

## Our reply to Frank Ferguson at Crown Prosecution Service (CPS) is below. But first ...

David Wolchover had been copied on the 9<sup>th</sup> January reply from Frank Ferguson at CPS, because he too had been in contact with them over the same concern. David's contact had come in early October, prior to our learning the Met would not investigate our complaints.

David replied to Ferguson with two key points that are summarised here. In our reply to Ferguson below, we make reference to the second of these points.

- In response to Ferguson's assertion that the decision to launch an investigation rests with the police and not with CPS, David reminded him that we did not request an investigation of CPS; we requested that they prosecute. Our submissions had been to say that the evidence warranting a prosecution is manifest on the face of the published documentation.
- In his letter, Ferguson had confirmed that the legal advice obtained by the Met looked at the status of the EU (Notice of Withdrawal) Act 2017 in so far as it relates to Article 50. That advice, he said, had confirmed that the Act does amount to a legally binding declaration of the UK's intention to withdraw from the EU. David highlighted a disharmony between that advice and the position taken by the government in pre-action correspondence relating to at least one of the Article 50 invalidity challenges he is aware of. In that context, the government are contending that all that was needed was enactment of authority to notify the UK's leave intention. It's subtle but important: The Met's advice says the Act was itself a legally binding declaration and therefore (we guess) the leave decision is made impliedly. The government's position is that all that was needed from the Act was authority to notify, in which case (we guess) the decision-making was delegated to the government.



THE WOLCHOVER ACTION GROUP

20 January 2018

Mr Frank Ferguson  
Crown Prosecution Service  
Special Crime & Counter Terrorism Division  
Rose Court  
2 Southwark Bridge  
London SE1 9HS

Dear Mr Ferguson

**RE: Allegations of Misconduct in Public Office in relation to "Brexit"**

Thank you for your letter dated 9<sup>th</sup> January 2018.

Needless to say it was not the response I was hoping for. Nevertheless I appreciate your consideration of the issue.

David Wolchover has shared with me his replies to you on this subject. I am equally alarmed at the disharmony he has described in his letter dated 11<sup>th</sup> January 2018 between the advice obtained by the Met and the position taken by the government and its legal department with regard to the European Union (Notice of Withdrawal) Act 2017 (NoW Act) as it relates to Article 50. Your letter takes as given that clarification of this interaction is the correct and necessary starting point for a decision by the Met about whether to investigate the allegations. That the legal advice obtained by the Met is at odds with the position taken by the government and its legal department weakens that assertion considerably.

In addition to the above, I strenuously object to the asserted starting point on wholly separate grounds. The starting point for such an assessment must be a clear understanding of the Supreme Court ruling in the *Miller* case, read together with the withdrawal procedure described by Article 50. I say this for two reasons: First, the NoW Act was written as a direct response to the *Miller* ruling so it is imperative to understand what objective the Act was designed to achieve and how well it measures up constitutionally. Second, it makes no sense that the NoW Act is the starting place for understanding whether an investigation is called for because the Act and activities surrounding it are themselves at the heart of what is to be investigated.

In the Supreme Court ruling in the *Miller* case, the court stressed that whatever course Parliament resolved to take it had to make its objective crystal clear on the face of the statute because fundamental rights of citizens are at stake (para [87]). It also made clear that political statements to the effect that the Referendum result would be implemented had no legal significance (para [119]). The message to the government was that they needed to ask Parliament either to make an express, unequivocal decision to withdraw or otherwise to delegate the decision to the government. These substantive points could not have been clearer.

In a regrettable conflation of the substance of the ruling and the mechanics of notification, the hitherto clear substantive message of the Supreme Court ruling is muddled by undue emphasis on the authorization of notification under Article 50. The NoW Act opportunistically leverages this "feature," conveniently ignoring those pesky (to the government) substantive elements of the

Supreme Court ruling that require an express, unequivocal decision of Parliament. To claim that the NoW Act fulfils the obligation for a constitutionally legitimate decision under Article 50(1) requires an exceedingly narrow and cherry-picked reading of the Supreme Court ruling. That the government would wilfully bypass the substantive points of the ruling and head straight for a loophole is shameful, as it is for the Met and CPS to turn a blind eye to it.

But the perceived loophole falls apart under rudimentary scrutiny:

1. The substantive message in the Supreme Court ruling is that the decision to withdraw, whether stipulated by Parliament itself or otherwise delegated by Parliament, must be crystal clear in statute.
2. Article 50 requires a decision that meets the UK's constitutional requirements (as clearly articulated in the Supreme Court ruling - see #1) before notification can be given.
3. The NoW Act does not declare the leave decision, does not ratify the Referendum result as the decision, and does not delegate decision-making to the government. Indeed, there is no mention whatsoever of a decision.

What is particularly galling is that we know the government know all of this. The government's legal team in *Miller* understood exactly what was required because they told us, clearly and succinctly, in this passage taken from the Secretary of State's written submissions to the Supreme Court:

*"The surprising consequence of the DC judgment is that, if the outcome of the referendum is to be implemented, Parliament must decide to confer a new legal power on the government to make that decision pursuant to Article 50(1) TEU and to give notification of that decision pursuant to Article 50(2) TEU. In other words, if the UK is to withdraw from the EU, Parliament must be asked to answer precisely the same question which was put by Parliament to the electorate and has been answered in the referendum, and must give the same answer in legislative form."*

The constitutionally valid decision required by Article 50 still does not exist. Government ministers involved in the deceptions described in Mr Wolchover's articles have wilfully defied the Supreme Court ruling. The NoW Act was expressly designed to bypass Parliamentary debate of the Referendum result while offering the appearance of compliance with the Supreme Court ruling. Any journey through the plain facts and on-record statements presented in Mr Wolchover's articles that does not, at the very least, conclude that a case for Misconduct in Public Office could be argued, must itself be treated with suspicion.

In Mr Wolchover's reply to you on 10<sup>th</sup> January he had some final points to make but also said he had no wish to engage in further debate on the subject. I, on the other hand, would appreciate a reply to the concerns I've raised in this mail. I would also ask that the CPS reconsider the claim as I've proposed, with reference to the substantive elements of the Supreme Court ruling (paras [87,119]) rather than against the disputed NoW Act that is at the heart of our allegations and whose status as an Article 50(1)-enabler is as much in question as the government ministers we claim have committed the offense of Misconduct in Public Office. Furthermore, I once again invite you to assume the proactive role envisaged by s.3(2)(b) of the Prosecution of Offences Act 1985.

Yours sincerely



**for the Wolchover Action Group**