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

CLAIMANT'S SKELETON ARGUMENT
FOR RENEWAL HEARING (19.3.19)

A. SUMMARY

1. At issue in these judicial review proceedings is the question whether the Defendant has acted compatibly with her public law duties as to the question of whether to establish a public inquiry under s.1 of the Inquiries Act 2005 ("the 2005 Act") into a series of matters concerning the conduct of the 2016 EU Referendum campaign ("the EU Referendum"). A request was first made by the Claimant for a public inquiry on 5 July 2018. It is common ground that (a) the Defendant has a statutory power to establish an inquiry; and (b) she has not made a decision on whether to do so. By this judicial review claim, the Claimant seeks (i) an order that there be an independent public inquiry; alternatively (ii) an order requiring a decision to be made as to whether to establish an independent public inquiry.

2. On 22 January 2019 permission to apply for judicial review was refused on the papers by Mr Justice Davis **(A/130)**, on the basis that he considered that (i) this claim is out of time; (ii) this claim is unarguable both as a result of the decision of Mr Justice Ouseley refusing permission in *Wilson and others v Prime Minister* [2018] EWHC 3520 ("*Wilson HC*") and viewed independently. On this renewed application for permission the Claimant submits that the appropriate course is to grant permission (granting any necessary extension of time). The Court is also invited to discharge or vary the Judge's cost order.[1]

B. FACTUAL AND PROCEDURAL BACKGROUND

3. On 5 July 2018, the Claimant wrote to the Prime Minister asking for conduct that had deeply compromised the EU Referendum to be the subject of an inquiry **(B/1-2)**.

[1] This has been dealt with in separate submissions **(A/135-141)**.

There was no response to that letter. On 20 July 2018, Deighton Pierce Glynn, the Claimant's then solicitors, sent a pre-action letter, repeating that request **(B/5-24/§§5(a), 68(a))**. That letter also raised a number of public law arguments that the EU Referendum was vitiated by unlawful practices that had come to light as a result of the investigations undertaken to date by the Electoral Commission. Subsequently, and with new solicitors Bindmans LLP, the focus has been exclusively on the need for an independent public inquiry under the 2005 Act.[2] The basis for the Claimant's focused challenge was set out, in detail, in a pre-action letter dated 24 September 2018 ("PAP Letter") **(B/34-86)**. The broader challenges set out in Deighton Pierce Glynn's 20 July 2018 letter were adopted by another set of claimants, which ultimately led to the refusal of permission by Mr Justice Ouseley in *Wilson HC*. The Court of Appeal affirmed that decision on 21 February 2019, with a judgment promulgated on 4 March 2019.[3]

4. The Claimant's request for a 2005 Act public inquiry was based on the following: (1) the extensive evidence that had come to light, and continues to come to light, which indicates irregular and unlawful conduct, including interference by a foreign State (i.e. Russia) in the EU Referendum;[4] (2) the fact that the consequences of this irregular conduct are far-reaching but, to date, have not been assessed; and (3) the fact that conventional regulatory, investigatory and oversight mechanisms are 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.[5]

5. The Claimant's request for a public inquiry was and is not based, even primarily and still less exclusively, on unlawful conduct by specific organisations and individuals that has been, or is being, investigated by the Electoral Commission, the Police or the National Crime Agency ("NCA"). The Claimant's 24 September 2018 PAP Letter identified <u>eight issues</u> which, it said, give rise to serious public concern and require investigation by a body that can compel the production of documents and the giving of evidence.[6] The same issues are identified in the Claimant's JR Grounds **(A/44-45/§18)**. In respect of each of the eight issues, the Claimant identified the evidence that was then available, and the reasons why there are no other bodies capable of addressing the issue. In the six months since the 24 September 2018 PAP Letter, the evidence in respect of the eight issues, and the corresponding need for a public inquiry, has become even stronger. None of the issues has been addressed in

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[2] The Claimant notified the Defendant of this on 2 August 2018, and asked that the Defendant hold off responding to the 20 July 2018 letter until further submissions had been made **(B/25)**. The Defendant did not do so and provided a response to the 20 July 2018 letter on 3 August 2018 **(B/26-30)**.
[3] [2019] EWCA Civ 304 ("*Wilson (CA)*").
[4] A detailed overview of the evidence as it was at 24 September 2018 is set out in the 24 September 2018 PAP Letter, **(B/54-74/§§69-155)**.
[5] See PAP Letter, **(B/54-79/§§69-155, 156-177)**.
[6] See PAP Letter, **(B/77-79/§§168-177)**.

any detail by the Defendant, either in correspondence or in the pleadings filed to date.

6. The eight issues are:

(1) First, there is a public concern about Russian interference in the EU Referendum. On 26 June 2018, the fact of foreign interference was noted by the Electoral Commission in its report "*Digital campaigning - Increasing transparency for voters*" ("Digital Campaigning Report"),[7] however it was not investigated.[8] On 29 July 2018, the Digital, Culture, Media and Sport Committee ("DCMS Committee") published its interim report on its inquiry into the growing phenomenon of 'fake news', "*Disinformation and 'fake news': Interim Report*" ("DCMS Committee's Interim Report"),[9] and described "*a co-ordinated, longstanding campaign by the Russian Government to influence UK elections and referenda*",[10] however the DCMS Committee's work on the issue was hampered by non-cooperation and its inability to compel attendance or impose sanctions for non-compliance with information requests.[11] The DCMS Committee noted that "*the Mueller Inquiry into Russian interference in the United States is ongoing*" and that "*[i]t would be wrong for Robert Mueller's investigations to take the lead about related issues in the UK*". It recommended 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*".[12] On 23 October 2018, the Government published its response to the DCMS Committee's Interim Report, "*Disinformation and 'fake news': Interim Report: Government Response to the Committee's Fifth Report of Session 2017-19*",[13] and failed to provide any such assurance.[14] On 18 February 2019, the DCMS

[7] A copy of the Digital Campaigning Report can be accessed here: https://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/244594/Digital-campaigning-improving-transparency-for-voters.pdf.
[8] PAP Letter, **(B/61-62/§§100-103)**.
[9] DCMS Committee's Interim Report **(I/1-89)**.
[10] PAP Letter, **(B/69/§136)**, DCMS Committee's Interim Report **(I/45/§161)**.
[11] PAP Letter, **(B/69-71/§137)**, DCMS Committee's Interim Report **(I/47/§168-176)**.
[12] PAP Letter, **(B/71-72/§145)**, DCMS Committee's Interim Report **(I/54/§204)**.
[13] Government Response to DCMS Committee's Interim's Report **(I/90-112)**.
[14] The Government's response said this in response to recommendation 49 **(I/110)**: "*The remit of the Special Counsel's investigation into Russian interference in the 2016 Presidential election is a matter for the United States. The Special Counsel's investigation would not take the lead on any investigations into allegations about Russian interference in the UK. The Government has taken steps to ensure that there is a coordinated structure across all relevant UK authorities to defend against hostile foreign interference in British politics, whether from Russia or any other State. The Government is committed to protecting the UK against any attempts to interfere with the security and integrity of our democratic processes. There has, however, been no evidence to date of any successful foreign interference.*" This is to be contrasted to the evidence given by the Secretary of State for Digital, Culture, Media and Sport, Jeremy Wright QC MP, to the DCMS Committee, which stated in terms that (in response to Q210): "*[w]hat is undoubtedly true is that there have been efforts by Russia to interfere in the process. This applies in the UK and it also applies, as the Committee knows, in other*

Committee published "*Disinformation and 'fake news': Final Report*" ("DCMS Committee's Final Report"),[15] which stated that "*there has been clear and proven Russian influence in foreign elections, and we highlighted evidence in our Interim Report of such attempts in the EU Referendum*".[16] The DCMS Committee's Final Report stated that "*[t]he Government should be conducting an analysis to understand the extent of Russian targeting of voters during elections*",[17] and repeated the "*call to the Government to make a statement about how many investigations are currently being carried out into Russian interference in UK politics*".[18] The DCMS Committee's Final Report also made a call for attempted Russian interference in the EU Referendum to be addressed publicly: "*[t]he Government has been very ready to accept the evidence of Russian activity in the Skripal case, an acceptance justified by the evidence. However, it is reluctant to accept evidence of interference in the 2016 Referendum in the UK. If the Government wishes the public to treat its statements on these important matters of national security and democracy seriously, it must report the position impartially, uninfluenced by the political implications of any such report*".[19] There is currently no investigation by any UK body into Russian interference in the EU Referendum campaign, and its consequences.

(2) Secondly, there is public concern about involvement of foreign-based companies (especially political strategy and data analytics companies) in the EU Referendum campaign. There is substantial evidence of foreign companies supplying services to the designated 'Leave' campaign and other campaigners during the EU Referendum campaign. These include, among others: (i) AIQ, a Canadian data analytics company and an associated company, SCL, which have worked on election campaigns around the world involving serious unlawful and deeply unethical practices;[20] (ii) Cambridge Analytica, a company that has been linked to Leave.EU;[21] and (iii) Goddard Gunster, a political public relations firm in Washington, which has been questioned, but refused to provide information to the Electoral Commission.[22] On 26 June 2018, these issues were noted by the Electoral Commission in its Digital Campaigning Report, as were related issues of foreign payments for adverts to circumvent spending controls, but the Electoral Commission made no "*claim to*

countries. What we have not seen, I think, is evidence that that has been successful". The oral evidence heard on 24 October 2018 can be found here:
http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/the-work-of-the-department-for-digital-culture-media-and-sport/oral/91986.html

[15] DCMS Committee's Final Report **(I/113-223)**.

[16] DCMS Committee's Final Report **(I/182/§237)**.

[17] DCMS Committee's Final Report **(I/184/§241)**.

[18] DCMS Committee's Final Report **(I/191/§273)**.

[19] DCMS Committee's Final Report **(I/185/§248)**.

[20] PAP Letter, **(B/70/§139)**.

[21] PAP Letter, **(B/59/§91)**.

[22] PAP Letter, **(B/59/§90)**.

have all the answers".[23] On 29 July 2018, the DCMS Committee, in its Interim Report, noted its concerns regarding foreign-based companies, and suggested that the precise nature of the co-ordination between the different organisations and campaigns should be investigated further.[24] These concerns were repeated on 18 February 2019 in the DCMS Committee's Final Report.[25] There is currently no investigation by any UK body into the ethical and regulatory issues regarding foreign companies' role in the EU Referendum and the consequences of it.

(3) Thirdly, there is a public concern about issues of truthfulness during the EU Referendum campaign. In September 2016, the Electoral Commission published its "*Report on the 23 June 2016 referendum on the UK's membership of the European Union Referendum*" ("Referendum Administration Report"),[26] which acknowledged that significant public concern has been raised in relation to the truthfulness of certain campaign arguments, including from politicians, which in some cases undermined public confidence in the result, but stated that it was not its role to address the issue.[27] On 26 June 2018, the Electoral Commission, in its Digital Campaigning Report,[28] identified that "*targeted messages that spread false or misleading information*" was a "*main concern*", however repeated that it was not in a position to address this issue.[29] The DCMS Committee has, to a limited extent, examined this issue, however its examination has been hindered by its inability to compel attendance or impose sanctions for non-compliance with information requests.[30]

(4) Fourthly, there is a public concern about the lack of effective sanctions and accountability for overspending in the context of the EU Referendum. In March 2017, in its "*Report on the regulation of campaigners at the referendum on the UK's membership of the European Union held on 23 June 2016*" ("Referendum

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[23] PAP Letter, **(B/60-62/§§97-103)**.
[24] PAP Letter, **(B/70/§139)**, DCMS Committee's Interim Report **(I/36/§124)**, **(I/55-61/§§206-231)**, **(I/42/§150)**.
[25] DCMS Committee's Final Report **(I/164/§166), (I/170/§192).**
[26] A copy of the Referendum Administration Report can be accessed here: https://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/215279/2016-EU-referendum-report.pdf.
[27] PAP Letter, **(B/56/§79)** .
[28] A copy of the Digital Campaigning Report can be accessed here: https://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/244594/Digital-campaigning-improving-transparency-for-voters.pdf.
[29] PAP Letter, **(B/61/§99)**.
[30] For example, the CEO of Facebook, Mark Zuckerberg, refused three requests to attend to give evidence to the DCMS Committee, DCMS Committee's Final Report **(I/123/§10)**), leading the Committee to censure him **(I/128/§29)**. There are many other examples: see, e.g., PAP Letter, **(B/70-71/§§140-143)**.

Campaigners Report"),[31] the Electoral Commission asked that the sanction limit of £20,000 be reviewed and increased to a level that would act as a suitable deterrent.[32] On 26 June 2018, in its Digital Campaigning Report, the Electoral Commission stated that it would like new powers to enable it to act proactively during a campaign "*to compel the provision of documents, information and explanation*" and to share information with other bodies.[33] It also repeated its request to increase the maximum fine, which might be considered "*a cost of doing business*" by some campaigners.[34] The extent to which current enforcement powers, and sanctions were an ineffective deterrent to overspending or other unlawful conduct in the EU Referendum and the consequences has not been addressed.

(5) Fifthly, there is a public concern about the scale of campaign donations in the EU Referendum. On 29 July 2018, the DCMS Committee, in its Interim Report, noted that Arron Banks is believed to have been responsible for £8.4 million of the Leave campaign's funding, the largest political donation in British politics, but that it is unclear from where he obtained those funds.[35] On 18 February 2019, the DCMS Committee, in its Final Report, confirmed that "*questions still remain over both the sources of that donation and the extent of Mr Banks' wealth*".[36] This is not an isolated concern. There are, for example concerns about an unincorporated funding organisation based in Scotland called the Constitutional Research Council ("CRC") having donated £435,000 to the DUP for its Referendum campaign.[37] Donations at these levels are contrary to Parliament's intention when enacting the Political Parties, Elections and Referendums Act 2000 ("PPERA").[38] Although other aspects of Arron Banks' conduct is the subject of investigation (for suspected breaches of PPERA and European Union Referendum Act 201 (see §7 below)), the scale of his and others' campaign donations and their consequences has not been investigated.

(6) Sixthly, there is a public concern regarding the source of funds used by certain campaigners in the EU Referendum. On 29 July 2018, the DCMS Committee, in its Interim Report, noted that it had concerns about Arron Banks' and his associates' dealings with Russia, however stated that it was unable to address them satisfactorily.[39] The Electoral Commission can investigate issues of

[31] A copy of the Referendum Campaigners Report can be accessed here: http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/223267/Report-on-the-regulation-of-campaigners-at-the-EU-referendum.pdf.
[32] PAP Letter, **(B/57/§86)**.
[33] PAP Letter, **(B/57/§104)**.
[34] PAP Letter, **(B/57/§104)** .
[35] PAP Letter, **(B/70/§140)**, DCMS Committee's Interim Report **(I/52/§191)**.
[36] DCMS Committee's Final Report **(I/188/§260)**.
[37] PAP Letter, **(B/58/§87)**.
[38] PAP Letter, **(B/43/§22)**.
[39] PAP Letter, **(B/70/§140)**, DCMS Committee's Interim Report **(I/52/§191)**.

secondary financing, but only in relation to compliance with the PPERA. There is presently no general investigation into secondary financing, and nor is there any process, backed with coercive powers, which will result in public scrutiny of these matters.

(7) Seventhly, there is a public concern that anomalous rules relating to Northern Ireland have created lacunae which may have been exploited. In the March 2017, Referendum Campaigners Report the Electoral Commission noted a number of anomalies in the rules applicable in Northern Ireland. In particular, donation and loan reports remain confidential, and there is no bar on parties in Northern Ireland making donations to parties and other regulated entities in Great Britain in the context of referendums.[40] There is evidence that this loophole was exploited by the DUP.[41] On 3 August 2018, the Electoral Commission announced that it had made enquiries, but considered it did not have sufficient evidence to open an investigation in relation to the DUP. It also called for the Government to pass legislation that will allow for retrospective transparency.[42] In evidence to the DCMS Committee the then CEO of the Electoral Commission explained that "*we are restricted by law on what we can say about any donations made before 2017*" and that it is a situation "*that we do not really want to be in, and it is deeply regrettable*".[43] There is currently no investigation into the extent to which these anomalous rules were utilized during the EU Referendum, including by the DUP, and the consequences.[44]

(8) Eighthly, there is a public concern about psychographic targeting in political campaigns and the lack of oversight of these new methods of political campaigning. On 26 June 2018, the Electoral Commission, in its Digital Campaigning Report, noted its concern about new forms of digital campaigning.[45] Similar concerns were identified and by the DCMS Committee on 29 July 2018[46] and 18 February 2019.[47] The Information Commissioner's Office ("ICO") has done a considerable amount of work in this area, commencing an investigation into the use of data analytics in political campaigns, and publishing an "*Investigation Update*" ("Data Analytics Interim Report")[48] on 10 July 2018, its report entitled "*Democracy Disrupted? Personal*

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[40] PAP Letter, **(B/57/§84)**.
[41] PAP Letter, fn 4 **(B/57-58/§84)**.
[42] PAP Letter, fn 5 **(B/58/§87)**.
[43] DCMS Committee's Final Report, **(I/179/§230)**.
[44] The Electoral Commission's decision not to investigate alleged breaches of PPERA by the DUP was the subject of a judicial review claim, but this was refused permission on 4 February 2019.
[45] PAP Letter, **(B/60-61/§97)**.
[46] PAP Letter, **(B/69-70/§§135-139)**, DCMS Committee's Interim Report **(I/28/§92)**, **(I/45/§§161-162)**, **(I/47/§168)**, **(I/21/§64)**.
[47] DCMS Committee's Final Report, **(I/159/§150)**, **(I/164-170/§§167-192)**.
[48] A copy of the Data Analytics Interim Report can be accessed here: https://ico.org.uk/media/action-weve-taken/2259371/investigation-into-data-analytics-for-political-purposes-update.pdf.

information and political influence" ("Democracy Disrupted")[49] on 11 July 2018, and its "*Report to Parliament*" ("Data Analytics Final Report")[50] on 6 November 2018. Although the ICO has investigated aspects of this issue in her investigation into the use of data analytics for political purposes, it was recommended in Democracy Disrupted that the Government "*should conduct a review into the regulatory gaps in relation to content and provenance and jurisdictional scope of political advertising online*".[51]

7. The investigations currently being undertaken by the Metropolitan Police and the NCA are not addressing any of the eight issues identified above. Those bodies' investigations are limited to establishing whether specific individuals or organisations have breached electoral law. To the Claimant's knowledge, the Metropolitan Police is still assessing evidence in in relation to Elizabeth Bilney, David Halsall and Darren Grimes regarding *"potential criminal offences under section 123(4) PPERA"*[52] following an Electoral Commission referral in May 2018;[53] and the NCA is investigating Arron Banks, Elizabeth Bilney and associated organisations for *"suspected electoral law offences"* following an Electoral Commission referral on 1 November 2018.[54]

8. The call for an independent public inquiry has been recognised by others. The Deputy Leader of the Labour Party, Tom Watson MP, has repeatedly raised the question as to whether an inquiry was now needed.[55] On 4 October 2018, Tom Watson sent a letter to the Foreign Secretary calling for an inquiry into Russian interference.[56] To the Claimant's knowledge there has been no reply. On 28 November 2018, he asked the following 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, 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*" **(A/86)**.

[49] A copy of Democracy Disrupted can be accessed here: https://ico.org.uk/media/action-weve-taken/2259369/democracy-disrupted-110718.pdf.
[50] A copy of the Data Analytics Final Report can be accessed here: https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-use-of-data-analytics-in-political-campaigns-final-20181105.pdf.
[51] PAP Letter, **(B/68/§§130)**.
[52] Metropolitan Police letter, 17 August 2018 **(A/111)**.
[53] PAP Letter, **(B/65-66/§§120-121)**.
[54] NCA press release, 1 November 2018, **(A/88)**.
[55] PAP Letter, **(B/72-73/§§150, 152)**.
[56] **(J/1-2)**.

An answer was published on 4 December 2018:

> "*There are no plans to establish a Public Inquiry on the conduct of the EU referendum. The EU referendum was carried out based on legislation passed by Parliament and almost three quarters of the electorate took part. The EU referendum provisions were carefully scrutinised and ratified by Parliament. In line with the precedent for referendums, there was a six week period in which the formal result and administration of the EU Referendum could be challenged by judicial review. We treat the integrity and security of our democratic processes extremely serious. If offences are alleged, it is right that they are investigated thoroughly by the appropriate agencies. This is what is happening at the moment and those agencies and investigations are independent of government*" **(A/119)**.

9. Calls for an inquiry have been made by the DCMS Committee, and its Conservative Chair, Damian Collins MP.[57] Very recently, in the DCMS Committee's Final Report on 18 February 2019, the DCMS Committee:

> "*recommend[ed] that the Government launch an independent investigation into past elections – including … the UK Referendum of 2016 … to explore what actually happened with regard to foreign influence, disinformation, funding, voter manipulation, and the sharing of data, so that appropriate changes to the law can be made and lessons can be learnt for future elections and referendum*" *(***I/191/§273)**.

10. Notwithstanding sustained calls and multiple requests, no public inquiry has been established. Indeed, no decision has been made in relation to setting up an independent public inquiry under the 2005 Act. The Defendant has confirmed that no decision was taken in response to the Claimant's 5 July 2018 letter, and that there was no earlier decision.[58] The Summary Grounds state in terms that "*to date, no decision has been taken in respect of whether there should be public inquiry into the conduct of the EU Referendum*" **(A/20/§11)**. That position has been maintained, notwithstanding the answer to the Parliamentary Question set out at §8 above. In that regard, the Defendant has stated that she intends to "*assert Parliamentary Privilege should [the Claimant] seek to rely in court on the Parliamentary answer in support of the inaccurate and disputed proposition that a decision has been taken as suggested by you*" **(B/164)**.

11. The issue in this claim is whether the position adopted by the Defendant is lawful. In circumstances where there has been a properly made request for a public inquiry, and a power to grant or refuse it, has the Defendant acted lawfully by (i) failing to

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[57] See, e.g., PAP Letter, **(B/73/§150)**.

[58] The Claimant had initially considered that there had been a decision, recorded in the Defendant's 3 August 2018 letter, however the Defendant has since confirmed that that is not the case (e.g. JR Grounds **(A/40/§§12-13)**) and the witness statement of John Halford dated 3 December 2018 **(A/95-99/§§14-28)**.

establish a public inquiry; and/or (ii) failing to give due consideration of the request to establish one and make a reasoned decision on it?

C. <u>THE CLAIMANT'S JUDICIAL REVIEW GROUNDS</u>

(a) <u>The Defendant's failure to establish an inquiry</u>

12. A public inquiry can be established using statutory or common law powers. The 2005 Act provides by s.1(1) 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*". Parliament recognised that the purpose of an inquiry is distinct from that of a regulatory or criminal investigation (s.2(1)), as was also made clear during the passage of what became the 2005 Act. 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 (Keyu) v SSFCA* [2012] EWHC 2245 (Admin) §§157-169, [2016] AC 1355 §306. 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).

13. Under the statutory scheme, 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.2: see, e.g., *R (Litvinenko) v SSHD* [2014] HRLR 6,[59] §§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 (in circumstances where s.149 of the Equality Act 2010 is engaged); (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.[60]

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[59] 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.

[60] *R (Keyu) v SSFCA* [2012] EWHC 2245 (Admin), §157-175; *R (Keyu) v SSFCA* [2016] AC 1355, §§310-311 (Lady Hale).

14. The Defendant has accepted that if a decision not to set up an inquiry pursuant to s.1 of the 2005 Act is unreasonable it would be susceptible to challenge (Summary Grounds **(A/22/§19)**). In *Keyu* it was the issue of reasonableness which split the Supreme Court [2016] AC 1355 *per* Lady Hale dissenting at §313.[61]

15. The Claimant submits that the following factors support the instigation of an independent public inquiry to address the eight issues of public concern identified at §6 above:[62]

    (1) An inquiry would be able to 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.[63] The unwillingness of individuals and organisations to co-operate with investigations to date,[64] could be addressed by way of the inquiry panel's coercive investigatory powers (§12 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,[65] the Public Administration and Constitutional Affairs Committee, the Electoral Commission,[66] the ICO,[67] and, in due course, the police and NCA.[68]As a result of its broader powers, an inquiry could make more progress than the Electoral Commission has, for instance, on issues of foreign

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[61] "*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* [2013] EWHC 1412 (Admin) §143.

[62] See Supplementary Grounds **(A/41/§15)**.

[63] An overview of the relevant investigatory and inquiry powers is set out at PAP letter, **(B/48-54/§§40-68)**.

[64] See, e.g., PAP letter **(B/59/§90)** (Electoral Commission noting the lack of cooperation from Arron Banks, Andy Wigmore and Goddard Gunster), **(B/69-72/§§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).

[65] PAP Letter, **(B/68-72/§§133-149)**.

[66] PAP Letter, **(B/55-64/§§74-113)**.

[67] PAP Letter, **(B/66-68/§§124-132)**.

[68] PAP Letter, **(B/65-66/§§117-123)**.

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,[69] but did not investigate itself. According to the Chair of the DCMS Committee, what they have discovered on this issue to date "*is the tip of the iceberg*".[70] 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 touching upon the EU Referendum.[71]

(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 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 would 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.

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[69] PAP Letter, **(B/62/§102)**.

[70] PAP Letter, **(B/69/§134)**.

[71] This was one of the concerns raised by the DCMS Committee: see PAP Letter **(B/71-72/§145)**.

(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. The Claimant submits that, having regard to all the possible purposes and benefits of such an independent public inquiry, a decision not to establish an inquiry is contrary to the public interest, unreasonable and disproportionate. Relevant to factor (10) is the Defendant's submission, through the Summary Grounds, that the matters the Claimant 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 incorrect: see §6 above; Supplementary Grounds **(A/47/§27)**; Halford **(A/100/§30)**; and Taylor **(A/56/§20)**. But more fundamentally, 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. Inquiries are frequently established later than three months of the events being enquired into, and subsequent developments are obviously relevant.

17. Notwithstanding her refusal to make a decision, the Summary Grounds set out four reasons why, according to the Defendant, the Claimant's arguments for an inquiry have no merit. None of the arguments are persuasive; still less constitutes a clean knock-out blow.

18. First, it is submitted by the Defendant 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 (§7 above, Summary Grounds **(A/22/§20)**). This is based on a mischaracterisation of the basis for the Claimant's request. As the summary of the relevant eight issues identified at §6 above makes clear, it is not correct 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. None of these matters are being considered by the police or the

NCA (see further Halford **(A/100/§§31-32)**). This has been confirmed, in express terms, by the Police **(D/3-4)** and the NCA **(A/88)**.

19. Secondly, it is submitted by the Defendant that a public inquiry is not an appropriate forum for changes or developments to the law, as these are matters for the consideration of Parliament (Summary Grounds **(A/23/§21)**). This misunderstands the functions of inquiries which, without exception, have a lesson-learning and recommendation-making function.[72] Parliament can, of course, then choose to act on those recommendations on an informed basis (as it did, e.g. following the MacPherson, Shipman and Leveson inquiry reports).

20. Thirdly, it is submitted by the Defendant 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 **(A/23/§22)**). 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 the 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 in the list of issues for the inquiry (Halford **(A/101/§36)**).

21. Fourthly, it is submitted by the Defendant 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 **(A/23/§23)**; see also **(A/21/§17)**). 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 Defendant in correspondence.[73] 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 **(A/102/§37)**; Taylor **(A/57/§25)**). The Defendant's attempt to characterise the target of the claim as in some way not justiciable is therefore not well founded.

[72] See the schedule to John Halford's witness statement which sets out terms of reference of a number of recent inquiries that explicitly state this **(A/105)**.

[73] See 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*" **(B/114)**.

(b) The Defendant's failure to make a decision in respect of an inquiry under the 2005 Act

22. The Defendant has acted unlawfully by failing to give due consideration to the Claimant's request for an independent public inquiry, or a reasoned decision on that request. In principle, a failure to act – including 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 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"*.[74] Here that duty arises in the context of s.1 of the 2005 Act. It has not been discharged. That failure is unlawful.

D. THE JUDGE'S APPROACH ON THE PAPERS

23. The question for the Court on this renewal application is whether the two grounds set out above are properly arguable. The Claimant submits that the answer is "*yes*". The refusal of permission is intended for cases which are "*hopeless, frivolous or vexatious*" (White Book §54.4.2). That is not this case. The Defendant has failed to engage with any of the points set out above, let alone administer a clean knock-out blow as to why they are unarguable.

24. The issue of permission is at large at this renewal hearing. But it is appropriate to address the paper Judge's reasoning.

(a) Extension of time

25. The Judge held that the relevant target was 12 July 2018, which was seven days after the Claimant's 5 July 2018 pre-action letter. This was on the basis that the 5 July 2018 letter stated that a failure to reply would be taken by the Claimant as a refusal to take the steps set out in that letter. In the alternative, the Judge held that there had been undue delay such as to be detrimental to good administration.

[74] 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."*).

26. In response:

(1) Nothing happened on 12 July 2018. The Defendant's own position is that no decision was taken on that day, or any other day (Summary Grounds **(A/20/§11)**). The fact that solicitors had stated, in their 5 July 2018 letter, that they would treat silence as indicative of a refusal decision does not change the fact that the Defendant has positively stated that no decision was taken on that day, or any other day.

(2) If there has been an unlawful failure, either to set up a public inquiry, or to make a decision in respect of a public inquiry, that failure is continuing. Continuing failures to act are familiar: see, e.g., *R (Hammerton v London Underground Ltd* [2002] EWHC 2307 (Admin) §197; *Somerville v Scottish Ministers* [2007] 1 WLR 2734, §§51, 81, 145, 197. The fact that a challenge could have been brought earlier, does not provide a knock-out blow: see *R (Burkett) v Hammersmith and Fulham London Borough Council and another* [2002] 1 WLR 1593. If there is a continuing obligation, or a continuing state of affairs, that suffices.

(3) The Claimant only became aware that the Defendant had failed to make <u>any</u> decision in respect of instigating a public inquiry when it was served with the Summary Grounds on 21 November 2018.[75] It was at that time that the Claimant amended its Judicial Review Grounds to include the second ground addressed at §§22-23 above. This challenge could not have been made prior to 21 November 2018.

27. Even if the grounds had first arisen on 12 July 2018, the delay in filing is extremely short (four days). It was reasonable in the circumstances.[76] No extension is required, but if it were, there would be ample justification for one. The claim raises issues of general public importance, and the Defendant has failed to identify any prejudice. That is highly material to the question of whether to refuse permission for delay: see *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] 1 WLR 983, §43.

28. The Claimant made it clear that it was seeking an extension, this was not explicitly considered by the Judge. The Judge held that there had been "*undue delay*" in making the application for judicial review "*such as to be detrimental to good administration*". However, no prejudice was identified by the Judge. There is no

[75] See Halford **(A/99/§28)**.
[76] See Halford **(A/94-99/§§8-28).**

reason why the timing of the claim, or its outcome, would impact on the work an inquiry would do.

29. Contrary to what is said at Summary Grounds **(A/21/§17)**, 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.

(b) *Wilson v Prime Minister*

30. The Judge concluded that the claim was unarguable by reason of the decision of Mr Justice Ouseley refusing permission in *Wilson v Prime Minister* [2018] EWHC 3520. The Judge states that the, "*[w]hilst it is correct to say that his decision dealt with issues outside the ambit of this claim, it is not accurate to assert … that the claim in Wilson has nothing to do with the instigation of a public inquiry*" **(A/130)**. He considered this clear from "*the particular relief sought in relation to the order directed at the Prime Minister*" **(A/131)**. The Judge referred to §75 of the judgment of Mr Justice Ouseley, which concluded that the Prime Minister "*has not ignored a material consideration in the form of unlawful conduct itself; she has left that to the relevant authorities in which whose actions it is wrong for her to interfere*". He concluded that: "*The claim is not put in precisely the terms in which the Wilson claim was made. But it is sufficient close as to make it unarguable given the terms of the judgment in Wilson*" **(A/131)**.

31. In response:

    (1) *Wilson* was a challenge arguing (i) the referendum was vitiated in law (ii) with the consequence that proceeding with Brexit was unlawful because (iii) in relation to proceeding with Brexit the Prime Minister should have done or considered certain factors. It was therefore 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 HC* **(H/261/§6)**. As Ouseley J put it, "*the attack on the referendum and its outcome is at the heart of the case*" **(H/268/§45)**. Similar observations are made by the Court of Appeal **(H/311/§1, H/324/§55-56)**. As the *Wilson* JR Grounds had 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 (JR Grounds **(H/2/§3)**, *Wilson HC* **(H/266/§33)**). The claimants were seeking 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 (JR Grounds **(H/3-6/§§5-6)**; *Wilson HC,* **(H/266-267/§§34, 37)**).

    (2) In the present claim, the Claimant does not argue that the referendum is vitiated in law, nor that giving of the Article 50 notice or proceeding with Brexit is a violation of law. The Claimant does not argue that the Prime

Minister ought to have taken steps relevant to the Article 50 process. This case is about whether the circumstances called (and still call) for (i) a public inquiry (ii) or at least a decision in relation to one. The relief that is sought is an order requiring a decision to be made as to whether to establish a public inquiry; alternatively, an order that there be a public inquiry. This case is not about impugning the referendum as invalid in law, or trying to stop Brexit.

(3) With respect to the Judge, it was also correct to say that the *Wilson* claim does not concern the establishment of a public inquiry, or the failure to make a decision in respect of a public inquiry. The *Wilson* claimants did not challenge the failure to instigate a public inquiry, or the failure to make any decision in relation to a public inquiry. The *Wilson* claimants did not seek any relief which, if granted, or would have led to a public inquiry, or a decision on whether there out to be one. None of the pleadings or skeletons filed in *Wilson* contained a single reference to the 2005 Act.

(4) It is right that the JR Grounds in *Wilson* also sought an order requiring the Prime Minister "*lawfully to re-consider the decision to do nothing in response to the said findings*" (JR Grounds **(H/5-6/§6(3))**). However, the context in which that relief was sought is very important. This relief related to the claimants' 'reformulated' second ground of challenge, which was framed as follows (see the *Wilson* renewal skeleton argument at **(H/114, 145-147/§§19, 94-98)**): "*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 skeleton argument makes it clear that the target of this 'reformulated' second ground was <u>the decision to take the UK out of the EU</u> (**(H/145-146/§§94-97)**). The *Wilson* claimants 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: see, in particular:

> "*[T]he Defendant's approach involves a failure to take into account a relevant consideration and/or is unreasonable in the Wednesbury sense. The Claimants rely on the fact that the illegal conduct constitutes and/or illegal practices and/or general corruption under the common law, which moreover, had it taken place in the context of a local or national election would have resulted in the result being declared void and a re-run. That too is the position applying the rules set out in the Venice Commission Code, set out above. <u>This is a relevant consideration for the Defendant that she must take into account in exercising her powers lawfully in relation to taking the UK out of the EU. For the Defendant to refuse to have regard to these facts is wholly unreasonable having regard to the enormous implications of the relevant decision.</u> These include not just the departure from the EU but also, the*

faith of the people in the democratic process. For such a momentous decision to be taken on the basis of a procedure vitiated by illegality and fraud, will necessarily undermine faith in democracy and the rule of law." (emphasis added) **(H/146/§97)**.

(5) It was in this context that Mr Justice Ouseley assessed the 'reformulated' second ground, and it was this context that was critical to his decision to refuse permission in respect of it. Hence, he 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*" **(H/269/§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*" **(*id*)**. As there was no basis for establishing vitiation of the referendum result, the 'reformulated' second ground was unarguable. This reasoning is also clear from the Court of Appeal judgment (**H/323-324/§50-54)**.

(6) This reasoning is no answer to the present claim. The Claimant's claim is that (i) there is a general public concern about series of matters concerning the conduct of the 2016 EU Referendum campaign; (ii) where there is such a public concern, there may be a basis for an inquiry pursuant to the 2005 Act; (iii) such an inquiry has been requested; and (iv) in the 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 or the decision to take the UK out of the EU. Mr Justice Ouseley was not told about the present proceedings, the Judge was not presented with any of the arguments raised in the present claim, including the eight issues identified at §6 above, none of which were identified by the *Wilson* claimants. The issue is distinct, as it was in *R (Elias) v SSD* [2006] 1 WLR 3213, after *ABCIFER* [2013] QB 1397.

(7) In answer to those arguments that were made, Mr Justice Ouseley held that the Defendant "*has not ignored a material consideration in the form of unlawful conduct itself; she has left that to the relevant authorities in which whose actions it is wrong for her to interfere*" **(H/275/§75)**. The bodies with sole responsibility for investigating and prosecuting unlawful conduct should continue to discharge their responsibilities, and it would be wrong for the Defendant to interfere with those processes. However, that has nothing to do with whether the Defendant has acted lawfully in refusing to establish an independent public inquiry and/or to make any decision in relation to an independent public inquiry, in circumstances where the majority of the concerns identified by the Claimant do not correspond to criminal offences, and are not presently been considered via any statutory or other process (see §6 above).

32. For these reasons, it is wrong to treat *Wilson* as dispositive. For present purposes, it would suffice that it is arguable that *Wilson* is not dispositive.

(c) Unarguable

33. The Judge evidently thought the claim unarguable viewed independently of *Wilson*. He said: "*The Claimant is anxious to dismiss the suggest that the claim now made is something other than an attack on the Prime Minister's decision not to hold an independent public inquiry*" **(A/131)**. But it is not "*something other*" than an attack on the failure to establish, and the failure to make a decision (there is no "*decision*") to establish a public inquiry. The Judge continued: "*Taking that assertion at face value, the fact that there is in fact a criminal investigation in train means that there can be no proper challenge to the decision. That investigation may have begun after the letter of July 2018 and the lack of response to it but it is compelling evidence that the Prime Minister's approach i.e. to leave it to the relevant authorities was reasonable*" **(A/131)**.

34. In response:

(1) This reasoning is incorrect in the light of the substance of the Claimant's challenge.

(2) The Judge evidently had in mind the NCA investigation which commenced in November 2018 (§7 above), but that investigation is not addressing any of the eight issues which the Claimant has identified are appropriate for a public inquiry.

(3) Once this is appreciated, the Judge's sole reason on lack of arguability disappears.

E. CONCLUSIONS

35. The Court is invited to grant permission for judicial review.

(1) Whether it is compatible with public law duties to (a) decline to establish a public inquiry and (b) decline to make a decision about whether to establish a public inquiry is, as to each limb, properly arguable.

(2) The failure and refusal are continuing acts.

(3) Any delay was short, the Claimant acted reasonably and there is no prejudice: *R v Comr for Local Administration, Ex p Croydon London Borough Council* [1989] 1 All ER 1033 per Woolf J at 1046; *Maharaj* [2019] 1 WLR 983, §43.

(4) The issues are important, which is relevant to permission both as to (a) substance and (b) delay.

(5) Permission for judicial review is warranted in the public interest.

MICHAEL FORDHAM QC
JASON POBJOY

Blackstone Chambers

JOHN HALFORD
SALIMA BUDHANI
CAROLINE ROBINSON

Bindmans LLP

5 March 2019