CO/3220/2017

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

BETWEEN:

THE QUEEN
(on the application of
CIARAN McCLEAN)

Claimant

-and-

(1) FIRST SECRETARY OF STATE
(2) HER MAJESTY'S ATTORNEY GENERAL

Defendants

DEFENDANTS' SKELETON ARGUMENT
For permission hearing, 26 October 2017

References to the hearing bundle are given as [volume/tab/page (if applicable)]

The claim

1. The Claimant challenges a purported "*decision of Her Majesty's Government to enter into, and continue to hold office and govern, pursuant to the terms of a confidence and supply agreement with the Democratic Unionist Party of Northern Ireland dated 26 June 2017*" on the grounds that it (a) contravenes the Bribery Act 2010 ("**the 2010 Act**") **[3/31/779]** and (b) entails the unlawful use of ministers' public expenditure powers. The principal ground on which the challenge was initially brought, namely contravention of the British Irish Agreement has recently been abandoned. The Claimant seeks a declaration that the purported decision is unlawful and also an order quashing it.

2. The agreement in question - the *Agreement between the Conservative and Unionist Party and the Democratic Unionist Party on Support for the Government in Parliament* ("**the Agreement**" **[1/1/25]**) – was negotiated and entered into with the DUP not by the Government but by the Conservative Party, and there has been no decision "*that the Government should continue to hold office and govern under the terms of the DUP Agreement*". However, the Defendants will assume, for the purposes of this permission hearing, that the conclusion and/or continuing operation of the Agreement involves a decision of a public body which could be susceptible to challenge by judicial review.

3. The Defendants submit, nevertheless, that the Claim is unarguable, and permission should be refused, since:

   (1) The criminal law of bribery plainly does not apply to a confidence and supply agreement between political parties.

   (2) The allegation that the Agreement entails public expenditure which is unlawful at common law and/or without parliamentary authority, is misconceived in particular because the expenditure contemplated by the Agreement will have appropriate Parliamentary authorisation.

4. That is not only the correct legal position but also the position which accords with long-established constitutional practice in this country and elsewhere. It is commonplace, where an election results in no overall majority in the legislature, for arrangements to be entered into whereby one political party offers its support to another on the strength of certain commitments as to the future policy of the Government which the arrangements enable.[1] If the Claim were to be upheld then, surprisingly, such commonplace arrangements would be both criminal and contrary to public law principles.

[1] The 2010 Coalition Agreement **[3/49/1200]** is a recent example of this. The Republic of Ireland is currently governed pursuant to a confidence and supply agreement between Fine Gael and its minority partner Fianna Fáil **[3/48/1192]**. See, generally, Institute for Government, *Supplying Confidence: how confidence and supply agreements between minority governments and smaller parties work* (2017) **[3/47/1182]**.

The 2010 Act

5. The Claimant alleges that the Agreement gives rise to breaches of the criminal law created by the 2010 Act. If that were correct, the parties to the Agreement would have committed offences contrary to s. 1 of the 2010 Act (bribing another person) and s. 2 (being bribed).

6. These serious allegations are plainly misconceived. From the pre-action stage onwards, the Defendants pointed out that "*[t]he most obvious, but far from the only, reason why the Bribery Act does not apply in current circumstances is that the Agreement does not entail DUP MPs acting other than entirely properly when voting in Parliament. MPs do not have a duty to act "impartially" when voting in Parliament. Indeed, political parties could not enter into coalition agreements and MPs could not take the whip of any party if there were such a duty*" **[1/7/119]**.

7. That point was made with reference to s. 1(2) of the 2010 Act, whereby the offence of bribery will be committed where a financial or other advantage is offered "*to induce a person to perform improperly a relevant function or activity*". Under s. 3(1), a "*relevant function or activity*" is a function or activity which meets one or more of the conditions set out in s. 3(3)-(5). These state:

> "*(3) Condition A is that a person performing the function or activity is expected to perform it in good faith.*
>
> *(4) Condition B is that a person performing the function or activity is expected to perform it impartially.*
>
> *(5) Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.*"

8. A relevant function or activity is performed improperly "*if it is performed in breach of a relevant expectation*" (s. 4(1)(a)) and, by s. 4(2), a relevant expectation "*in relation to a function or activity which meets condition A or B, means the expectation mentioned in the condition concerned*". The Claimant's submission – referring to Condition B - is that the function of voting in Parliament is one which DUP MPs are expected to perform impartially, and that the Agreement commits them to voting other than impartially.

9. There is no basis for the submission that MPs have a duty to vote "*impartially*" in the sense contended for by the Claimant, namely without previously committing themselves to vote one way or the other on particular matters (see DSG §48). The Code of Conduct of MPs **[3/39/913]** to which the Claimant refers, which would contain such a duty if one existed, does not do so. Entirely standard features of political life, in addition to agreements by one political party to support another would be contrary to such a duty if it did exist. For example, MPs could not, consistent with a duty of impartiality, take the party whip or take any public positions for or against particular policies in advance of a relevant vote.

10. The Claimant's only response to the point made in pre-action correspondence and repeated above is that §11 of the Code of Conduct (cited in DSG §44), which prohibits MPs from accepting bribes, "*identifies and delineates the circumstances in which an MP is expected and required to vote impartially, namely without the influence of a bribe, for the purposes of s. 3 of the 2010 Act*" (DSG §45). This reasoning is entirely circular. The Claimant's submission is that MPs have a duty to vote impartially for the purposes of the offence of bribery, because they have a duty not to accept bribes. But there can only be a "bribe" within the 2010 Act where there is a pre-existing duty to vote impartially (a pre-existing duty which the Claimant cannot establish).

11. Even if there were any substance in the allegation that criminal offences under the 2010 Act have been committed, it would be wholly inappropriate for this Court to rule, and grant relief, to that effect. It is only in very exceptional cases that it would be appropriate for the civil courts to rule as to whether a proposed future course of conduct would contravene the criminal law (*R (Rusbridger) v Attorney General* [2004] 1 AC 357, §16 **[2/15/427]** citing *Imperial Tobacco v Attorney General* [1981] AC 718 **[2/16/449]**). The Claimant has cited no precedent or authority that it could be appropriate for this Court to rule that conduct in the past entailed the commission of criminal offences (*Imperial Tobacco* being an example of a case where such a declaration was refused). There could be no justification for the making of findings of criminal conduct without the safeguards which attach to a criminal prosecution. Plainly, these are matters within the sole jurisdiction of the criminal courts.

12. The allegation of breach of the 2010 Act also raises serious issues of Parliamentary privilege. The voting behaviour of MPs falls squarely within the prohibition in Article 9 of the Bill of Rights 1689 **[3/30/773]** whereby 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.

13. The Claimant submits that that provision does not prevent the prosecution of an MP for bribery-related offences, in reliance upon *R v Chaytor* [2011] 1 AC 684 **[2/10/308]**. However, whilst there are, in theory, many activities in respect of which an MP could be bribed the key question in every case is the strength of the nexus between the alleged conduct and proceedings in Parliament and whether, "*if [the actions in question] do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament*" (*Chaytor*, §§44 and 47). Here, the strength of the nexus with the core business of Parliament could not be closer and the allegations made by the Claimant could undoubtedly call into question the conduct of that core business. In any event, whatever the justification for permitting the criminal courts to assume jurisdiction over certain matters relating to Parliamentary business, this is a civil claim and should not benefit from any such justification.

Expenditure without Parliamentary authority

14. In amended grounds, the Claimant contends that the Agreement is unlawful because it commits Ministers to exercising public expenditure powers without the requisite Parliamentary authority.

15. It is uncontroversial that "*all expenditure of public funds by ministers requires parliamentary authority*" (DSG §12B) and that "*an agreement between two political parties cannot by itself constitute the necessary authority for the expenditure of public funds*" (DSG §12C).

16. But the Claimant has misunderstood the effect of the Agreement. His core complaint is that the Agreement "*purports to commit HMG to specified*

expenditures regardless of legality or parliamentary authority" (DSG §12K). That is incorrect:

(1) The Annex to the Agreement **[1/1/28-30]** provides that the Government is prepared to make available additional financial support to Northern Ireland and then sets out certain specific heads of additional expenditure under "*Economy and Infrastructure*" and "*Health and Education*".

(2) The mechanism by which money is made available by central Government to Northern Ireland is in s. 58 of the NIA 1998 **[3/28/751]**:

> "*The Secretary of State shall from time to time make payments into the Consolidated Fund of Northern Ireland out of money provided by Parliament of such amounts as he may determine.*"

In practice, payments into the Consolidated Fund of Northern Ireland are made by the Secretary of State for Northern Ireland.

(3) Any such payments, including any additional payments which may be made pursuant to the Agreement, are normally included in the Main or Supplementary Estimates of the Northern Ireland Office for the financial year in which they are made. This is in accordance with long-established procedures, under which central Government requests the grant of money by the House of Commons (a grant which is assented to by the House of Lords). Proposals for central Government funding are put before the House of Commons in the form of Main and Supplementary Estimates. Estimates are subject to a vote in the House of Commons and are typically subject to debate in that House, as determined by the Liaison Committee. Estimates which are granted by the House of Commons are termed "Supply" and become embodied in primary legislation: a Supply and Appropriation (Main Estimates) Act and a Supply and Appropriation (Anticipation and Adjustments) Act for Supplementary Estimates presented during a financial year.

(4) The Government is committed to ensuring that any money provided has appropriate Parliamentary authorisation. The Agreement could not, and does not, involve the Government committing itself to any provision of additional funds to Northern Ireland which would not be authorised under standard procedures, including the consent of Parliament.

17. The Claimant also relies upon passages from the HM Treasury document *Managing Public Money* **[3/42/1030]**, which explain the necessity for Parliamentary consent to expenditure by central Government departments (DSG §12N). But it is nowhere explained why he believes that the expenditure referred to in the Annex to the Agreement will be treated other than in accordance with the standard procedures.

18. No suggestion is, or could be, made that it would be unlawful for Ministers to request, in Estimates, additional funds from Parliament to meet the commitments set out in the Annex to the Agreement. That is not a matter which could properly be the subject of judicial review, on account of Parliamentary privilege: see *R (Wheeler) v Prime Minister* [2008] EWHC 1409 (Admin), §§45-51 **[2/11/356]** where the Divisional Court held that the courts may not review decisions to put draft legislation before Parliament in a particular form. Again, this is within the core business of Parliament protected by Article 9 of the Bill of Rights **[3/30/773]**. See also *R (Unison) v Secretary of State for Health* [2010] EWHC 2655 (Admin) **[2/12/378]**, §10 "*The courts cannot forbid a Member of Parliament from introducing a Bill. To do so would be just as much an interference with Parliamentary proceedings as to require the introduction of a Bill*".

19. The Claimant also argues, in the alternative, that Ministers have no power to incur the additional expenditure referred to in the Annex to the Agreement because it is unlawful at common law, by analogy with the conduct of a local authority, Westminster City Council, in making policy for the sale of social housing, which was considered in *Porter v Magill* [2002] 2 AC 357 **[2/9/152]** (DSG §12P). The very significant factual and legal differences between that case and the present undermine any such analogy. In *Porter*, a local authority,

itself a creature of statute, had – at the instigation of the appellant councillors – acted in breach of its statutory powers, by deciding to sell social housing for purely political purposes and indeed in a manner which was liable to prevent the authority from meeting its statutory obligations. In the present case, the Claimant has not identified any statutory provisions which have been breached by the Agreement and nor is it contended that the policy commitments appended to the Agreement do not have a sound public interest justification in their own right.

20. However, the common law claim must in any event fail for the same reason as the submission regarding lack of Parliamentary authorisation. Any money provided under the Agreement will have appropriate Parliamentary authorisation and its subsequent provision to Northern Ireland is not, therefore, capable of being challenged on the basis of common law principles relied upon by the Claimant.

Conclusion

21. For these reasons, permission to apply for judicial review should be refused.

22. If the Court refuses permission, the Defendants apply for their costs of preparing the acknowledgment of service in accordance with the guidelines in *R (on the application of Mount Cook Ltd) v Westminster City Council* [2004] P & CR 22. They seek an order for costs in a sum to be assessed, if not agreed.

JAMES EADIE QC
JASON COPPEL QC
SEAN AUGHEY

19 October 2017