Neutral Citation Number: [2025] EWCA Civ 673

Case No: CA-2023-002540

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Fordham
[2023] EWHC 3088 (Admin)

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 May 2025

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE SINGH
and
LORD JUSTICE DINGEMANS

- -

Between :

The KING (on the application of TORTOISE MEDIA LIMITED)	**Claimant**
- and -	
CONSERVATIVE AND UNIONIST PARTY	**Defendant**
CHANCELLOR OF THE DUCHY OF LANCASTER	**Intervener**

- -
- -

Alan Payne KC and Aaron Moss (instructed by **Lewis Silkin LLP**) for the **Claimant**
Timothy Straker KC and Kevin Brown (instructed by **Rosenblatt**) for the **Defendant**
Christopher Knight (instructed by the Treasury Solicitor) for the **Intervener** (by way of written submissions only)

Hearing dates: 13-14 May 2025

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 23 May 25 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. The main issue in this case is whether, when it elected its leader in 2022, the Conservative and Unionist Party ("the Conservative Party" or "the Party") was exercising a public function for the purposes of section 6 of the Human Rights Act 1998 ("HRA"). That issue arises in the context of a request by the Claimant, Tortoise Media Limited ("Tortoise"), for the disclosure of information concerning that leadership election, which was refused by the Party.

2. Tortoise applied to the High Court (in the Administrative Court) for permission to bring a claim for judicial review of that refusal. Permission was refused on the papers on 19 July 2023 by Lang J and, after the application was renewed at an oral hearing on 23 November 2023, was again refused by Fordham J, who gave a detailed, reserved judgment on 5 December 2023. Both judges held that the Conservative Party was not exercising a public function when it conducted the leadership election, and was not amenable to judicial review.

3. Tortoise then applied for permission to appeal against the decision of Fordham J to this Court. After considering that application on the papers, in an order sealed on 31 July 2024, rather than granting permission to appeal, Stuart-Smith LJ granted permission to bring the claim for judicial review and reserved the substantive hearing of that claim to this Court. So it is that this Court, as happens on occasion, is considering not an appeal but a claim for judicial review for itself.

Factual background

4. On 7 July 2022, the incumbent Prime Minister, Boris Johnson, resigned as leader of the Conservative Party. He remained as Prime Minister until his successor had been appointed by the Sovereign, the late Queen Elizabeth II. His resignation triggered a leadership election. The election process included a ballot of eligible Party members, who could vote for one of two candidates after votes by the Parliamentary Party had eliminated other candidates. On 5 September 2022 the result of the election was announced: Liz Truss had won more votes than Rishi Sunak. On the following day, Ms Truss flew to Balmoral and was invited by the late Queen to become Prime Minister and form a government.

5. On behalf of Tortoise there is a witness statement by James Harding dated 6 October 2022. Mr Harding is the editor and one of the co-founders of Tortoise. In the past he was Director of BBC News for five years and, before that, he was editor of *The Times*. I will summarise his evidence so far as necessary here.

6. In the summer of 2022, Tortoise became interested to learn that GCHQ (Government Communications Headquarters) had been in contact with the Conservative Party to ensure the safe conduct of the leadership election. This prompted Tortoise to start thinking about who was voting in the election and how the contest was being run. Only limited information concerning the details had been publicised. Information

about the number of Conservative Party members was not available. It was not known how many of those members were foreign nationals, were not resident in the United Kingdom or were not of voting age. In short, it appeared to Tortoise that there were a number of unanswered questions about the election process.

7. In order to test the safeguards being applied in the leadership contest, in August 2022 Tortoise applied for four new memberships of the Conservative Party. The applications were for Archie Harding, a pet tortoise, two foreign nationals and Margaret Roberts, the maiden name of the late Prime Minister, Baroness Thatcher. Each of these applications was successful, with the membership fee being taken by the Party and the individuals being issued with membership numbers. Despite not being members on 3 June 2022 (the date for eligibility to vote in the election), each of the individuals was invited to the leadership contest hustings. Mr Harding states that the approach taken to these applications reinforced the concerns that Tortoise had about the election process.

8. On 17 August 2022 Mr Harding wrote a letter to Darren Mott OBE, Chief Executive Officer of the Conservative Party, setting out nine requests for information regarding the Party's membership and the leadership contest. Mr Harding makes it clear that the requests were for general, anonymised data and Tortoise was not requesting the names or personal data of any individual Party member.

9. The letter requested the following information:

> "1. Anonymised data you hold on the demographic of the Party's membership:
>
> - Particularly we invite you to provide, where held, the number of Party members who:
>
> - Live abroad;
>
> - Are foreign nationals
>
> - Under voting age
>
> - We ask also you to provide data in respect of:
>
> - The age range of members;
>
> - The geographic distribution of members; and
>
> - The gender 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:
>
> - How does the Conservative Party check that new members are who they say they are?
>
> - 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 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."

10. The substantive response was provided by Mr Mott in a letter dated 26 August 2022. He pointed out that the Conservative Party is an unincorporated association that runs under its current Constitution, first adopted in 1998 and most recently amended in January 2021. The Party is also registered under the Political Parties, Elections and Referendums Act 2001 [*sic*: that Act was enacted in 2000]. The letter stated:

> "The Party is not a public body and it does not carry out public functions."

In relation to the leadership contest, the letter stated:

> "… The election of the Leader of the Conservative Party is a private matter for the members of the Party under its Constitution. Under its Constitution, the Party Board and 1922 Committee are responsible to the Party members for the process of that election."

The letter continued:

> "The appointment of the Prime Minister is a matter for the Sovereign. By convention she is likely to ask the person recently elected as the Leader of the Party, especially as that is the most probable recommendation of the outgoing Prime Minister. If that person were not likely to be able to command a majority of the House of Commons, it is possible for the Sovereign to ask someone else to take on the role."

The letter concluded by declining to answer Mr Harding's questions in detail.

The process for appointment of the Prime Minister

11. The Court has before it a witness statement dated 14 November 2024 by Robert Hazell, a Professor of Government and the Constitution at University College London. Although the witness statement was filed on behalf of Tortoise, it sets out general matters which appear to be uncontentious. It was not suggested that it is inaccurate.

12. Professor Hazell states that the Sovereign's personal prerogative power to appoint the Prime Minister is circumscribed by constitutional convention. The convention is that the Sovereign will appoint the person who is most likely to be able to command the confidence of Parliament: in modern times this means the person who is most likely to command the confidence of the House of Commons.

13. The convention is recorded as follows, at para 2.9 of the Cabinet Manual (2011):

> "In modern times the convention has been that the Sovereign should not be drawn into party politics, and if there is doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons."

14. As Professor Hazell observes, the last time that the Sovereign attempted to appoint a Prime Minister who did not have the support or a majority of members of the House of Commons was in 1834.

15. The Cabinet Manual states, at para 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."

16. The Cabinet Manual states, at para 2.10:

> "It remains a matter for the Prime Minister, as the Sovereign's principal advisor, to judge the appropriate time at which to resign, either from their individual position as Prime Minister or on behalf of the government. Recent examples suggest that previous Prime Ministers have not offered their resignations until there was a situation in which clear advice could be given to the Sovereign on who should asked to form a government."

17. Professor Hazell states that the advice as to who can command the confidence of the House of Commons, and whom the Sovereign should appoint as the next Prime Minister, is normally provided by the outgoing Prime Minister, who remains the Sovereign's principal constitutional adviser until he or she resigns.

18. It is important to note that constitutional conventions are not rules of law and so courts of law cannot enforce them, although they may have regard to them: see *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, at paras 141-146 (in the majority judgment, given by Lord Neuberger PSC). As the majority judgment put it at para 146:

> "Judges therefore are neither parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question … but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world. …"

Evidence and judicial notice

19. Complaint was made to us on behalf of Tortoise that certain aspects of the Party's skeleton argument were inadmissible because they contained matters of evidence, including expert evidence, which had not been adduced in proper form. On behalf of the Party Mr Timothy Straker KC submitted that these were simply matters of which judicial notice can be taken. His skeleton argument included some references to events in history, which he submitted are either well-known or can readily be verified by consulting a history textbook. In my view, it is unnecessary for this Court to dwell on this dispute, which does not materially affect the conclusion which I would reach in any event, disregarding any of the contentious matters.

The Claimant's case in outline

20. A claim for judicial review may be brought in respect of the lawfulness of "a decision, action or failure to act in relation to the exercise of a public function": see CPR 54.1(2). Tortoise submits that the Conservative Party was acting in relation to the exercise of a public function when it conducted its leadership election in 2022.

21. Tortoise also submits that, in refusing the information that was requested in August 2022, the Party erred in law and should have to reconsider its position in accordance with a correct understanding of the law. In support of its contention that it was entitled to the information requested, Tortoise relies upon *Magyar Helsinki Bizottság v Hungary* (2020) 71 EHRR 2, in which the Grand Chamber of the European Court of Human Rights "clarified" its earlier case law and now recognised that Article 10 of the European Convention on Human Rights ("ECHR"), which guarantees the right to freedom of expression, may impose a positive obligation on a body to provide information to the media, who act as "watchdogs" in the public interest: see paras 158-170 of the judgment.

Analysis

22. In practical terms what Tortoise seeks is access to certain information, in response to the nine questions which were put to the Conservative Party in August 2022. I do not doubt that it made that request out of a sincere concern to report on matters of public interest. The difficulty for Tortoise is that, as is common ground, the natural place in which such a right to information would be found in domestic law is not available to it: that is the Freedom of Information Act 2000. The Conservative Party is not a "public authority" within the meaning of that Act, for the simple reason that it is not in the list of public authorities which is set out in Schedule 1 to that Act. This is why Tortoise invokes the positive obligation said to arise under Article 10 of the ECHR, which is one of the Convention rights set out in Schedule 1 to the HRA.

23. But before Tortoise can rely on Article 10, it has to be shown that the Conservative Party is a "public authority" within the meaning of section 6 of the HRA. Subsection (1) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Unlike the Freedom of Information Act, the approach taken in the HRA was not to define the phrase "public authority" exhaustively but subsection (3) provides that it "includes":

> "(b) any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

Subsection (5) provides that:

> "In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private."

24. The meaning of a public authority in section 6 of the HRA was considered by the House of Lords in *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95.

Although Baroness Hale of Richmond dissented in the result, she helpfully set out the structure of the HRA in what are uncontentious terms, at para 37:

> "Under section 6(1) of the Act, it is unlawful for a public authority to act in a way which is incompatible with a convention right. 'Public authority' is nowhere exhaustively defined, but by s. 6(3)(b) it includes 'any persons certain of whose functions are functions of a public nature'. However, in relation to any particular act, s. 6(5) provides that 'a person is not a public authority by virtue only of subs. (3)(b) if the nature of the act is private'. The broad shape of the section is clear. 'Core' public authorities, which are wholly 'public' in their nature, have to act compatibly with the convention in everything they do. Other bodies, only certain of whose functions are 'of a public nature' have to act compatibly with the convention, unless the nature of the particular act complained of is private. The law is easy to state but difficult to apply in individual cases such as this."

25. The critical question which arises in the present case is whether the Conservative Party qualifies as a "public authority" within the meaning of section 6(3)(b) of the HRA. This is not necessarily the same question as the one with which many of the authorities in this jurisdiction have been concerned, namely the amenability of a body to judicial review. The authorities on that question may help to inform the answer to the critical question which arises under the HRA but it is strictly speaking the latter question which needs to be answered before Tortoise can rely on Article 10 under the HRA.

26. As Lord Hope of Craighead said in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 AC 546, at para 41, this question "is sensitive to the facts of each case" and the question whether section 6(5) applies to a particular act "depends on the nature of the act which is in question in each case."

27. We were referred to a large number of authorities on the question whether a body is amenable to judicial review or performs public functions within the meaning of the HRA. Suffice to say that some of the decisions hold that a body fell on one side of that line, while others decide that a body fell on the other side. None of the decisions is directly on point. Many concern, for example, regulatory or self-regulatory bodies, such as the Jockey Club: see *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909, in which it was held that the Jockey Club was not amenable to judicial review. Although it exercised dominant control over racing activities in Great Britain, its powers and duties were derived from the contractual relationship between the Club and those agreeing to be bound by the rules of racing and they were in no sense "governmental".

28. In *R (Beer (Trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2003] EWCA Civ 1056; [2004] 1 WLR 233, at para 12, Dyson LJ described the decision of this Court in *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 as "seminal". I will return to *Datafin*, which forms the lynchpin of the submissions for Tortoise, in more detail below. In *Beer*, at para 16, Dyson LJ said

that the law had now developed to the point where, unless the source of a power clearly provides the answer, the question whether the decision of a body is amenable to judicial review "requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law." Dyson LJ acknowledged that it could be said with some justification that this criterion "is very broad, not to say question-begging." At para 29, Dyson LJ suggested that, although the question whether a body is amenable to judicial review and the question whether it is exercising public functions for the purposes of the HRA are distinct questions, nevertheless "on the facts of most cases, the two issues march hand in hand: the answer to one provides the answer to the other."

29. It is common ground that the Conservative Party is not a public authority in the conventional sense, as is, for example, a Government department, i.e. it is not a "core" public authority. It is also common ground that many functions performed by the Conservative Party are not public functions. This would include, for example, matters in respect of its members such as disciplinary action.

30. It is even common ground that in many circumstances the election of its leader would not be a public function. That concession is rightly made: the Party is a voluntary association, governed by its own constitution; it does not exercise any statutory or other public law powers; and the election of its leader is not an exercise in governmental functions. What is submitted on behalf of Tortoise by Mr Alan Payne KC is that, in the circumstances which arose in 2022, the election of its leader *was* the exercise of a public function. This is particularly for the following combination of reasons:

(1) The Conservative Party then held an absolute majority in the House of Commons.

(2) The resignation of Mr Johnson occurred midway through the Parliament that was elected in 2019 and so the Party did not need to go to the country in order to have a new Prime Minister appointed.

(3) By well-known constitutional convention, the Sovereign was bound to follow the advice of Mr Johnson that she should invite the newly elected leader of the Conservative Party, Ms Truss, to become Prime Minister in September 2022.

31. Beguilingly simple though Mr Payne's submissions are, in my judgment, they cannot be accepted. This is because the process for the appointment of the Prime Minister, as a matter of constitutional law, comprised the following three conceptually distinct elements:

(1) The election of the Party leader ("stage 1").

(2) Advice given by the incumbent Prime Minister to the Sovereign as to which person was likely to have the confidence of the House of Commons and therefore should be invited to become Prime Minister and form a government ("stage 2").

(3) The appointment by the Sovereign of the Prime Minister ("stage 3").

32. Stages 2 and 3 concern the exercise of public functions but the present claim for judicial review concerns only stage 1. The defendant to this claim is only the Conservative Party. Mr Payne contends that the Party was performing a public function when it was electing its leader. In my judgment, that is simply wrong. In order to explain why, I will take the stages in reverse order.

Stage 3

33. No criticism is made about stage 3 as such but Mr Payne submits that he does not need to make that complaint. In that respect, Mr Payne submits, this case is not materially different from *R (Miller) v Prime Minister* [2019] UKSC 41; [2020] AC 373 ("*Miller 2*"), which concerned the prorogation of Parliament in 2019. In that case, as Mr Payne says, the Sovereign was not criticised for having prorogued Parliament, as she was bound to accept the advice of the Prime Minister. Nevertheless, as he submits, the prorogation was held to be invalid because it was based upon advice by the Prime Minister which was outside the limits of the prerogative power and was accordingly unlawful: see the judgment of the Court given by Lady Hale PSC and Lord Reed DPSC, at paras 30 and 35-36. The Supreme Court differed from the Divisional Court in that case, which had held that the issue was non-justiciable.

Stage 2

34. At the hearing before this Court Mr Payne suggested that, when Mr Johnson gave advice to the late Queen in September 2022, he was acting as the "delegate" of the Conservative Party. In my judgment, he was not: he was acting as her principal adviser, in other words in his capacity as the then Prime Minister. The relevant constitutional convention is that the Sovereign will follow the advice of the Prime Minister on the issue of who should be invited to form the next government.

35. In any event, a fundamental difficulty that Mr Payne's argument faces is that he does not in fact challenge the advice given by Mr Johnson at stage 2. If he had done so, there might have arisen difficult questions as to whether such a case was justiciable. Mr Straker submits that it would not be but it is not necessary for this Court to decide that question in this case.

36. Mr Straker invites us to distinguish *Miller 2* and hold that the exercise of the prerogative power to appoint the Prime Minister is non-justiciable. He submits that that appointment is one of the few remaining *personal* prerogative powers of the Monarch. He cites R. F. V. Heuston, Essays in Constitutional Law (1964), at pages 75-76, where it is said that:

> "The Constitution indeed permits to the monarch a number of personal prerogatives, common law powers to act in public affairs, which are exercisable in the sole discretion of the monarch and *without the previous advice of a Minister*." (Emphasis added)

Mr Straker also points out that in *Miller 2*, at pages 393H-394A, it was accepted by counsel for the appellant in that case in the course of argument, that the power of *dissolution* of Parliament had been unreviewable before 2011, because it was a personal prerogative power until Parliament intervened by statute in that year, but it was common ground that the Sovereign had no such personal prerogative in the case of the *prorogation* of Parliament. In my judgment, this does not assist the Conservative Party in the present case because it is well-established by constitutional convention that the Sovereign will appoint the Prime Minister on the advice of the incumbent Prime Minister.

37. Mr Straker also relied on the dicta of Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 418A-C:

> "Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as other are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another."

38. I would prefer not to dispose of the present claim on the ground that it raises an issue which is non-justiciable. I note that some of the examples that Lord Roskill gave as being non-justiciable have been held in subsequent cases to be justiciable: see e.g. *R v Secretary of State for the Home Department, ex p. Bentley* [1994] QB 349 (the prerogative of mercy). The question of justiciability which Mr Straker raised is an issue of some general importance which was not fully argued before this Court; in my opinion, the present case can be disposed of for the simple reason that the Conservative Party was not exercising a public function when it conducted its leadership election.

Stage 1

39. What Mr Payne has to show but, in my judgment, cannot show, is that the Conservative Party was exercising a public function at stage 1 of the process. The "nature" of the "act" (to use the language of section 6(3)(b) of the HRA) was private and, in my judgment, it does not become public simply because of the consequences which would follow, in accordance with constitutional convention. The constitutional convention is that the person who should be appointed Prime Minister is the person who has the confidence of the House of Commons. That may very well be in most

situations the leader of the political party which has a majority in the House of Commons but that is not what the constitutional convention is about.

40. There were other difficulties thrown up during the hearing before this Court, as Mr Payne sought to avoid some of the problems with his main submission. At one point, he submitted that *any* election of a leader by *any* political party is the exercise of a public function but, on reflection, he resiled from that position, and was right to do so. He does not now contend that a political party is performing a public function if it conducts a leadership election while in opposition, because he accepts that, before its leader becomes Prime Minister, that party will have to win a general election. His submissions cannot cater for the possibility that there may be a coalition government formed, in circumstances in which the person recommended to become Prime Minister is not in fact the leader of a party with an absolute majority in the House of Commons. Nor can his submissions cater for the possibility that a political party may have more than one leader, in which case the leadership election will not dictate who is to be invited to become Prime Minister.

41. In the end, Mr Payne has to circumscribe the principle for which he contends by reference to the particular circumstances of this type of case: where (1) one party has an absolute majority in the House of Commons; and (2) the Prime Minister resigns mid-term, in other words not after losing a general election. He submits that the change of Prime Minister is not only the known consequence of the leadership election, it is also the Party's desired consequence. Be that as it may, that does not alter the *nature* of the act of electing a party leader, which is at all times a private act. The fact that it has important, indirect consequences for the public does not transform a private act into a public one.

42. If Mr Payne's submissions otherwise had merit, they would lead to a potential enquiry into which person has the confidence of the House of Commons and this potential enquiry into proceedings in the House of Commons might raise issues under Article 9 of the Bill of Rights 1689, which provides that:

> "the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament."

It is unnecessary to go into that question, however, as it is clear, in my view, that Mr Payne's argument fails at first base: the Conservative Party was not exercising a public function when it conducted its leadership election.

43. The high point for Mr Payne's submissions is to be found in a dictum by Lloyd LJ in *Datafin* [1987] QB 815, at 847C:

> "If the body in question is exercising public law functions, or *if the exercise of its functions have [sic] public law consequences*, then that may … be sufficient to bring the body within the reach of judicial review." (Emphasis added)

44. It is important to note that, even in that passage, it was not said that any "public consequences" will be sufficient; it was rather that "public *law* consequences" "may" be sufficient.

45. Mr Payne also placed emphasis on what was said by Sir John Donaldson MR in *Datafin*, at page 838E:

> "Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction."

46. It is important, as always, to read judicial dicta in their proper context. As Sir John Donaldson MR went on to say at page 838F-H, the panel in that case was "without doubt performing a public duty and an important one." This was clear from the express willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the panel as the centrepiece of his regulation of that market. Sir John Donaldson MR said, at page 838G-H:

> "The rights of citizens are indirectly affected by its decisions, some, but by no means all of them, may in a technical sense be said to have assented to this situation, e.g. the members of the Stock Exchange. At least in its determination of whether there has been a breach of the code, it has a duty to act judicially and it asserts that its raison d'etre is to do equity between one shareholder and another. Its source of power is only partly based upon moral persuasion and the assent of institutions and their members, the bottom line being the statutory powers exercised by the Department of Trade and Industry and the Bank of England."

Sir John Donaldson MR continued, at pages 838H-839A:

> "In this context I should be very disappointed if the courts could not recognise the realities of executive power and allowed their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted."

47. Sir John Donaldson MR concluded on this issue, at page 839A-B, that there was no convincing alternative remedy available by established forms of private law, e.g. torts such as actionable combinations in restraint of trade. Accordingly, this Court concluded that it had jurisdiction to entertain applications for judicial review of decisions of the panel.

48. In my view, the outcome in *Datafin* is readily understandable but that decision does not assist the arguments of Tortoise in the present case. The panel in that case was performing a regulatory function, and had to act "judicially". Its decisions could have

an indirect effect upon others. The background was that the Government had deliberately decided not to intervene by establishing a statutory regulator but was content to leave the matter to self-regulation. There was an underpinning to the panel's functions in statutory powers by the Department of Trade and the Bank of England. Finally, no private law action was available. The Court of Appeal decided that the mere fact that the source of the panel's powers was not statute or the royal prerogative did not prevent it being amenable to judicial review. It was certainly not a purely consensual organisation.

49. In my judgment, it is plain that the Conservative Party was not exercising any public function when it conducted the process for the election of its leader in 2022.

50. There is one important issue of principle which should also be mentioned, which reinforces that conclusion. This is the importance in a free and pluralistic society of permitting political parties to adopt their own rules, for example as to how they elect their leader, without undue interference by the state. Of course there are limits to this principle, for example there may well be rules of law which prohibit discrimination on certain grounds such as sex or race in relation to who can become a member of a political party. Either such rules will apply, in which case it is that legal regime which will govern the issue under consideration; or such rules will not apply. If such rules do not apply, then, in my view, it would be wrong for the courts to impose constraints on the autonomy of political parties which Parliament has not thought fit to impose.

Submissions for the Intervener

51. This Court received helpful written submissions from Mr Christopher Knight on behalf of the Chancellor of the Duchy of Lancaster, who was granted permission to intervene in the case for the Cabinet Office. The submissions were not concerned with the main issue in this case but were concerned with the issue whether the Court should follow the judgment of the Grand Chamber in *Magyar*. Mr Knight submitted that UT Judge Wright was correct to hold, in *Moss v Information Commissioner and Cabinet Office* [2020] UKUT 242 (AAC), that, despite the judgment in *Magyar*, no court below the level of the Supreme Court can decline to follow the decisions of that court in *BBC v Sugar (No. 2)* [2012] UKSC 4; [2012] 1 WLR 439 and *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455. In view of the conclusion which I have reached on the gateway question in this case of whether the Conservative Party was performing a public function, it is unnecessary to address these issues concerning Article 10 of the ECHR and the doctrine of precedent under the HRA.

Conclusion

52. For the above reasons, I have reached the clear conclusion that this claim for judicial review must be dismissed.

Postscript: appeals where permission to apply for judicial review has been refused

53. In view of the procedural history of this case I would add a few words which I hope will be of assistance in the future.

54. CPR 52.8 provides:

> "(1) Where permission to apply for judicial review has been refused at a hearing in the High Court, an application for permission to appeal may be made to the Court of Appeal except where precluded by section 18(1)(a) of the Senior Courts Act 1981.
>
> …
>
> (5) On an application under paragraph (1) …, the Court of Appeal may, instead of giving permission to appeal, give permission to apply for judicial review.
>
> (6) Where the Court of Appeal gives permission to apply for judicial review in accordance with paragraph (5), the case will proceed in the High Court unless the Court of Appeal orders otherwise."

55. As the commentary in the White Book (Civil Procedure 2025), volume 1, page 1874, para 52.8.6, observes, there is an obvious danger that cost-saving mechanisms such as the requirement for permission before a claim for judicial review can be brought may in fact end up multiplying costs. The commentary continues that rule 52.8(5) empowers the Court of Appeal "to cut the Gordian knot" and, instead of granting permission to appeal, to grant permission to apply for judicial review. In many cases this will no doubt be the appropriate course to take. Nevertheless, there are cases, of which I believe the present was one, in which the Court does not have jurisdiction to consider a claim for judicial review. The High Court, first on the papers and then after an oral hearing, gave detailed consideration to that preliminary question. In my judgment, the High Court was correct to refuse permission to apply for judicial review.

56. There are various mechanisms available to this Court to do justice in cases of this type:

(1) One course is indeed to grant only permission to appeal against the initial refusal of permission to bring a claim for judicial review. That means that at the substantive appeal the only issue for this Court will be whether the case is, on analysis, in truth arguable and, if it is not, the appeal should be dismissed, in other words permission to apply for judicial review is refused.

(2) Another practical course may be for the single judge considering the application on the papers to adjourn it to an oral hearing, perhaps before two or three members of this Court.

(3) A final course that may be appropriate is for there to be a "rolled-up" hearing directed, with the substantive claim for judicial review to be heard only if this Court decides to grant permission to apply for judicial review. A "rolled-up" hearing is now often directed in the Administrative Court, for example where there is a real issue about whether judicial review is available at all in the circumstances of the case: see para 9.2.1.5 of the Administrative Court's Judicial Review Guide 2024. Since, in the unusual circumstances of a case like the present, this Court is considering whether to grant permission to bring a claim for judicial review and retain the substantive hearing in this Court rather than remit it to the High Court, this Court should also give active consideration to whether there should be a "rolled-up" hearing.

Lord Justice Dingemans:

57. I agree.

Sir Geoffrey Vos MR:

58. I also agree.