



THE WOLCHOVER ACTION GROUP

06 December 2017

Mrs Alison Saunders,  
Director of Public Prosecutions  
Crown Prosecution Service  
Rose Court  
2 Southwark Bridge  
London SE1 9HS

**By Email and Post**

Dear Mrs Saunders

**Misconduct in Public Office in relation to “Brexit”**

I am writing on behalf of the Wolchover Action Group (WAG), its members, and those who have endorsed our actions. The Wolchover Action Group is a Facebook campaign named after the barrister David Wolchover, author of the article entitled “Non-mandated Brexit: Are the Responsible Cabinet Members Criminally Liable?” which was published in *Criminal Law and Justice Weekly*, (2017) 181 JN, July 15, 487-491, and “Criminal Implications of Non-Mandated Brexit: A Postscript,” *ibid*, July 21. Mr Wolchover is not involved in the organisation of the campaign, although we maintain contact with him.

You may be aware that a number of UK citizens and residents have sent letters to the Commissioner of the Metropolitan Police and chief officers of diverse county forces to register criminal complaints against the Prime Minister, the Rt Hon Theresa May, and the Brexit Secretary, the Rt Hon David Davis. Additionally, nearly 4,300 signatures were collected during a targeted weeklong campaign to gauge public support and accept endorsements of those complaints, which were at that time being reviewed by the Specialist Crime Unit under Commander Stuart Cundy. These were delivered to the Commissioner on October 18. Engagement in the campaign was impressive, particularly as the charges require a level of study well beyond the single-question polls and petitions that are largely answered by gut feeling.

The complaint centres on the allegation that Mrs May and Mr Davis, together with other unidentified senior members of the government, have committed the offence of Misconduct in Public Office in connection with the government’s handling of the “triggering” of Article 50 of the Treaty on European Union.

A substantive response dated November 27 has now been received from Commander Cundy. In his letter Mr Cundy states that the Metropolitan Police carefully considered the arguments and commissioned independent legal advice to evaluate the legal arguments advanced by David Wolchover on which we relied. Mr Cundy states that in the light of the advice duly received it is the view of the Metropolitan Police that the European Union (Notification of Withdrawal) Act 2017 was “sufficient to constitute a legally binding declaration of the UK’s intention to withdraw from the European Union (EU) and to empower the Prime Minister to notify the United Kingdom’s intention to withdraw from the EU under Article 50(2).” Accordingly no action by way of an investigation would be taken.

We believe that if the view of the Metropolitan Police is based on the advice received, it is wholly misconceived. It is clear beyond doubt that the Act did not, *and was expressly not intended* by the government, to constitute a legally binding declaration of the UK's intention to withdraw from the EU. Accordingly, the action of those key members of the cabinet who gave their consent to Mrs May's letter purporting to invoke Article 50 have committed the criminal offence of Misconduct in Public Office over their handling of Brexit. In order to understand why that is the case it is essential to appreciate the relationship between Article 50 of the Treaty on European Union (the "Lisbon" Treaty) and the European Union Referendum held on 23 June 2016.

The unchallengeable facts and propositions are as follows:

- Article 50(1) permits any EU Member State to withdraw from the EU "in accordance with its own constitutional requirements."
- In the *Gina Miller* case the Supreme Court held that the Referendum result could not and did not stand constitutionally as the withdrawal decision. The Referendum was merely advisory, or consultative, as the government had themselves described it in sponsoring the European Union Referendum Bill, which brought it into being.
- As the Court stressed, the expression "in accordance with its own constitutional requirements" meant that the UK could only decide to withdraw from the EU under Article 50 by an Act of Parliament declaring the UK's intention to do so.
- Nonetheless, when Brexit Secretary David Davis on behalf of the government introduced the Bill which became the European Union (Notice of Withdrawal) Act 2017 he wilfully and knowingly disregarded the law proclaimed by the Supreme Court, telling the House of Commons that the decision had already been made by the Referendum and *that the Bill did not enact the leave decision*. He was echoed by Baroness Evans in the House of Lords and by other ministers outside Parliament.
- The wording of the Act is entirely on all fours with the government's statement that it did not enact the decision. It reads: "The Prime Minister may notify, under Article 50(2) of the [TEU], the [UK]'s intention to withdraw from the [EU]." For there to be a valid Article 50(2) notice there would need to have been an Article 50(1) decision. If the Act had enacted such a decision it would have included the two words "hereby affirmed" or "hereby declared" after the word "intention."
- For effective notice to be given under Article 50(2), a decision must have been made under Article 50(1). It follows that the Act does not authorise the Prime Minister to give notice unless there has been an Article 50(1) decision. The Act does not make such a decision (or declare an intention to withdraw). That it authorises the Prime Minister to give Article 50(2) notice cannot be said to imply that it also makes the Article 50(1) decision itself.
- Indeed, if the Act had made the decision it would have **obliged** the Prime Minister, as head of the government, to give notice of the decision, instead of merely authorising her to do so, where applicable. Article 50(2) states that a Member State that decides under Article 50(1) to leave the EU **must** notify the European Council of its intention.
- The government know full well that neither the Referendum nor the Act made the withdrawal decision and that they have no constitutional mandate to pursue the Brexit process.
- Since there has been no such constitutional decision by the UK to withdraw, Mrs May's letter to President of the European Council Donald Tusk of 29 March, this year, did not

*“trigger” Article 50. There was nothing to notify. You cannot give notification about something that hasn’t happened.*

- Yet by using wilfully misleading words in Parliament and then purporting to “trigger” Article 50 to start the process of withdrawing the UK from the EU the government have quite clearly committed a blatant case of Misconduct in Public Office.

Indeed it is as bad a case as might be imagined. By their actions the cabinet leaders have caused enormous alarm and distress for millions of British people and citizens of EU member states and having wasted a fortune in time and effort to no avail, a level of deceit and misconduct which must surely render them liable to criminal sanctions.

In a nutshell, then, the Misconduct in Public Office attributed to Mr Davis, Mrs May and others consists in

- asserting that the Referendum result constituted the UK’s leave decision,
- wilfully and knowingly contradicting therefore the Supreme Court’s pronouncement that Article 50 required an Act of Parliament to make the leave decision
- shepherding through Parliament a Bill which they declared was not intended to make the decision and which did not do so
- purporting thereafter to invoke Article 50 by commencing the process of withdrawal negotiations with the European Union and doing so therefore without a constitutional mandate.

It is virtually inconceivable that the suspects might have been unaware of the Supreme Court’s stricture that an Act of Parliament was needed to endorse the Referendum result. Their knowledge is a matter of irrebuttable inference.

Criminal investigators customarily and pragmatically look for motive. What might have been the motive in this particular case? It may be noted that in his various writings on this subject Mr Wolchover has ventured to suggest that the government wished to avoid giving Parliament the opportunity to subject the leave or remain question to debate for fear of becoming hostages to fortune. He has suggested that the government apprehended that with so many committed remainers among the legislators any Bill would be likely to receive a rough passage and might well not get through. For their part Parliamentarians were probably glad to be relieved of the obligation to decide the issue. We agree with this thesis.

Whilst this may be of little concern to some people who support the departure of the UK from the EU at all cost, the vast majority of the British public, both remainers and leavers, would, we believe, be horrified if they appreciated the depth of the deception involved.

Although numerous complaints have been made to the police it is difficult to see what significant investigations the police might make. All the evidence is there as a matter of record, requiring little or no interpretation or clarification. There is no covert evidence to detect or uncover. The criminality speaks for itself.

We make this point in order to invite you to take an unusual course. As you of course know section 3(2) of the Prosecution of Offences Act 1985 provides that

*“[i]t shall be the duty of the Director . . . (b) to institute and have the conduct of criminal proceedings in any case where it appears to him that— (i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or (ii) it is otherwise appropriate for proceedings to be instituted by him.”*

The case is certainly not difficult in legal terms and its importance goes without saying. However, the political implications may have caused the police – and in particular the Metropolitan Police – to

fight shy of becoming involved, which is precisely why we would invite you to assume the proactive role envisaged by s.3(2)(b).

It is worth making mention of one other angle, if only to dismiss it. In his letter Mr Cundy does not elaborate on the legal advice taken by the MPS that informed their decision not to record the crime, so we are left guessing. We wonder if the advice relies on an alternative premise.

Mr Wolchover's arguments are constructed upon the premise that the withdrawal decision required by Article 50(1) must precede the notification obligation described in Article 50(2). This is consistent with the Government's position on the irrevocability of Article 50 and with Mr Davis' emphasis in the Commons that the decision had already been made by the Referendum. In this construction, the Article 50 notification is invalid because there has been no constitutionally valid leave decision and, as mentioned above, the criminality of Mrs May, Mr Davis and others speaks for itself.

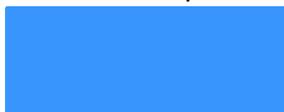
However, whilst Article 50(3) indicates that a decision to withdraw is irrevocable, there are arguments to the contrary (though controversial). This leads us to wonder whether the advice taken by the MPS relies on a "revocability" argument. We see this as perhaps the only way Mr Cundy's response (quoted in the 4<sup>th</sup> paragraph, above) can navigate around the worst of the Misconduct charges (though Mr Davis' mendacity in Parliament still stands). We also see what is problematic about relying on this argument because it presupposes that a constitutionally valid withdrawal decision is yet to be taken, a proposition that stands in stark contradiction of the Government's position that "No Brexit" is not an option. It is also worth noting that in the case brought by Gina Miller, R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union (Appellant) [2017] UKSC, the parties agreed Article 50 could not be revoked, and the Government has consistently echoed this position.

To summarise, using the Wolchover "invalidity" argument, the criminal misconduct is incontrovertible. Whilst the "revocability" argument can for the most part stand alongside Mr Cundy's response, it cannot stand alongside the Government's position on "No Brexit." For that reason we believe it must be dismissed unless we see a reversal of the Government's position.

Finally, we make no secret of the fact that we have deliberately adopted much of the text of a letter sent to you by David Wolchover himself on October 2, 2017.

We look forward to hearing from you.

Yours sincerely



**for the Wolchover Action Group**

### References

"Article 50: the trigger that never was?" *Counsel Magazine online*, June 2 2017, <https://www.counselmagazine.co.uk/articles/article-50-the-trigger-never-was>

"Non-mandated Brexit: Are The Responsible Cabinet Members Criminally Liable?" *Criminal Law and Justice Weekly*, July 15, 2017, pp.487-492  
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<https://www.criminallawandjustice.co.uk/features/Criminal-Implications-Non-Mandated-Brexit-Postscript>

*False Mantra of the "People's Will"* – visit [www.DavidWolchover.co.uk](http://www.DavidWolchover.co.uk), click link on front page.

"Case of the Missing Mandate" *New Law Journal*, 8 Sept 2017  
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