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Case No: CO/3695/2022
AC-2022-LON-002781

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 5th December 2023

Before:
FORDHAM J

- -

Between:
THE KING (on the application of TORTOISE MEDIA LIMITED) — **Claimant**
- and -
CONSERVATIVE AND UNIONIST PARTY — **Defendant**

- -
- -

Alan Payne KC and **Aaron Moss** (instructed by Lewis Silkin LLP) for the **Claimant**
Kevin Brown (instructed by Rosenblatt) for the **Defendant**

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Hearing date: 23.11.23
Draft judgment: 27.11.23

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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FORDHAM J

FORDHAM J:

Part 1. Introduction

1. This is a case about the appointment of a new Prime Minister mid-term, the Political Party Leadership selection process from which that new Prime Minister emerged, and the reach of judicial review and the Human Rights Act 1998 ("HRA"). It is also a case about information and the press.

Information and the Press

2. These are the opening words of Lord Mance's judgment in Kennedy v Charity Commission [2014] UKSC 20 [2015] AC 455 (at §1):

> ***Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise the press, NGOs and individuals concerned to report on issues of public interest.***

3. And these are the words at the heart of the judgment of the Grand Chamber of the European Court of Human Rights in Strasbourg, in Magyar Helsinki Bizottság v. Hungary Case No.18030/11 (2020) 71 EHRR 2 (8.11.16) (at §167):

> ***The manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable the press to exercise its vital role of "public watchdog" in imparting information on matters of public concern, just as it is to enable NGOs [non-governmental organisations] scrutinising the state to do the same thing. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their "watchdog" role effectively, and their ability to provide accurate and reliable information may be adversely affected.***

New Prime Ministers

4. The Cabinet Manual is a guide to the laws, conventions and rules on the operation of government. This is how it describes the Prime Minister (at §§3.1-3.2):

> ***The Prime Minister is the head of the Government and holds that position by virtue of his or her ability to command the confidence of the House of Commons, which in turn commands the confidence of the electorate, as expressed through a general election. The Prime Minister's unique position of authority also comes from support in the House of Commons. By modern convention, the Prime Minister always sits in the House of Commons. The Prime Minister will normally be the accepted leader of a political party that commands the majority of the House of Commons… The Prime Minister accepts office at a private audience with the Sovereign, at which time the appointment takes effect…***

This is how it describes a mid-term change of Prime Minister (§2.18):

> ***Where a Prime Minister chooses to resign from his or her individual position at a time when his or her administration has an overall majority in the House of Commons, it is for the party or parties in government to identify who can be chosen as the successor.***

5. David Torrance's comprehensive House of Commons Library Research Briefing (24 October 2023) is entitled "The Royal Prerogative and Ministerial Advice". Torrance identifies the King's "constitutional" or "personal" prerogatives as including the appointment of the Prime Minister (pp.9, 35). He says this about the Prime Minister's appointment after a General Election (p.39):

> ***Following an election, the monarch is bound by strong convention to appoint the person who holds, or is most likely to hold, the confidence of the House of Commons. If this is unclear, for example if an election has produced a hung Parliament, then the Cabinet Manual states that it is for political parties to reach an agreement.***

Torrance then says this about a change of Prime Minister mid-term:

> ***If a Prime Minister has resigned mid-term, then the choice is guided by the choice of MPs or party members as to who ought to succeed them as party leader. While an outgoing Prime Minister will have indicated their intention to resign, they do not formally do so until clear advice can be given to the Sovereign as to who should be asked to form a government.***

New First Ministers

6. Torrance adds that the First Ministers of Scotland and Wales are "nominated following a vote in the Scottish and Welsh Parliaments", which "circumscribes any requirement for 'advice'". This is by reason of statutory provisions in the Scotland Act 1998 and the Government of Wales Act 2006. There, the UK Parliament has provided that the First Ministers are to be "appointed by His Majesty" (1998 Act s.45; 2006 Act s.46) and that, if a First Minister tenders their resignation to His Majesty, the Scottish Parliament or Welsh Senedd must "nominate" one of its members "for appointment as First Minister", after which the Presiding Officer is to "recommend to His Majesty the appointment" of the person so nominated (1998 Act s.46; 2006 Act s.47).

7. The Court was supplied with materials which provide an illustration. When Scottish First Minister Sturgeon announced her resignation, there was then a 2023 party leadership selection process conducted by the SNP, prior to the vote in and nomination by the Scottish Parliament and the recommendation to the Sovereign.

The 2022 Mid-Term Change of Prime Minister

8. On 7 July 2022, the incumbent Prime Minister The Rt Hon Boris Johnson MP announced his resignation as leader of the Defendant ("the Conservative Party"). He said: "it is clearly now the will of the parliamentary Conservative Party that there should be a new leader of that party and therefore a new prime minister". The Conservative Party's Constitution provides that the Party Leader determines the political direction of the Party having regard to the views of Party Members and the Conservative Policy Forum. It provides that the Party Leader is drawn from those elected to the House of Commons, elected by Party Members by a process overseen by the Party Board, with the 1922 Committee presenting a choice of candidates applying procedural rules determined by its Executive Committee after consulting the Board. On 11 July 2022 Sir Graham Brady MP, the Chairman of the 1922 Committee, announced the rules of the leadership contest, which had been agreed with the Board. First, Conservative Party MPs would vote on the prospective candidates for leader until only two candidates remained. Secondly, the members of the Conservative Party would vote on which of

those two remaining candidates they wished to become leader, with the result of that vote being announced on 5 September 2022.

9. On 5 September 2022 the Conservative Party announced that The Rt Hon Elizabeth Truss MP had won the leadership contest. She and Prime Minister Johnson flew to Balmoral the next day, 6 September 2022, and she was duly appointed Prime Minister at the invitation of Her late Majesty Queen Elizabeth II.

10. And so, The Rt Hon Elizabeth Truss MP was "the accepted leader of [the] political party that commands the majority of the House of Commons" and "the party … in government" had acted "to identify who [could] be chosen as the successor" (§4 above). And so, the choice of person most likely to hold the confidence of the House of Commons was "guided by the choice of MPs or party members as to who ought to succeed them as party leader" (§5 above).

11. Everyone in this case agrees that "clear advice" will at that stage have been "given to the Sovereign as to who should be asked to form a government" (§5 above). This would have been on 5/6 September 2022. The Court was told this advice was likely to have been given by outgoing Prime Minister Johnson, or possibly by The Lord President of the Privy Council. Everyone agrees that the advice given to Her late Majesty Queen Elizabeth II communicated the fact that The Rt Hon Elizabeth Truss MP had won the Conservative Party leadership contest. Mr Brown says the "advice" will also have identified The Rt Hon Elizabeth Truss MP as having the ability to command, or being likely to hold, the confidence of the House of Commons.

12. A mid-term appointment of a new Prime Minister effected in this way is familiar in this country. As Lady Hale and Lord Reed explained in R (Miller) v Prime Minister [2019] UKSC 41 [2020] AC 373, Prime Minister May was chosen as leader of the Conservative Party and took the place of Prime Minister Cameron in 2016 (§7); and Prime Minister Johnson was chosen as leader of the Conservative Party and took the place of Prime Minister May in 2019 (§14).

13. Writing in the Sunday Times on 4 September 2022, Jonathan Sumption listed 10 "Party Vote" handovers of the office of Prime Minister out of the 19 between Prime Minister Lloyd George in 1916 and Prime Minister Thatcher in 1979. He also said this:

> ***political parties are not just private associations. They do not belong only to their members. In a parliamentary democracy, they have a vital constitutional role as intermediaries between the public and the state.***

Tortoise and the 9 Questions

14. The Claimant ("Tortoise") is a British news outlet whose Editor and co-founder is James Harding, former BBC News director and editor of The Times. Tortoise describes itself as providing in-depth and investigative journalism, specialising in "slow news", rather than headline-oriented content. On 17 August 2022, Mr Harding wrote to Darren Mott, CEO of the Conservative Party. That letter requested the Conservative Party to provide Tortoise with information in response to 9 questions about the 2022 leadership election. The request was made at common law and pursuant to Article 10 ECHR (scheduled to the HRA). The 9 questions asked for information as to:

> ***(1) Anonymised data you hold on the demographic of the Party's membership: (a) Particularly, we invite you to provide, where held, the number of Party members who: (i) Live abroad; (ii) Are foreign nationals; and (iii) Are under voting age. (b) We also ask you to provide data in respect of: (i) The age range of members; (ii) The geographic distribution of members; and (iii) The genders balance. (2) An explanation of whether, and if so how, the Party keeps its membership database up to date, ensuring that it sends ballot papers to correct addresses. (3) Anonymised data you hold on variations in member numbers over time, presented quarterly over the past 10 years. The public interest is particularly acute in respect of quarterly membership numbers for the past twelve months. (4) An explanation of the Party's system of compliance, including the following questions: (a) How does the Conservative Party check that new members are who they say they are? (b) Who oversees compliance? i.e. who independently checks whether the Conservative Party is checking? (5) What is the number of efforts at infiltration which the Party has thwarted, i.e. how many cases have you discovered of a fictional person, a dead person, a bot, a person of non-voting age or a member of another political party registering as Conservative member? (6) An explanation of any third party compliance mechanisms in place to ensure that only those eligible to vote do so, that they vote only once each, and that the election is not manipulated. (7) An explanation of the circumstances by which GCHQ [Government Communications Head Quarters] came to offer advice on the distribution of Conservative party ballots. (8) An explanation of why non-UK citizens who join the party abroad are eligible to vote even if they pay no tax and spend no time in the UK. (9) Confirmation of whether Party members under the national voting age can vote in the election of Party leader and Prime Minister.***

The Impugned Refusal

15. By a decision letter dated 26 August 2022, Mr Mott communicated the Conservative Party's response. The Party declined to provide any of the information requested. Mr Mott made these points. (i) "The Party is not a public body and it does not carry out public functions". (ii) "The selection of a candidate by a political party, even in its safest of seats where one might argue the process is in effect selecting the MP is not regarded as a public function. The election of the MP is a matter for the electorate." (iii) "The election of the Leader of the Conservative Party is a private matter for the members of the Party under its Constitution." (iv) "The appointment of the Prime Minister is a matter for the Sovereign".

The Judicial Review Claim

16. In this claim for judicial review, Tortoise submits that the information sought by Mr Harding, and declined by Mr Mott, is "State-held information" which the Conservative Party is legally obliged to provide. That is by reason of a positive obligation pursuant to the public interest "criteria" articulated (at §§157-170) and applied (at §§171-180) by the Strasbourg Grand Chamber in Magyar. Having thus established an Article 10 interference, Tortoise says it cannot be justified (see Magyar at §§181-200). Tortoise also submits that the August 2022 refusal was vitiated by a material error of law, in that Mr Mott failed to recognise a relevant "public function" of the Conservative Party; and by failing to take account of a relevant consideration, namely the public interest.

The Magyar Public Interest Criteria

17. The Magyar public interest criteria relate to: (i) why (purpose of information request); (ii) what (nature of the information sought); (iii) to whom (role of the applicant); and (iv) how (availability of the information). They can be found identified by the Strasbourg Court in Magyar at §§157-170 and applied in that case at §§171-179.

Part 2: The Public Function Premise

18. Tortoise's claim has as its core premise the following proposition. The conduct by the Conservative Party of the 2022 leadership election was a "function of a public nature" within the legally correct meaning of the HRA s.6(3)(b) and "the exercise of a public function" for the purposes of judicial review (see CPR 54.1(2)(a)(ii)). I will call these an "HRA Public Function" and a "JR Public Function". From its public function premise come Tortoise's further submissions in this case: that the August 2022 refusal of information was a judicially reviewable decision itself in the exercise of an HRA Public Function and a JR Public Function; that the refusal was vitiated by public law error; that the refusal constitutes a violation by the Conservative Party of Tortoise's Article 10 right of access to "State-held" information; and that Tortoise as the victim can seek judicial review (HRA s.7).

JR Public Function and HRA Public Function

19. The statutory concept of an HRA Public Function and the common law concept of a JR Public Function are legally distinct: see Aston Cantlow Parochial Church Council v Wallbank [2003] UKHL 37 [2004] 1 AC 546 at §52; and YL v Birmingham City Council [2007] UKHL 27 [2008] AC 95 at §87. The JR Public Function is providing the answer to this question: whether the defendant's conduct is subject to the supervisory jurisdiction of judicial review, where courts enforce standards of lawfulness, reasonableness and fairness in claims brought promptly by persons with a sufficient interest. The HRA Public Function is providing the answer to this question: whether the defendant's conduct engages the state's liability to act compatibly with Convention rights, so that courts protect victims from violations, acting within the HRA framework, including by the supervisory jurisdiction of judicial review. In the present case, both parties have relied on the same points in support of their competing contentions about each of these concepts. It is common ground that there is no question of the Conservative Party being a "core public authority" bound to respect Convention rights in all aspects of its activities. That means the HRA Public Function would be that of a so-called "hybrid" public authority, by reference to HRA s.6(3)(b), as a public authority only by reference to the nature of the particular act under consideration (see YL at §81).

Cases and Encapsulations

20. To assist me on the issues relating to the public function premise, the parties placed these authorities before the Court: R v Panel on Take-overs and Mergers, ex p Datafin Plc [1987] QB 815 (CA 5.12.85); R v Disciplinary Committee of the Jockey Club, ex p Aga Khan [1993] 1 WLR 909 (CA 4.12.92); Aston Cantlow (HL 26.6.03); R (Beer) v Hampshire Farmers' Markets Ltd [2003] EWCA Civ 1056 [2004] 1 WLR 233 (CA 21.7.03); YL (HL 20.6.07); R (Miller) v Prime Minister [2019] UKSC 41 [2020] AC 373 (SC 24.9.19); R (Liberal Democrats) v ITV Broadcasting Ltd [2019] EWHC 3282 (Admin) [2020] 4 WLR 4 (DC 29.11.19). Datafin was a case about a takeover bidding complaint, where the non-statutory takeover panel – as 'de facto' regulator – was exercising a JR Public Function. Aga Khan was a case about horse-race doping, where the non-governmental sport regulator's disciplinary committee was not exercising a JR Public Function. Aston Cantlow was a case about collecting chancel repair contributions, where the non-governmental church council was not exercising an HRA Public Function. Beer was a case about a refused licence to participate in a farmer's market, where the council-established corporate regulator was exercising an HRA Public Function. YL was a case about curtailing a local authority placement in

residential care, where the commercial care home was not exercising an HRA Public Function (until that outcome was reversed by Parliament). Miller was a case about the Prime Minister advising the Sovereign to prorogue Parliament, which was the exercise of a JR Public Function and "justiciable" because the advised prorogation exceeded the limits of the prerogative prorogation power by impeding Governmental accountability to Parliament. Liberal Democrats was a case about a double-headed party leaders debate, where the commercial broadcaster licensee did not (but its statutory regulator did) exercise a JR Public Function.

21. Among the encapsulations intended to help us in identifying a JR Public Function are the emphasis on "public element, which can take many different forms" (Datafin at 838E-F); "a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public law element, flavour or character to bring it within the purview of public law" (Beer at §16); and the propositions "(1) The fact that a service is for the public benefit does not mean that providing the service is a public function. (2) The fact that a function has a public connection with a statutory duty of a public body does not necessarily mean that the function is itself public. (3) The fact that a public authority could have performed the function does not mean that the function is a public one if done by a private body. (4) The private profit-making motivation behind a private body's operations points against treating it as a person with a function of a public nature. (5) Functions of a public character are essentially functions which are governmental in nature" (Liberal Democrats at §72). Among the encapsulations intended to help us in identifying an HRA Public Function are that "[f]actors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service" (Aston Cantlow at §12); and that "the underlying rationale" is "that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest" (YL at §65).

Paper Refusal

22. In refusing permission for judicial review on the papers, Lang J rejected Tortoise's public function premise. She described the grounds of challenge as unarguable and having no realistic prospect of success. She said:

> ***The Defendant is a private unincorporated association. It is not a public body and it does not exercise public functions. In particular, the election of the leader of the Defendant is not a function of a public law nature. The appointment of Prime Minister is a prerogative power of the Monarch, and the Defendant has no powers in this regard. It follows that the Defendant's decision of 26 August 2022 is not susceptible to judicial review. In R (Khaw) v The Conservative and Unionist Party (21 January 2015), Lewison LJ stated, when refusing permission to appeal against the High Court's refusal of permission to apply for judicial review: "The Conservative party itself (unlike those of its members who are elected to Parliament or who hold government office) performs no public function"…***

Part 3: Tortoise's Argument

23. The essence of Tortoise's arguments in support of the claim, as I saw it, involves five key points. The first (the practical reality point), second (the injustice point) and the third (the Miller point) are arguments deployed to support the public function premise. The fourth (the Magyar point) is the argument, starting from that public function

premise, to support the claimed HRA violation. The fifth (the arguability point) is an overarching point about the general viability of the case at this permission-stage. What follows (§§24-32 below) is my attempt to encapsulate the essence of the argument of Mr Payne KC and Mr Moss for Tortoise:

The Practical Reality Point

24. Public law focuses on substance and not form. Context is everything. The questions whether there is a JR Public Function and whether there is an HRA Public Function do not turn on the status of the defendant as an entity, nor on the source of its powers. These questions do not turn on generalisations about the entity's functions across the board. What is needed is a careful focus on the specific function which is under consideration. And what is needed is a clear focus on the substance – the practical realities – of what the entity is doing. "Governmental power may be exercised de facto as well as de jure" (Aga Khan at 931D). The Courts need to "recognise the realities of executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted" (Datafin at 838H-839A). In Datafin, the take-over panel was "a body which de facto exercises … public law powers" (Datafin at 828D). In Beer there were the public functions of regulating access to the farmer's market. In each case, that was because of the practical realities – the substance – of what that private body was doing.

25. This case is about a very specific function of a political party, exercised in a very special set of circumstances. It is this specific function:

> ***Specific function: A political party's function of selecting its new party leader, mid-term, while the party has a majority of the MPs in the House of Commons.***

That specific function has known consequences. Everybody knows that the new party leader selected by the party will then become the person identified in the advice to the Sovereign. That advice is simply a conduit for 'advising' the outcome of the selection. Everybody knows that the new party leader, identified in the advice to the Sovereign, will then be invited by the Sovereign to become the new Prime Minister. That invitation is an appointment which simply adopts the advice, and simply appoints the person selected by the party. This happens, because of "strong convention" (§5 above). These known consequences are two short and – in practical reality – automatic steps, between the party leader selection by the political party and the Prime Minister's appointment. In substance and reality, the selection of the party leader is the party choosing the Prime Minister. This function is the 'de facto' election of the new Prime Minister. This selection function is closely interwoven into the system of government. It is intrinsically governmental. It has a strong public element, public flavour and public character.

26. Other functions of a political party are distinct. They do not assist the analysis. (1) There is the political party's distinct function of making decisions affecting its members, including disciplinary decisions (cf. Aga Khan). Khaw was a member expulsion decision. (2) There is the political party's distinct function of selecting a prospective Parliamentary candidate before a General Election or a By-Election. As the Conservative Party's decision letter explains, in a very safe seat, that selection may be expected to mean that the candidate becomes an MP. But an important democratic step is interposed: an election with public participation. (3) There is the political party's function of selecting its new party leader, other than mid-term while the party has a

majority of the MPs in the House of Commons. True, even a new party leader selected by the party while it is in opposition may come to be the subject of advice to the Sovereign and appointment as the new Prime Minister. But again an important democratic step is interposed: a general election with full public participation. (4) There is also the function of selecting a new party leader, mid-term, while a Scottish or Welsh party has a majority of the Members of the Scottish Parliament or Welsh Senedd. There again an important step is interposed (§6 above): a debate, nomination and recommendation in the Scottish Parliament or Welsh Senedd.

The Injustice Point

27. In the exercise of this specific function, the Conservative Party should not be "above the law" and should not "go on its way cocooned from the attention of the courts in defence of the citizenry" (Datafin 827A, 839A). The function needs to attract public law and human rights standards of accountability and transparency. Otherwise, those standards of accountability and transparency are seriously undermined, and there is clear injustice. There is no other remedy. By virtue of the refusal of information being susceptible to judicial review, the Conservative Party is rightly accountable to the public and to public scrutiny for the process which it chose and the safeguards which it did or did not implement, in conducting the 2022 leadership election. So, "injustice" is "caused in the present case by the denial of a public law remedy" (Aga Khan 933G).

The Miller Point

28. There is an important read-across from the Miller case. That case gives the authoritative analysis of the principled public law approach to reviewability and "justiciability" of formal prerogative powers of the Sovereign, acting on advice. In Miller, the act of the Prime Minister advising the Sovereign was reviewable and justiciable, to the extent of the judicial review court determining the lawful "scope" and "limit" of the prerogative power (§§35-38, 52). Whether reviewability and justiciability could extend further – to the lawfulness of the exercise of the prerogative power – was left open (§36). In Miller, the prorogation advice to the Sovereign was unlawful because it advised action beyond the lawful scope and limit of the prerogative power, by serving to frustrate or prevent Parliament's constitutional role in holding the Government to account (§§50, 55-56).

29. The position is as follows. (i) The same analysis as in Miller would apply to the scope and limit of the prerogative power to appoint the Prime Minister (and the question about the lawfulness of the exercise of the prerogative power is an open question). (ii) It follows from this that the political party is discharging a public function of selecting its new party leader – mid-term while the party has a majority of the MPs in the House of Commons – because the party is deciding the content of the reviewable and justiciable advice to the Sovereign.

The Magyar Point

30. Important consequences flow, once it is recognised – by reference to practical reality, injustice and/or Miller – that the Conservative Party was exercising a JR Public Function and an HRA Public Function of selecting its new party leader, mid-term, while the party had a majority of the MPs in the House of Commons. (1) The information sought in Tortoise's 9 questions would constitute "State-held information" for the purposes of the public interest criteria identified in Magyar. (2) The principles in

Magyar would therefore be applicable, and their proper application means that Tortoise has an Article 10 right to receive the information. (3) The Conservative Party would be under a statutory duty (HRA s.6) not to violate that right. (4) The Conservative Party's refusal to provide the information would be amenable to judicial review for violating that Article 10 right.

31. The application of the Magyar public interest criteria is open to the domestic courts, including the High Court and the Court of Appeal. That is what the United Kingdom told the Strasbourg court constituted the 'domestic remedy' in Times Newspapers Ltd v United Kingdom (2019) 68 EHRR SE3 (Application No. 64367/14) (13.11.18) at §84 (applied at §118). Magyar is a clear, watershed authority of the Strasbourg Grand Chamber. No 'domestic precedent' stands in the way, and Moss v ICO [2020] UKUT 242 (ACC) is wrong on this point. The views expressed in the Supreme Court in Kennedy were obiter. The previous decisions in BBC v Sugar (No. 2) [2012] UKSC 4 [2012] 1 WLR 439 and in the Court of Appeal in Kennedy [2011] EWCA Civ 367 [2012] EWCA Civ 317 [2012] 1 WLR 3524 constitute no bar. Those cases actually decided that no 'general' Article 10 right to receive information had 'yet' been recognised in Strasbourg. Magyar involves a 'specific' right, authoritatively now recognised in Strasbourg.

The Arguability Point

32. It is necessary at this permission-stage only for Tortoise to establish an arguable claim for judicial review with a realistic prospect of success, which it has done. It is for the Conservative Party to establish a clean knockout blow, which it has failed to do. Permission for judicial review should be granted, to enable the Court to give an authoritative analysis on the important issues in this case, charting for the first time important new areas on the legal map.

Part 4: Analysis

33. I am unable to accept that there is in this case a viable claim for judicial review. I cannot accept the public function premise, whether by reference to any or all of the Practical Reality Point, the Injustice Point or the Miller Point. In my judgment, the Arguability Point fails. It is not arguable with a realistic prospect of success that the Conservative Party's 2022 selection process involved a JR Public Function or an HRA Public Function. On these topics I agree with Mr Brown's submissions. I agree with Lang J. It follows that the Magyar Point, and the grounds for judicial review (§16 above) can go nowhere. I will explain why I have come to these conclusions.

Substance and Reality

34. I will first confront concerns about practical reality. I accept Mr Payne KC's submissions about substance and not form, about context, and about the need for a careful focus on the specific function which is under consideration. The focus on specific function is why the Law Society (in 1992) exemplified there being "no reason why a private club should not also exercise public power" (Aga Khan at 931A-B). The focus on specific function is why Lord Bingham declined to decide whether Jockey Club decisions "may ever in any circumstances be challenged by judicial review" (Aga Khan at 924D). The focus on specific function is why the HRA s.6(3)(b) makes provision for a person "certain of whose functions" are a HRA Public Function. I accept

that Khaw is a functionally distinguishable case, involving an expulsion of a party member.

35. What then, as a matter of substance and practical reality, is this specific function? The answer is that it is the Party selecting the new Leader of the Party. On the evening of 5 September 2022 the Party's function was completed. Its function had an outcome. But there was not a new Prime Minister. This was not "executive" power or "governmental" power. It does not meet the encapsulations seen in the cases (§21 above). It was political party power. The known consequence was that the new Leader of the Party was about to become the subject of advice to the Sovereign, and was about to become the subject of a decision of the Sovereign in the exercise of the prerogative power. But this – the practical reality – was by virtue of an external function of adoption. The Party's choice of party leader has the consequence of producing an appointed Prime Minister. But that is through external adoption. The adoption is the product of well-established convention. It has an identifiable rationale: the person is identified as commanding the confidence and support of the House of Commons. A function is not to be equated with a consequence, including a known consequence. The external adoption was and is, itself, a specific function. It matters. The political party has no legal power to select or appoint the Prime Minister. That is an act of the Sovereign, on advice to the Sovereign. That is the true reality. It is not vision clouded by subtlety. And it can be tested.

Did the Conservative Party Exercise the Prerogative Power?

36. One test is to ask whether, by virtue of substance and practical reality, the Conservative Party was exercising the prerogative power. I asked Mr Payne KC whether his case on practical reality went this far. His answer, unhesitatingly, was "no". I think that is plainly right. There is no sense – including as to substance or as to practical reality – in which such a claim could be made. Interestingly, in the Miller case Lady Hale and Lord Reed were able, speaking of the Court's conclusions on the reviewability and justiciability of the Prime Minister's prorogation advice to the Sovereign, to describe this as "ensuring that the Government does not use the power of prorogation unlawfully" (§34). They also spoke of "the executive" acting "through the use of the prerogative" (§42). The Conservative Party does not – including as a matter of practical reality and of substance – exercise the prerogative power, or "use" the prerogative power, or act "through the use" of the prerogative power. The Party does not 'step into the shoes' of the Sovereign (cf. Beer at §37; YL at §104). The appointment of the Prime Minister has not been 'outsourced' to a political party. The internal party function and the external adoption function are – in substance and reality – distinct.

Could this be a Statutory Public Authority Function?

37. This is another way to test the position. It has been explained that the fact that a public authority "could have performed" the function does not mean it is a public one (Liberal Democrats §72: §21 above). But I think that a different 'what if' formulation can assist. It is this. The fact that a statutory public authority 'could never perform' this function indicates that this is not a public function. This is not a predictive criterion asking whether, but for the existence of a non-statutory body performing the relevant function, there would probably or inevitably have been intervention to entrust that function to a statutory body (De Smith's Judicial Review 9th ed. at §3-056). It is a reality check – as a matter of practical substance – about whether something could happen. In Datafin it was said of the takeover panel that (835G):

> ***No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law.***

In Beer the local authority had previously been the statutory body with the function of regulating access to the farmer's market, before setting up the corporate entity to step into those shoes.

38. In the present case, it would be a massive surprise. More than that, it would be an impossibility. This specific selection function could never be placed in the hands of a statutory public authority, as Mr Payne KC rightly accepts. This, as he emphasises, is an "internal" election, with no statutory arrangements, with no election courts, and with no engagement of the Convention right to free elections found in Article 3 Protocol 1. Choosing the next leader of a political party – which is necessarily entailed by this specific function – must be a matter for the autonomy of that political party, through its chosen arrangements involving its party members, party member MPs, board and committees, constitutional and administrative arrangements. The leader of a political party could not be chosen by an independent 'appointments commission'.

39. What there could be is an external, overlaid decision-making function which does not involve making any choice as to the leadership of the political party. That could evolve as a Parliamentary function. It could be described in a written Constitution. It could be the subject of statutory duties, similar to those seen for the Welsh and Scottish First Ministers (§6 above). But this further emphasises the point. When First Minister Sturgeon announced her resignation, the SNP discharged the internal function of choosing its new party leader (§7 above); but that was distinct from the external, overlaid decision-making function which follows pursuant to the Scotland Act. This reinforces the real distinction – as a matter of substance and practicality – between the political party's choice of leader and whatever functions and mechanisms operate in light of that choice. Any public function must necessarily occupy the space between the choice of the political party leader and the appointment of the Prime Minister. However great or small that space, whoever occupies it and by reference to what factors, it does not belong to the political party. There is a footnote to this. Suppose there were, in the Westminster system, a pre-appointment mechanism requiring a vote in Parliament and a nomination from Parliament. That would not constitute a JR Public Function or an HRA Public Function; not because it would be 'private', but because it would fall within "proceedings in Parliament" (see HRA s.6(3)), as Mr Payne KC rightly accepted when I put this to him.

Unremedied 'Injustice'

40. I turn to confront concerns about injustice. Tortoise's Injustice Point is about the undermining of principles of "accountability" and "transparency", suggesting that real "injustice" arises. My conclusion is that, beyond reasonable argument, this specific function is not one where it is necessary or appropriate for the rule of law and other constitutional principles to be given effect through judicial scrutiny applying judicial review principles. That is language borrowed from De Smith's Judicial Review at §3-054. I think there are four points to make.

41. The first point is about the logic of public law judicial supervision. Tortoise says there is a JR Public Function and an HRA Public Function when a political party selects its new party leader, mid-term, while it has a majority of the MPs in the House of

Commons. The inexorable logic is that decisions in the exercise of this specific function thereby become amenable to judicial supervision by way of judicial review. That means, in principle, public law duties of lawfulness, reasonableness and fairness are applicable and enforceable in the Administrative Court. Since this is an HRA Public Function, the duty of lawfulness would include the public sector equality duty (see Equality Act 2010 ss.149(2), 150(5)). A person with a "sufficient interest" could, in principle, seek a public law remedy invoking standards of reasonableness and fairness which the court would enforce. And the "injustice" – if there is one – must begin with the unjust absence of that supervisory jurisdiction over the specific function.

42. The second point is about the aptness of public law judicial supervision. This case, as Mr Payne KC emphasises, is the first time any interested person has attempted to argue that it is a reviewable public function when a political party selects its new party leader, mid-term, while the party has a majority of the MPs in the House of Commons. Tortoise says non-reviewability brings real injustice. So what, then, is the case – the 'justice' – which demonstrates the aptness of public law judicial supervision? No direct case is advanced at all. No public law error is even suggested, as to the exercise of the Conservative Party's 2022 selection of its new party leader. No case is made that the process breached a public law standard of fairness, that the decision or decision-making breached a public law standard of fairness, that the decision-making breached some duty or that it violated some right. In fact, Mr Payne KC and Mr Moss are at pains in their grounds for judicial review, and their submissions, to emphasise the virtue that they are not challenging the Conservative Party's decision-making function. So, even Tortoise in this case is not actually seeking to invoke a judicial review supervisory jurisdiction over the actual relevant function. Tortoise is not even arguing that the decision-making, when the Conservative Party selected its new leader, was vitiated by public law error or violated some Convention right. In terms of "injustice", that is not the "accountability" claim which is actually being made. Something else is happening in this case.

43. The third point is about collateral access to information. This is what is actually happening in this case. What is being said by Tortoise is that the ancillary function of refusing to provide information needs the "judicial" scrutiny (judicial review), so that the specific function of the political party selecting the new leader can then be the subject of "public" scrutiny. The "justice" of the case lies in what are called principles of transparency and accountability. Tortoise has no right to the information under the Freedom of Information Act 2000, since this does not apply to political parties. It sees the Magyar criteria as assisting accountability, to "public scrutiny". But that cannot be achieved unless the information is "State-held information", and unless Tortoise can invoke the HRA. So, this specific function of selecting a new leader is characterised as a "public function", not because there is a need for judicial supervision of that function, but solely as a stepping stone to try to achieve information rights, by making the information "State-held" and the Conservative Party an HRA hybrid public authority for the purposes of reviewing the refusal of the information. This suggests that if there is an "injustice", it is really a function of the limits of the law on information rights. There is no convincing "injustice" claim – in this case or in the arguments in this case – actually directed to the specific function of the political party selecting the new leader.

44. The fourth point is about "injustice" and the read-across from Miller. Mr Payne KC says the drawing of a parallel with the Miller case – a point raised for the first time after

both skeleton arguments had been filed – shows how judicial review might be needed and apt in the context of the prerogative power of appointment of the Prime Minister. That is the topic to which I now turn, confronting the Miller case.

The Read-Across from Miller

45. I have explained (§20 above) that Miller was the case about the Prime Minister advising the Sovereign to prorogue Parliament, where judicial review lay against the Prime Minister because the advice had exceeded the limits of the prerogative prorogation power by impeding Governmental accountability to Parliament. This was a collision with a constitutional value. I have identified Tortoise's argument (§§28-29 above): (i) that this would apply to the prerogative power to appoint the Prime Minister, and the question about the lawfulness of the exercise of the prerogative power is an open question; and (ii) that it follows from all of this that the political party is discharging a public function of selecting its new party leader – mid-term while the party has a majority of the MPs in the House of Commons – because the party is deciding the content of the reviewable and justiciable advice to the Sovereign.

46. Let it be supposed that Miller supports a scope for reviewability and justiciability in relation to advice to the Sovereign as to the appointment of a Prime Minister. That would answer the quest for the legally and constitutionally appropriate level of independent judicial scrutiny, informed by the rule of law and the protection of constitutional values. It would be the answer to questions of "injustice". I asked the parties whether there could conceivably be an appointment of a Prime Minister which could raise an issue involving action beyond the scope and limit of the prerogative power, or even an illegality in the exercise of the prerogative power, which could be a candidate for judicial intervention. Mr Payne KC gave as a possible example the purported appointment, of a Prime Minister on advice, as the product of a process corrupted by the influence of a foreign state. Mr Brown gave a possible example – subject to an important caveat – of the purported appointment of a Prime Minister who is not an MP. I suggested a possible example of the purported appointment of a Prime Minister who has been medically assessed to be lacking in capacity. Mr Brown submitted that a candidate for judicial intervention would need to be an appointed person incapable of satisfying the constitutional rationale of commanding confidence and support in the House of Commons (§§4-5 above). I think that is right. It is these situations, if anything, which illustrate a possible "injustice" calling for public law judicial scrutiny.

47. But at this point we encounter Mr Brown's important caveat. His submissions were as follows. The recognised function of the advice to the Sovereign about the new Prime Minister is to identify the individual who can command the confidence and support of the House of Commons (§§4-5 above). The advice to the Sovereign, based on the outcome of the political parties selection process, will be that the emergent party leader does meet that description. In the Miller case, the whole point was that accountability to Parliament was being undermined and the judicial review court needed to step in. That is not the case here. In this situation, accountability to Parliament would follow immediately after appointment. The safeguard is that the House of Commons will be able to decide for itself whether the appointed individual does, or does not, command the support of the House of Commons. Observations about the rules or conventions of the political party, or of its committees, about when there can and cannot be a no confidence challenge within the party mechanisms, miss the point. The point is about

Parliament's mechanisms and the practical realities of commanding – or not commanding – confidence and support in the House of Commons. If the new Prime Minister cannot in fact command the confidence and support of the House of Commons, the safeguarding remedy for that "injustice" lies squarely within Parliamentary accountability and scrutiny. An inability to command that support could therefore mean that a new mid-term Prime Minister does not in fact last long in office. I accept these submissions. I think, beyond reasonable argument, that this identifies a constitutionally suitable and appropriate safeguard. It identifies the mechanism for a debate and a decision in Parliament. Unlike the position with the First Ministers, it is after rather than before appointment. But it is the safeguard and accountability which render judicial review inapt and unnecessary.

48. Even if this were incorrect, Miller does not assist Tortoise. The short answer is that Tortoise's step (ii) is not a sustainable consequence flowing from its step (i) (§§28-29, 45 above). It is, in my judgment, impossible to proceed from the sorts of candidate examples that could call for judicial scrutiny of the advice to the Sovereign regarding the exercise of the prerogative power (§46 above) to (ii) the conclusion that a JR Public Function and an HRA Public Function is constituted by the general underlying specific function of the political party selecting the new leader. That reasoning suffers from two flaws. The first flaw is that the very limited reach of reviewability at step (i) would be far too narrow to sustain any general conclusion at step (ii). That is demonstrated by the present case. Here, there is no candidate for judicial scrutiny of the advice to the Sovereign regarding the exercise of the prerogative power, and yet the reviewability is still asserted as to the underlying function of the political party selecting the new leader. The second flaw is that the analysis starts with reviewability and justiciability in relation to the distinct functions of external adoption of the party's leadership choice. It then, unconvincingly and unnecessarily, asserts a consequential reviewability and justiciability for the distinct and prior function of the political party. Even if we suppose reviewability and justiciability can be needed in the context of the exercise of the prerogative power to appoint a mid-term Prime Minister, none of that explains why it should follow that they are needed for the political party's leadership selection process. In so far as there is an act of the executive susceptible to review whose constitutional legality is justiciable in a court of law, it would be the act of the adviser of the Sovereign; not the Sovereign, and not the political party.

Part 5: Conclusion, Certification and Costs

49. For these reasons, the claim lacks viability because its public function premise is unsustainable. That is the end of the case. There is no JR Public Function for the Court to supervise by judicial review. There is no HRA Public Function involving any Article 10 violation. There is no State-held information engaging the Magyar public interest criteria. There is a clean knock-out blow at this permission stage. I add this. I would have accepted as arguable Mr Payne KC's contention that the reach of a 'hybrid' public authority's public function falls within 'State-held information': see Magyar at §§38 and 141. As to the 'domestic precedent' point and Magyar – if anything could have turned on it – I would have allowed Mr Payne KC's argument (§31 above) through to a substantive hearing: in Moss (as in Lavery [2022] NIQB 19) the Article 10 argument failed anyway; and I do not find the point clear-cut. Mr Brown raised in writing, and maintained without further developing, arguments about delay and utility. I found these

unconvincing and would have rejected them. As with the Liberal Democrats judgment, I am certifying that this judgment may be cited, given its subject-matter.

50. Having circulated this judgment in draft, I can deal with the contested consequential matter, namely costs. The principles are identified in the Administrative Court Judicial Review Guide 2023 at §25.2.5 (indemnity costs) and §25.4 (permission-stage costs). Lang J provisionally ordered Tortoise to pay the Conservative Party's costs of preparing the Acknowledgment of Service ("AOS"). The Conservative Party's position is that the Court should order Tortoise to pay its full costs (£59,329), as costs on an indemnity basis, covering these components: (i) pre-action costs (£12,687); (ii) AOS costs (£26,955); (iii) post-AOS costs (£4,971); and (iv) hearing costs (£14,716). Mr Brown says there are exceptional grounds justifying departing from the standard basis, and departing from the general 'AOS-only' principle. The claim was obviously bound to fail, as it pointed out from the start. Post-AOS, it was acting in compliance with Lang J's order and has assisted the Court in the context of an evolving claim. Tortoise's position is that there is no reason to depart from the general 'AOS-only' principle, or from the standard basis of assessment, and that proportionate AOS costs are no more than £14,000. Tortoise emphasises the public interest, the chilling effect of costs on journalism, the traction which its Article 10 argument had, and those arguments of the Conservative Party which did not prevail (delay, utility, and the scope of Magyar).

51. My Order is that Tortoise pay the Conservative Party's costs of the AOS and the hearing, on the standard basis, summarily assessed in aggregate at £30,000. That comprises £20,000 in respect of the AOS (component (ii)) and £10,000 in respect of the hearing (component (iv)). I refuse the application for costs in respect of components (i) and (iii). I refuse the application for indemnity costs. As to component (ii), the costs of the AOS are straightforwardly appropriate, subject to quantum. As to component (iv), there are two reasons why, exceptionally and in combination, an award of costs of the hearing is appropriate. First, a main plank of the claim on the public interest premise became the Miller point (see §§28-29, 45-48 above). That point was taken extremely belatedly, in a reply skeleton argument (§44 above), and in consequence Miller was itself belatedly added to the authorities bundle. Taken so late in the day, this argument could not have been addressed in the AOS. Taking an important new line of argument was a conscious decision by Tortoise and its team. It is perfectly obvious that fairness would require the chance for the Conservative Party to respond. Secondly, Mr Brown did respond and convincingly dealt with the new point at the oral hearing. He supplied the explanation of the situations which illustrate possible "injustice" (§46 above) and he provided the answer which identified the constitutionally suitable and appropriate safeguard (§47 above). If the claim had not taken this new direction, I would have refused the Conservative Party any costs of the hearing. It was not required to attend, by Lang J or by any other order. It was exercising a choice. But because the claim did take this new Miller direction, and because the Conservative Party dealt with the new line of argument at the hearing, I am satisfied that this justifies the added costs component (iv), in the special circumstances of the present case.

52. I do not agree that this case warrants costs on an indemnity basis, or an order for all items of costs at all stages. The general principles in judicial review as to permission-stage costs are clear, everybody understands them, and everybody can be advised about them. Tortoise's behaviour in bringing the claim has not been unreasonable or abusive. Any judicial review defendant is likely to need a 'clean knock-out blow' to resist

permission. If the defendant has engaged at the pre-action stage, as is expected, they will have made their 'knock-out blow' clear from the start. That is this case. Lang J did not certify the claim as totally without merit ("TWM"), which would have meant no right of renewal to an oral hearing. If I had been the paper permission Judge, I would not have certified this claim as TWM either. On the other hand, I am not impressed with the suggestions on behalf of Tortoise that it was partially successful, because of my view on arguability and the scope of Magyar (§49 above). What I accepted as arguable was that Magyar State-held information could extend to a hybrid public authority. But that could go nowhere – there was no traction – because the whole case, including Article 10 and Magyar, comprehensively failed on the public function premise. So, Tortoise must pay components (ii) and (iv). The levels of assessed costs which I have identified are, in my judgment, just and proportionate; for the permission-stage; for an AOS and for attending the permission hearing; on the standard basis; as an exercise of my judgment and discretion; given the nature of the case and in all the circumstances.