matter put forward in this claim*" (Defendant's Note §12) is simply wrong.

2. It would be enough if it were arguably wrong.

3. Note also that the idea that *Wilson* is dispositive for the present case is evidently an afterthought, now made against Fair Vote (who was never identified as a person directly affected by *Wilson*), having not featured for example in the Defendant's Summary Grounds dated 21 November 2018 (and in circumstances where two of the Defendant's Counsel in the present claim also appeared in *Wilson*).

4. The scope of the claim in *Wilson* is readily apparent from the Grounds of Judicial Review ("Grounds"), the skeleton argument dated 4 December 2018 ("Skeleton Argument"), and the judgment in *Wilson*. The Grounds and Skeleton Argument are appended to this note.

   (1) The target in *Wilson* was a challenge to "*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*" (*Wilson* §6). According to the Judge, "*the attack on the referendum and its outcome is at the heart of the case*" (*Wilson* §45).

   (2) As the Grounds made clear, the decision under challenge was the Prime Minister's decision that the UK should withdraw from the EU, and the notification of that decision under Article 50 (Grounds §3; *Wilson* §33). The claimants sought declarations that both the decision and the notification were unlawful, and a quashing of the decision of the Prime Minister to give notice under Article 50 (Grounds §§5, 6; *Wilson* §§34, 37).

   (3) The Grounds did not challenge the failure to instigate an inquiry, or the failure to make any decision in relation to an inquiry. They did they seek any relief which, if granted, would have led to a public inquiry, or a decision on whether there ought to be one.

   (4) The Defendant submits that, by the hearing, ground 2 of the Grounds had been reformulated in such a way that it became the same as the ground advanced by the Claimant in this case. That 'reformulated' ground appears at Skeleton Argument §§18, 94-98 and alleges "*that the Prime Minister's decision to refuse to take any steps in response to the findings of the Electoral Commission of serious offences and its referral for investigation to the Metropolitan Police and the NCA of further potential offences was unlawful as involving a misdirection of law, a failure to take into account a relevant consideration and was otherwise unreasonable in the Wednesbury sense*". The Defendant seeks to characterise this as "*the public inquiry ground*" (Defendant's Note §6) on the basis that a public inquiry could have been one of the 'steps' that could have been taken (Defendant's Note §9).

(5) The Defendant's characterisation is impossible to reconcile with the Skeleton Argument, which does not contain a single reference to a public inquiry, or to the Inquires Act 2005. As the Skeleton Argument makes clear, the target of the 'reformulated' ground 2 was the decision to take the UK out of the EU (Skeleton Argument §94), and it was submitted that that decision was vitiated by a misdirection of law and/or was unreasonable on the basis that the Prime Minister had failed to take any steps in response to the findings of the Electoral Commission (Skeleton Argument §§95-98). At §41, the Judge recorded an oral submission that one of the steps that could have been taken could have been a "*public inquiry*". That is the *sole* reference to a public inquiry in the *Wilson* judgment. Even as 'reformulated', the claimants in *Wilson* did not seek any relief which, if granted, or would have led to a public inquiry, or a decision on whether there ought to be one.

5. The present claim is materially different to that advanced in *Wilson*. The Claimant does not challenge the Prime Minister's decision that the UK should withdraw from the EU, or the notification of that decision under Article 50. That has been expressly disavowed by Mr Taylor (see witness statement of Kyle Taylor §13, 25 **(PB/A/54, 57)**), and forms no part of the Claim Form **(PB/A/1-6, 34A)** or Grounds **(PB/A/8-13, 35-49)**. The Claimant's sole target is the failure to instigate an independent public inquiry and/or a failure to make a decision. The relief that is sought is an order requiring a decision to be made as to whether to institute a public inquiry; alternatively, an order that there be an independent public inquiry.

6. The claimants in *Wilson* did not raise as a ground for judicial review that the Prime Minister had acted unlawfully by failing to institute a public inquiry, or by failing to make any decision.

7. In *Wilson* there was no argument:

(1) that the statutory basis for considering an inquiry under the Inquiry Act 2005 existed and that, a request having been made for such an inquiry, a decision needed to be taken[1];

(2) that the findings of the Electoral Commission, as well as the findings of other bodies including the Digital, Culture, Media and Sport Committee, the Public Administration and Constitutional Affairs Committee and the Information Commissioner's Office, raise questions as to whether there ought to be a public inquiry, and at the very least require a decision as to whether there should be a public inquiry[2];

[1] *Cf* Supplementary Grounds §§6-10 **(PB/A/37-39)**.
[2] *Cf* Supplementary Grounds §11, 18 **(PB/A/39-40, 44-45)**.

(3) that the subject of any public inquiry should extend beyond matters of criminal conduct[3]; or

(4) that these issues cannot be addressed by the police and/or NCA, in circumstances where many of the concerns identified do not correspond to criminal offences.[4]

8. All of these issues are at the core of the Claimant's case in the present challenge. None of the issues were determined, or even raised, in *Wilson*.

9. In light of the materially different scope of the claims, it is unsurprising that the judgment in *Wilson* has no impact on the present claim.

10. As to the substance, the Judge in *Wilson* held that "*[u]nless the referendum result is vitiated, there is no reason for the Prime Minister to 'take steps' of whatever type asserted by the claimants*" (*Wilson* §48). This was because, "*on the claimant's case*", "*[t]he Electoral Commission findings are only findings which require consideration because they would void the election*". As there was no basis for vitiating the referendum result, the 'reformulated' ground 2 was unarguable.

11. This reasoning does not answer the present case. Indeed, it has no application to the present case. The Claimant's claim is that (i) there is a general public concern about campaigning during the EU Referendum; (ii) where there is such a public concern, there may be a basis for an inquiry pursuant to the Inquiries Act 2005; (iii) such an inquiry has been requested; and (iv) in these circumstances, there must be a lawful, reasoned and justifiable decision on whether or not to establish one. The Claimant's challenge is not predicated on, or linked, in any sense, to the referendum result.

12. The Defendants also seek to rely on the reasoning at *Wilson* §75, where the Judge stated "*the only rational thing*" for the Prime Minister to do was to "*recognise that there are issues but to leave them to others through the statutory processes to resolve and carry on … 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*". This finding also has no application to the present case. It is entirely right that the bodies with sole responsibility for investigating and prosecuting unlawful conduct ought to continue to discharge their responsibilities, and that it would be wrong for the Prime Minister to interfere with those processes. However, this has nothing to do with whether the Prime Minister has acted lawfully in refusing to instigate an independent public inquiry and/or to make any decision in relation to a public inquiry, particularly in circumstances where the majority of the concerns raised

[3] *Cf* Supplementary Grounds §§11(1), 18 **(PB/A/39, 44-45)**.
[4] *Cf* Supplementary Grounds §§18-20 **(PB/A/44-45)**.

do not correspond to criminal offences and are not presently being considered via any statutory or other process.[5]

13. As to delay, the Judge held that the claimants were out of time to challenge the outcome of the referendum (*Wilson* §59). The Judge held that this also applied to ground 2, because "*the challenge to the referendum which was never made is an essential ingredient of the challenges under ground 2 to 4*" (*Wilson* §59). That has no bearing on the present claim. The Judge also rejected the submission that, in the context of the ground 2, there was a continuing failure, on the basis that ground 2 was "*but a stratagem*" (*Wilson* §62), and the "*true focus*" of ground 2 (i.e. the challenge to the referendum) should have been clearer sooner. Again, this has no bearing on the present claim, given its different target, and the different relief sought (*cf* Supplementary Grounds §§25-29 **(PB/A/47-48)**).

14. For all of these reasons, the Defendant is wrong to say that a "*public inquiry ground*" was pursued in *Wilson* (Defendant's Note §6); that such a ground was "*found to be out of time and lacking in arguable merit*" (Defendant's Note §12); and that *Wilson* provides a basis for refusing permission in the present case (Defendant's Note §3).

15. For present purposes, it would suffice that it is arguable that *Wilson* is not dispositive. If the Defendant wishes to argue that *Wilson* provides the answer to the present claim, so be it. But that is, at the very least, itself a properly contestable point.

16. So, it remains the case that the Defendant has failed to identify any knock-out blow, despite having had three opportunities to do so in writing. It remains the case that this claim is not "*hopeless, frivolous or vexatious*". It is clearly arguable and raises issues of enormous public importance. The Claimant invites the grant of permission, or alternatively a rolled-up hearing.

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14 JANUARY 2019

[5] Supplementary Grounds, §18 **(PB/A/44-45)**.