Neutral Citation Number: [2019] EWHC 1709 (Admin)

Case No: CO/2148/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 July 2019

Before :

THE RT. HON. LADY JUSTICE RAFFERTY
THE HON. MR JUSTICE SUPPERSTONE

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Between :

ALEXANDER BORIS DE PFEFFEL JOHNSON	**Claimant**
- and -	
WESTMINSTER MAGISTRATES' COURT	**Defendant**
- and -	
(1) BREXIT JUSTICE LIMITED	**Interested**
(2) MARCUS BALL	**Parties**

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- -

Adrian Darbishire QC and Rachna Gokani
(instructed by **BCL Solicitors LLP**) for the **Claimant**
Jonathan Auburn (instructed by **GLD**) for the **Defendant**
Jason Coppel QC and Anthony Eskander
(instructed by **Bankside Commercial**) for the **Interested Parties**

Hearing date: 7 June 2019

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Approved Judgment

Lady Justice Rafferty and Mr Justice Supperstone :

This is the judgment of the court:

Introduction

1. This claim for judicial review challenges the decision of a District Judge (Magistrates Court) ("the DJ") who at Westminster Magistrates' Court on 29 May 2019 decided that there was a proper case to issue a summons against Mr Boris Johnson ("the Claimant") for three offences of misconduct in public office. The application in contemplation of a private prosecution was on 20 February 2019 made by Brexit Justice Limited, alongside Mr Marcus Ball, the interested parties ("IP") to this claim.

2. On 4 June 2019 Supperstone J granted interim relief and ordered that there be an expedited rolled-up hearing of the application, to be heard by a Divisional Court.

The facts alleged

3. The allegation is that the Claimant endorsed two misleading statements: "*We send the EU £350 million a week let's fund our NHS instead*" and "*Let's give our NHS the £350 million the EU takes every week*". The first was displayed on the side of a bus as part of the Vote Leave campaign during the 2016 EU referendum. Each also appeared elsewhere, for example on billboards. During interviews shown on television, more than once the Claimant suggested that the UK parted weekly with that sum to Europe. At the time he was Mayor of London and a MP.

4. The proposed counts, each pleading misconduct in public office contrary to common law, were:

    i) that between 21 February 2016 and 23 June 2016 as a holder of public office namely a Member of Parliament and whilst acting as such the claimant wilfully neglected his duty and/or wilfully misconducted himself by endorsing and making statements which were false and misleading, without justification concerning the cost of European Union membership, thereby abusing public trust in his public office;

    ii) that between 21 February 2016 and 8 May 2016 as a holder of public office, namely the Mayor of London and whilst acting as such, the claimant wilfully neglected his duty and/or wilfully misconducted himself by endorsing and making statements which were false and misleading, without justification, concerning the cost of European Union membership thereby abusing public trust in his public office;

    iii) that between 18 April 2017 and 3 May 2017 as a holder of public office namely a Member of Parliament, and whilst acting as such, the claimant wilfully neglected his duty and/or wilfully misconducted himself by endorsing and making statements which were false and misleading, without justification, concerning the cost of European Union membership thereby abusing public trust in his public office.

5. The argument advanced by the IP was that the figure of £350 million a week was known to be misleading. It was properly expressed either as gross, or as a net £250 million per week. In espousing and promoting it, the Claimant was said deliberately to have acted in a misleading way whilst using the platforms and opportunities afforded him by virtue of his public office, undermining the integrity of a public referendum and bringing both offices into disrepute. During a political campaign the Claimant misrepresented or twisted statistics in the public domain so as to score a political advantage.

6. The Claimant's answer is that even were that contention made good, still lacking is the necessary relationship with his duties and powers as a public official. Central to his submissions is that the crucial distinction is between acting as a public official on the one hand and acting whilst a public official on the other. It was not in issue that the conduct impugned had as its sole purpose the boosting of a political campaign. As is commonly the case, once made, the assertion as to £350 million (derived from information freely available) was criticised contradicted and challenged, not least by the IP.

Legal Framework

7. When determining an application for a summons a magistrate must ascertain whether the allegation is of an offence known to law, and if so whether the essential ingredients of the offence are *prima facie* present (*R (DPP) v Sunderland MC* [2014] EWHC 613 (Admin) ("*Sunderland*")).

8. In *Attorney General's Reference (No 3 of 2003)* [2005] QB 73 ("AG Ref 2003") the Court of Appeal identified the four elements of the common law offence of misconduct in public office as:

   i) a public officer acting as such

   ii) wilfully neglects to perform his duty and/or wilfully misconducts himself

   iii) to such a degree as to amount to an abuse of the public's trust in the office holder

   iv) without reasonable excuse or justification.

9. At paragraph 43 the court referred to the case of *Shum Kwok Sher* v *HKSAR* (2002) 5 HKCFAR 381 from the Court of Final Appeal in Hong Kong, which held that a public official culpably misconducts himself if he wilfully and intentionally neglects or fails to perform a duty to which he is subject by virtue of his office or employment without reasonable excuse or justification. He also culpably misconducts himself if with an improper motive he wilfully and intentionally exercises a power or discretion which he has by virtue of his office without reasonable excuse or justification.

The decision of the DJ

10. The DJ received written and oral submissions from the Claimant. She was given by the IP an explanatory note signed by Lewis Power QC setting out details of the alleged offences and background circumstances. It included the author's approbation of the stance of the IP, his analysis and interpretation of how the law applied to the Claimant

and the attribution of blame to him. We felt confident in our ability to decide the case without reference to it.

11. Also provided was a document headed *Motive and Conduct* prepared by the Claimant.

12. The DJ's analysis of the ingredients of the offence in issue on this challenge was as follows:

> "27. ACTING AS SUCH
>
> 33. I have considered Mr Darbishire's [counsel for the defendant] skilfully argued submissions but at this stage I am considering only whether there is prima facie evidence, which will be made available before trial, of the necessary ingredients of this aspect of the offence. I consider that the defence arguments set out above are trial issues to be determined following service of all the evidence. That stage has not yet been reached…
>
> 34. WILFULLY NEGLECTS TO PERFORM HIS DUTY/OR WILFULLY MISCONDUCTS HIMSELF
>
> 42. I do not accept [the Claimant's submissions] for the purpose of considering whether there is prima facie evidence of this aspect of the offence. I accept that the public offices held by Mr Johnson provide status but with that status comes influence and authority.
>
> 43. I am satisfied there is sufficient to establish prima facie evidence of an issue to be determined at trial of this aspect. I consider the arguments put forward on behalf of the proposed defendant to be trial issues."

13. Further, the DJ rejected the Claimant's submission that the application for a summons was vexatious (paras 56-57).

Grounds of Challenge

14. Mr Adrian Darbishire QC, for the Claimant, submits that the DJ made an error of law in finding all the ingredients of the offence were made out. In particular he submits, albeit it is common ground that the Claimant was a public officer at the material times, the DJ erred (1) in finding that he was "acting as such" when making/endorsing the statement(s) of which complaint is made; and (2) in finding that the Claimant wilfully neglected to perform his duty and/or wilfully misconducted himself.

15. Further, Mr Darbishire submits that the DJ's finding that the application was not vexatious was *Wednesbury* unreasonable.

The Parties' Submissions and Discussion

No public law challenge

16. The first point taken by Mr Jason Coppel QC, for the IP, is that the claim raises no public law challenge (other than on the issue as to whether the application is vexatious).

17. We do not accept this submission. The Administrative/Divisional Court, acting speedily and by granting interim relief, is exercising its supervisory jurisdiction over an inferior court. The error of law about which complaint is made was bound (as we find, see below) to have led the DJ to act in excess of jurisdiction and unlawfully by deciding to issue a summons where the ingredients of the offence were not made out and which was outside the scope of the offence.

18. Further, such an error of law necessarily involves a finding that no DJ properly directing herself as to the ingredients of the offence could, on the material before her, reasonably have found the offence made out. In *Sunderland* the court stated:

> "22. In any event [the lay magistrate] was obliged to come to a judicial conclusion on whether or not to issue either or both summonses, and that required a review of whether there were prima facie evidence of the ingredients of the common law offence. We have set them out. Had he conducted a rigorous analysis of the legal framework, he could not reasonably have concluded that there was such. …
>
> 26. This case shouted out for legal advice to a lay magistrate. That advice should have been that he should consider the letters of summer 2013 to which we have referred, the interstices of which would have led him to read back to letters of summer 2012. Such a course would have shown beyond peradventure that to issue those summonses would be *Wednesbury* unreasonable."

19. We are entirely unpersuaded by the IP's argument. The Claimant contends the DJ erred in law and made a flawed finding that the ingredients of the offence were made out. That contention plainly raises a public law challenge.

The threshold test

20. The next point taken by Mr Coppel is that the threshold test for the issuance of a summons is a low one. That is wrong. *R (Kay and another) v Leeds Magistrates' Court* [2018] 4 WLR 91, [2018] 2 Cr App R 27 ("*Kay*") read with *Sunderland* unequivocally explains why.

21. In *Kay* the court held (at para 22):

> "(1) The magistrate must ascertain whether the allegation is an offence known to the law, and if so whether the essential ingredients of the offence are *prima facie* present; that the offence alleged is not time-barred; that the court has jurisdiction;

> and whether the informant has the necessary authority to prosecute.
>
> (2) If so, generally the magistrate ought to issue the summons, unless there are compelling reasons not to do so – most obviously that the application is vexatious (which may involve the presence of an improper ulterior purpose and/or long delay); or is an abuse of process; or is otherwise improper.
>
> …
>
> (4) Whether the applicant has previously approached the police may be a relevant circumstance."

For example, a refusal by the police to proceed with the matter may demonstrate that it is hopeless.

22. In *Sunderland* the court observed (at para 22):

> "… [The magistrate] was obliged to come to a judicial conclusion on whether or not to issue either or both summonses, and that required a review of whether there were *prima facie* evidence of the ingredients of the common law offence. We have set them out. Had he conducted a rigorous analysis of the legal framework, he could not reasonably have concluded that there was such."

23. That level of analysis is particularly important now that indictable offences are sent direct to the Crown Court. In the present case the attempt to bring a private prosecution did not even await referral of the matter to relevant authorities for consideration as to whether to prosecute or to institute other legal proceedings. In *Sunderland* (at para 23) the court stated:

> "The citizen enjoys the right to bring a private prosecution in England and Wales. It is an important safeguard against improper inaction by a prosecuting authority. It is, however, not unfettered…"

24. Failure to insist upon a high threshold, so as to confine the offence of misconduct in public office within its proper ambit, would place a constraint upon the conduct of public officers in the proper performance of their duties, contrary to the public interest.

The ingredients of the offence

25. The alleged offence set out in the Application for Summons is that the Claimant "repeatedly made and endorsed false and misleading statements concerning the cost of the United Kingdom's membership of the European Union". It appears that if the Claimant had said/endorsed a figure of £350m per week gross, or £250m per week net, there would have been no complaint.

26. The two ingredients of the offence in issue are (1) whether the Claimant, a public officer, was "acting as such" when he made the statements about which complaint is

made; and (2) whether he wilfully neglected to perform his duty and/or wilfully misconducted himself.

(1) "Acting as such"

27. The words "as such" plainly mean acting in the discharge of the duties of the office.

28. The Law Commission *Report on Misconduct in Public Office, Issues Paper 1: The Current Law* at para 4.19 reads:

> "The question of whether an individual 'is acting as such' (as a public office holder when the misconduct occurs) is usually answered by determining the duties to which he or she is subject as a result of being required to carry out a state function."

29. The DJ erred in finding that the Claimant as a public officer was "acting as such", when a proper analysis of breach of duty would have revealed the true position. It was not sufficient to say that he made the statements when in office as a MP and/or Mayor of London, and that "*the public offices held by Mr Johnson provide status but with that status comes influence and authority*" (see para 12 above). That does no more than conclude that he occupied an office which carried influence. This ingredient requires a finding that as he discharged the duties of the office he made the claims impugned. If, as here, he simply held the office and whilst holding it expressed a view contentious and widely challenged, the ingredient of "acting as such" is not made out.

30. The IP rely upon *Quach* [2010] VSCA 106, an Australian state case in which the court stated that "the proper formulation of the offence requires the element ['acting as such'] to be expressed so that it encompasses the circumstance in which the offender's misconduct, though not occurring while the offender was discharging a function or duty, had a sufficient connection to their public office. Whether the misconduct was so connected will turn upon the facts of the case". However, the court emphasised that "The misconduct must be incompatible with the proper discharge of the responsibilities of the office". The court approved the statement that "the kernel of the offence is that an officer, having been entrusted with powers and duties for the public benefit, has in some way abused them, or has abused his official position". This decision provides no support for the IP's contention that demonstrable untruths were sufficient to bring the teller of them within the ambit of the offence.

(2) "Wilfully neglects to perform his duty and/or wilfully misconducts himself"

31. Whilst there is a great variety of circumstances in which the offence of misconduct in a public office may be charged, in *AG Ref 2003* Pill LJ said (at para 55):

> "There must be a breach of duty by the officer. It may consist of an act of commission or one of omission. …"

32. Further support for this view is derived from *R v Mitchell* [2014] 2 Cr App R 2 where Sir Brian Leveson P said that defining a public office involved three questions:

i) What is the position held?

ii) What duties are undertaken by the officer?

iii) Does their discharge fulfil a responsibility of government such that the public has a significant interest in the discharge additional to or beyond that of a person who might be directly affected by a serious failure in its performance?

33. Misconduct in public office bites on breaches of duties, which constitute the offence itself. All the cases to which we have referred and many more we were shown share the common feature of corrupt *abuse* of public power for personal gain, or gross neglect in failing to comply with the core duties of the office. Such conduct is capable of satisfying the connected tests of breach of duty and the gravity necessary for the offence to be established. The offence will be made out only if the manner in which the specific powers or duties of the office are discharged brings the misconduct within its ambit. Consequently at the time of the alleged misconduct the individual must be acting as, not simply whilst, a public official.

34. This common law offence consistently considered neglect of duties or abuse of state power. No authority was shown to us suggesting that the offence can be or has been equated to bringing an office into disrepute or misusing a platform outside the scope of the office.

35. Mr Coppel accepts that there is no precedent for any office holder being prosecuted for misconduct in public office for wilfully making/endorsing a misleading statement in and for the purposes of political campaigning, or even any comparable case. He is thus obliged to submit that this matters not since what is alleged falls within the principles applicable to the offence. It does not.

36. The problem of false statements in the course of political campaigning is not new and has not been overlooked by Parliament. For at least the last 120 or so years Parliament has legislated to control certain false campaign statements which it considers an illegal practice. Thus the Corrupt and Illegal Practices Prevention Act 1895 protected against false statements about a candidate. It is an illegal practice to make or publish a false statement of fact about the personal character or conduct of a candidate during a parliamentary election for the purpose of affecting his/her return. The scope of the protection is narrow and in enacting the prohibition Parliament must deliberately have excluded any other form of false statement of fact, including those relating to publicly available statistics. The Representation of the People Act 1983 is the present incarnation of a like prohibition. In other words, Parliament twice made a choice not to do precisely that which the IP now seeks to achieve.

37. The Electoral Commission Report on the 2016 referendum recognised:

> "3.98 During the course of a referendum campaign it is the role of the campaigners to debate the relative merits of the arguments and claims being made by those campaigning for the opposing outcome. This ensures that voters understand the issues and positions on both sides of the referendum question. There is also a role for the media in analysing the claims made on both sides of the campaign and for voters themselves in ensuring that they have the information they feel they need to enable them to make an informed decision when casting their vote.

> 3.99 In a referendum there are at least two sides competing arguments, both of which are highly likely to be contested to some degree. Even official data can and will be presented by campaigners in a way that favours their argument – that is the nature of political campaigns. It will not always be possible to establish the truth about campaign claims in an independent truly objective sense."

Extending the ambit of the offence

38. The proposed application of the offence in the present case would extend the scope of the common law offence. Lord Bingham in *R v Rimmington* [2006] 1 AC 459 said:

> "33. …There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. If the ambit of a common law offence is to be enlarged, it 'must be done step-by-step on a case-by-case basis and not with one large leap': *R v Clark (Mark)* [2003] 2 Cr App R 363, para 13."

39. We have not found in her judgment any analysis by the DJ of this aspect of the Claimant's submissions.

40. We do not agree with the DJ that the ingredient of the offence, "*acting as such*", is a matter for evidence at trial. Further, the ingredient "*wilfully neglects to perform his duty and/or wilfully misconducts himself*" requires a rigorous analysis of the scope of the offence, and of whether the DJ's conclusion would extend the established limits of the offence. We have found none.

Vexatious Prosecution

41. A useful starting point is the document "*Motive and Conduct*" prepared by the Claimant and shown to the DJ. The IP made extensive use of social media from 2016 until the application. On one platform Mr Ball has admitted deleting all material posted by him before September 2018. His avowed justification was that once he realised he would be the subject of media interest he sought to protect the privacy of his family. Some but not much archived material has been recovered. The document thus distils, principally, aspects of contemporaneous news stories, from which an amount of what has now been made inaccessible can be deduced.

42. We give some examples:

    i) 2016: on the IP's crowdfunding website, now deleted, under the heading "*What is the Plan*?", sub-heading "objectives", listed objectives include funding a judicial review and other legal action to prevent Brexit, and prosecution of Vote Leave leaders based upon fraud, misconduct in public office, undue influence, and possibly inciting racial hatred. Under "*Potential advantages of preventing Brexit*", after a list of Vote Leave claims sits "I will not accept this because the campaign was based on lies … ignorance and emotion, not evidence".

ii) 19 July 2016: an extract from an interview with Business Insider reads: "The dream scenario would be a series of Leave politicians being prosecuted for …misconduct in public office…; prison sentences for politicians who have lied to the public and a second referendum… I am very much pro-Remain…."

iii) 20 July 2016: article in the Eastern Daily Press included a quotation attributed to the IP, "The team behind the campaign hopes that in proving that leave politicians have lied to the public it will be easier to call for a second referendum or annul the vote completely. "If we can prosecute them and step forward", Marcus [Ball] continues, "people will realise they have been lied to".

iv) 24 July 2016: news article, "… At the moment Brexit has a mandate but if they face criminal prosecutions then this will change", attributed to the IP.

v) 6 October 2016: interview with Legal Cheek, "My biggest responsibility is to raise far more funding for the case potentially more than £2 million… … … I've run out of personal credit card and bank overdraft funding after working for three months without a salary"

vi) 6 September 2018: Brexit Justice YouTube channel: "Hello Boris Johnson. My name is Marcus J Ball. I am a private prosecutor and I have a problem with lying politicians… which is why over the last 2 years it has been my legal team and I's job to build a private criminal prosecution case against you… … … which carries a maximum sentence of life imprisonment… We have the research, the evidence, the legal team, the QCs opinion on side… as well as lots of journalists and national press, keen to cover the story. If we win this prosecution, we could establish a case precedent in the common law, making it illegal for elected representatives to lie to the public about how their money is spent…"

vii) 18 January 2019: article by Marcus Ball in the Metro: "…prosecuting politicians is the only way out of this Brexit mess".

viii) 13 March 2019: Twitter: "We must first address lying in politics before we can address Brexit itself. We are prosecuting Boris Johnson MP".

43. The DJ found (at para 56) that the prosecution was not vexatious:

> "I accept the defence submission that when the applicant commenced his consideration of whether to bring a private prosecution against the proposed defendant, some three years ago, there may have been a political purpose to these proceedings. However, the information for the summons was laid on the 28th February 2019 and that argument, in my view, is no longer pertinent."

44. The passage of time since 2016 was no answer to the Claimant's detailed submission that the political motive for the prosecution is apparent from evidence as far back as July 2016 and up to the institution of the prosecution in February 2019, as even the limited extracts we have set out make clear.

45. The Claimant is entitled to know why the DJ found that the prosecution was not vexatious but we detect no reasoning to support her conclusion.

46. Though it is not necessary, given our conclusions above, we would also have quashed the decision on the basis that the finding that the prosecution was not vexatious was flawed. It is unnecessary for us to decide whether it was *Wednesbury* unreasonable.

Conclusion

47. For the reasons we have given, permission is granted, the claim succeeds and we quash the decision of the DJ.