

Neutral Citation Number: [2008] EWHC 936 (Admin)

Case No: CO/1915/2008

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 02/05/2008

**Before:**

**THE HONOURABLE MR JUSTICE OWEN**

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**Between:**

**MR JOHN STUART WHEELER**  
**(The Queen on the application of)**

**Claimant**

- v -

**OFFICE OF THE PRIME MINISTER**  
**and**  
**SECRETARY OF STATE FOR FOREIGN AND**  
**COMMONWEALTH AFFAIRS**

**First**  
**Defendant**  
**Second**  
**Defendant**

(Transcript of the Handed Down Judgment of  
WordWave International Limited  
A Merrill Communications Company  
190 Fleet Street, London EC4A 2AG  
Tel No: 020 7404 1400, Fax No: 020 7831 8838  
Official Shorthand Writers to the Court)

**Rabinder Singh QC and Jessica Simor (instructed by Burges Salmon LLP) for the Claimant**  
**Philip Sales QC and Jason Coppel (instructed by Treasury Solicitors) for the Defendants**

Hearing date: 22 April 2008

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**Judgment**  
**As Approved by the Court**

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**The Honourable Mr Justice Owen :**

1. This is an application for permission to apply for judicial review of the decision by the defendants, the Office of the Prime Minister and the Secretary of State for Foreign and Commonwealth Affairs, not to hold a referendum on whether the United Kingdom should ratify the Treaty of Lisbon. On 19 March 2008 Stanley Burnton J adjourned the permission application to an oral hearing.

2. The Claim

It is the claimant's case that the defendants clearly, unequivocally and repeatedly promised that a referendum would be held to allow the British public to express their view as to whether the Constitutional Treaty, signed by all member states of the EU on 29 October 2004, should be ratified. The promise was made in respect of the procedure that the defendants intended to adopt prior to exercising the Crown's prerogative power of ratification. It was a statement of policy as to how the Government intended to act. It therefore gave rise to a legitimate expectation that there would be a referendum prior to ratification of the Constitutional Treaty or any treaty having equivalent effect. The substance of the Constitutional Treaty was eventually enacted in the Lisbon Treaty which is in essence the Constitutional Treaty by another name. In renegeing on their promise to hold a referendum, the defendants have frustrated his legitimate expectation that a referendum in which he could vote, would take place. He seeks a declaration that the refusal to hold a referendum is unlawful as a breach of his legitimate expectation.

3. The background facts

For the purposes of this application the facts can be shortly stated. The Constitutional Treaty, which was the result of a process of EU institutional reform initiated in December 2001, was finally agreed on 17 - 18 June 2004, and was signed by all member states on 29 October 2004.

4. Until April 2004 the defendants took the stance that a referendum on the Constitutional Treaty was not required because these were matters for Parliament to resolve, and the Treaty did not involve any constitutional change to the relationship between the EU and its member states. But on 20 April 2004 the Prime Minister (then Tony Blair) announced to the House of Commons that although his position on the Constitutional Treaty remained the same, namely that it did not involve any fundamental change in the relationship between the EU and the member states, the perpetuation of myths on 'Europe' was such that it was necessary to 'let the people have the final say' by way of a referendum.
5. On 21 June 2004 the Prime Minister said in answer to a question in the House of Commons "... *there is no question of any Constitutional Treaty going through without the express consent of the British people ... regardless of how other members vote, we will have a referendum on the subject.*"
6. On 25 January 2005 the Government introduced the European Union Bill (the EU Bill) which made provision for the Constitutional Treaty to pass into law, subject to the

outcome of a referendum.

7. On 13 April 2005 the Prime Minister launched the Labour Party manifesto in which the earlier promises of a referendum, as reflected in the EU Bill, were repeated. Following the general election on 5 May, the promise to hold a referendum was repeated. On 13 May 2005 the Prime Minister was reported in The Sun newspaper as saying “*we don’t know what is going to happen in France, but we will have a referendum on the constitution in any event – and that is a Government promise.*” On 18 May the Prime Minister confirmed in the House of Commons that there would be a referendum in relation to the Constitutional Treaty, and on 24 May 2005 the Government re-introduced the EU Bill which still contained provision for a referendum, in the House of Commons.
8. The claimant relies on further iterations of the promise both by Tony Blair and by Gordon Brown. Examples of statements in the media are set out at volume 1 tab 1 page 1 of the claimant’s bundle.
9. On 29 May and 1 June 2005 respectively, French and Dutch voters rejected the Constitutional Treaty. That was followed by a ‘period of reflection’ on the future of constitutional reform.
10. On 23 June 2007 the member states agreed to an outline of a reform treaty (subsequently the Treaty of Lisbon) and to the convening of an inter-governmental conference (IGC) in July finally to conclude the terms of the reform treaty. Final agreement was reached at an informal European council meeting on 18 – 19 October 2007, the final text being published on 30 October 2007. The treaty was signed by the member states, including the UK, on 13 December 2007, at which point it became the Treaty of Lisbon.
11. On 17 December 2007, four days after the Prime Minister signed the Treaty of Lisbon, the European Union (Amendment Bill) was put before Parliament. It did not contain a referendum clause; and at the second reading of the Bill on 21 January 2008 the Foreign Secretary stated that the Government would not hold a referendum on ratification of the Lisbon Treaty. In his statement of facts and grounds of claim, the claimant recites a number of passages from Hansard setting out statements made by the Foreign Secretary in the course of the second reading:

*“the real issue is the content of the Treaty; and in its structure and consequence, as well as its content, it is different from the constitution and does not meet the bar of whether it constitutes fundamental constitutional change.”*

But he accepted:

*“... that the constitution did not constitute fundamental constitutional change ... [the Prime Minister] had the idea [of holding the referendum in order] that we should ‘clear the air’.*

*No doubt historians will debate the wisdom or otherwise of that for many years to come. There is absolute clarity however that the constitution did not constitute fundamental constitutional change.*” (Hansard debate 21.01.08 col. 1243)

He further stated:

*“I certainly agree that there was no way on the basis of constitutional significance that it [the Constitutional Treaty] merited the decision [to hold a referendum] that was taken.”*

When asked to explain why it was not possible to have a referendum, the Foreign Secretary said:

*“... the answer is because it is in the House that we make decisions about how we govern our country. It is in the House that we make the laws of our country and it is in the House that people elect us to make those difficult decisions not to dodge them.”* (Hansard debate 21.01.08 col. 1251).

12. The claimant contends that there is no material difference between the Constitutional Treaty and the treaty of Lisbon. He relies on the House of Commons European Scrutiny Committee initial report on the EU IGC in October 2007 which contains in its annexe a comparative analysis of the contents of each, and concludes at its paragraph 45:

*“It also shows that wherever the Constitutional Treaty re-stated the provision of the EU and EC treaties in an amended form, those amendments have been taken up in the reform treaty. Taken as a whole, the reform treaty produces a general framework which is substantially equivalent to the Constitutional Treaty. Even with the ‘opt-in’ provisions on police and judicial co-operation in criminal matters, and the Protocol on the Charter, we are not convinced that the same conclusion does not apply to the position of the UK under the Reform treaty. We look to the Government to make it clear where the changes they have sought and gained at the IGC alter this conclusion in relation to the UK.”*

13. The claimant further relies on the report of the House of Commons Foreign Affairs Committee of 16 January 2008 entitled ‘Foreign Policy Aspects of the Lisbon Treaty’, which states:

*“27. We conclude that there is no material difference between the provisions on foreign affairs in the Constitutional Treaty which the Government made subject to approval in a referendum and those in the Lisbon treaty on which a referendum is being denied.”*

14. The claimant also argues that the Government's 'red-lines' on social security and foreign policy are almost identical to those asserted in relation to the Constitutional Treaty, and that the other two red-lines, on the Charter and Home Affairs have been altered in an immaterial way. He says that the defendants have claimed that the red-lines successfully asserted in relation to the Constitutional Treaty were equally successfully asserted in respect of the Lisbon Treaty, such that the United Kingdom's constitutional position under the Constitutional Treaty is in no significant respect different from its current position under the treaty of Lisbon.
15. For the purposes of this permission application it is not necessary to embark upon a detailed comparative analysis of the content of the two treaties, but I approach the application on the premise that it is plainly arguable that there is no material difference between their provisions.

16. **The claimant's case**

The claimant contends that the defendants made clear, unambiguous representations, devoid of relevant qualification, that following full Parliamentary debate the Constitutional Treaty (and by implication any document with a different name having equivalent effect) would be put to the electorate in a referendum. He submits that the repeated promises made in statements to Parliament, to the press, and in the Labour Party election manifesto, that there would be a referendum, gave rise to a legitimate expectation on his part that he would have an opportunity to vote in a referendum on whether to incorporate the Constitutional Treaty, or by implication, any alternative treaty having largely equivalent effect, irrespective of its title. In short he argues that the defendants made a promise to the electorate, and have broken their word.

17. He founds his argument on the principle articulated by Lord Fraser of Tullybelton in *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 as the basis for protecting a legitimate expectation:

*"... it is in the interest of good administration that (the public authority) should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."*

18. The principle was re-stated by Laws LJ in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at paragraph 68:

*"the search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a*

*requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law.”*

19. The claimant further submits that there is no need for him to demonstrate reliance in the case of a statement of policy. As Sedley LJ said in *R v Education Secretary ex parte Begbie* [2000] 1 WLR 1115 at 1133E:

*“I have no difficulty with the proposition that in cases where Government has made known how it intends to exercise powers which affect the public at large it may be held to its word irrespective of whether the applicant had been relying specifically upon it. The legitimate expectation in such a case is that the Government will behave towards its citizens as it says it will.”*

20. Finally he submits that effect should be given to the promise unless the court is satisfied that the defendants have shown good reason to depart from it. The limits of ‘good reason to depart’ from a promise were explained by Laws LJ in *Nadarajah* at paragraphs 68 – 69:

*“... there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in the European convention. Accordingly a public body’s promise or practice as to future conduct may only be denied, and thus the standard that I have expressed may only be departed from, in circumstances where to do so is the public body’s legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances ...”*

21. The claimant submits that no legitimate justification has been advanced for reneging on the promise to hold a referendum, and accordingly the defendants have not shown that the decision to resile from their promise was made in pursuit of a legitimate aim in the public interest. The claimant therefore argues that he has demonstrated an arguable case, and that he should be granted permission to apply for judicial review.

22. **The defendants’ case**

The defendants submit that the claim is misconceived and that the permission application should be refused. In their summary grounds of defence they advanced five reasons why the application was bound to fail. But in the course of argument Mr Philip Sales QC, who appeared for the defendants, limited himself for the purposes of the permission application to three arguments, each of which in his submission presented an insurmountable hurdle for the claimant. They are first that the issue raised by the claim is not justiciable, secondly that the claim is a violation of parliamentary privilege, and thirdly that there was no unambiguous and unqualified representation that a referendum on the Lisbon Treaty would be held.

23. **The justiciability issue**

Mr Sales QC argues that it must follow from the contention that the defendants have acted unlawfully by failing to hold a referendum on the Treaty of Lisbon, that it would be unlawful for the government to proceed to ratify the treaty without holding a referendum. He submits that it is not logically possible to disentangle the promise to hold a referendum, from the process of ratification; and that in consequence the claim raises issues that are not justiciable.

24. The submission is based on the well established principle that the exercise of the Crown's prerogative power to conclude treaties may not be challenged in the domestic courts. In this context Mr Sales relied in particular upon two decisions of the Court of Appeal in claims made by individuals campaigning for a referendum to be held on the Treaty of Nice prior to its ratification and incorporation claims that were rejected by the Court of Appeal on the grounds that the issues to which they gave rise were not justiciable, namely *R (McWhirter and Gouriet) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ 384 and *R (Southall) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ 1002. In *McWhirter* the claimant appealed against a refusal by Maurice Kay J to give permission to apply for judicial review of a decision by the Secretary of State to ratify the Treaty of Nice. The appeal was dismissed; and in giving the lead judgment Laws LJ accepted the submission of the Secretary of State that "*ratification is a step taken on the international plane, and is not governed by domestic law nor operative at the level of domestic law.*"
25. In *Southall* the claimant sought a declaration that the Treaty of Nice should not be ratified unless and until the consent of the people had been sought in a referendum. Silber J refused permission to apply for judicial review. The Court of Appeal dismissed the appeal against his refusal, holding that the declarations sought were "*unsuitable to be the subject of a court pronouncement*", and that the question of whether or not a referendum should be held before Parliament passed the legislation necessary to incorporate the treaty was "*a matter of political judgment and not for the courts.*"
26. The claimant does not seek to challenge the principle upon which the defendants' submission is founded, namely that ratification of international treaties is not justiciable. But Mr Rabinder Singh QC sought to answer the defendants' argument in the following way. The claim does not involve a challenge to the defendants' exercise of the prerogative power of the Crown lawfully to ratify the Lisbon Treaty, whatever

the result of any referendum. Nor is the court being asked to adjudicate on the wisdom or merits of the policy to hold a referendum. As is clear from the statement of facts and grounds of claim, the single issue that the claimant seeks to litigate is whether, in renegeing on their promise to hold a referendum, the defendants have frustrated his legitimate expectation that a referendum in which he could vote, would take place. That is an issue of domestic law on which this court can and should adjudicate. In attempting to re-cast the claimant's case as a claim that the act of ratification, absent a referendum, would be unlawful, the defendants are seeking to conflate the consequences of the illegality, with the illegality in order to construct a platform upon which to base the justiciability argument.

27. In response Mr Sales argues that unless there is a connection between the decision not to hold a referendum and ratification of the treaty, this claim is a hollow exercise, 'beating the air' as he put it. Not so says Mr Rabinder Singh because a declaration that to renege on the promise to hold the referendum unlawfully frustrated the claimant's legitimate expectation that a referendum would take place, would have tangible consequences in the sense that it could change the political atmosphere.
28. In my judgment Mr Rabinder Singh makes out an arguable case that the narrow issue that the claimant seeks to raise is justiciable. The decisions in *McWhirter* and *Southall* can be distinguished. Both involved a direct challenge to the exercise by the executive of its power to ratify a treaty. In this case the challenge is to the decision to resile from a promise as to the procedure to be adopted prior to the exercise of the power to ratify, not to the exercise of that power.
29. Accordingly the justiciability argument does not provide the defendants with a complete answer to the claim.
30. **Parliamentary Privilege**

The second argument upon which the defendants seek to rely is that the claim is not justiciable because it amounts to a violation of Parliamentary privilege. Mr Sales based his submission on the decision in *R v HM Treasury, ex p Smedley* [1985] QB 657. The claim in *Smedley* was that a draft Order in Council laid by the Treasury before both Houses of Parliament would, if approved and then made, be ultra vires. The Court of Appeal held that whilst the courts could decide whether subordinate legislation, once enacted, would be ultra vires, they could not question the decision of the Treasury to lay the Draft Order before Parliament, or seek to influence the decision of Parliament as to whether or not to approve it. As Sir John Donaldson MR said at 666 C – E:

*“... it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another, subject to certain ultimate rights of Parliament over the judicature which are immaterial for present purposes. It therefore behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so. Although it is not a matter for me, I would*

*hope and expect that Parliament would be similarly sensitive to the need to refrain from trespassing upon the province of the courts.*

*Against that background, it would clearly be a breach of the constitutional conventions for this court, or any court, to express a view, let alone take any action, concerning the decision to lay this draft Order in Counsel before Parliament ....”*

31. So far as primary legislation is concerned “*the enactment of legislation and the procedure by which legislation is enacted are matters for Parliament, not the courts.*” See *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816 per Lord Nicholls at paragraph 55.

32. The machinery for holding referenda is contained in the Political Parties, Elections and Referendums Act 2000. Referenda are dealt with in part VII of the Act. The material parts of section 101, which defines the referenda to which part VII of the Act applies, is in the following terms:

*“101(2) in this part –*

*(2)(a) “Referendum” means a referendum or other poll held, in pursuance of any provision made by or under an Act of Parliament, on one or more questions specified in or in accordance with any such provision; ...*

*(4) If the Secretary of State by order so provides –*

*(a) sub-section (2) shall apply to any specified Bill which has been introduced into Parliament before the making of the Order as if it were an Act; and*

*(b) any specified provisions of this part shall apply, subject to any specified qualifications, in relation to any specified referendum for which provision is made by the Bill.*

Under section 156 no Order under inter-alia section 101(4) “*... shall be made (whether alone or with other provisions) unless a draft of the statutory instrument containing the Order has been laid before, and approved by a resolution of each House of Parliament.*”

33. It is submitted by Mr Sales that the situation is directly analogous to that in *Smedley* as in order for there to be a referendum, there would either have to be provision for it made by or under an Act of Parliament, or contained in a Bill introduced into Parliament together with an Order by the Secretary of State under Section 101(4) approved by a resolution of each House of Parliament. He argues that the claim therefore amounts to a violation of Parliamentary privilege in that, per *Smedley*, the courts may not question the decision of the Secretary of State to put such a Bill before Parliament and to make the requisite Order.

34. In response Mr Rabinder Singh argues that the decision in *Smedley* is the converse of this case, in that we are here concerned with a failure to take any steps in relation to Parliament. Having decided to resile from the promise given as to a referendum, the defendants have not taken any steps that would be protected from challenge in the courts by virtue of Parliamentary privilege. The relief sought is narrowly focused, is simply declaratory in nature, and does not require the defendants to take any steps that might encroach upon Parliamentary privilege. Thus he argues that the principle cannot bite.
35. In my judgment it is arguable that the claim, couched in the narrow terms that it is, does not amount to a violation of Parliamentary privilege for the reasons advanced by Mr Rabinder Singh.
36. The third argument advanced on behalf of the defendants is that “there was no unambiguous and unqualified representation that a referendum on the Lisbon treaty would be held.”
37. Mr Sales based his submission on a passage from the judgment of Lord Justice Bingham, as he then was, in *R v Inland Revenue Commissioners ex parte MFK Underwriting Agents Ltd and Others* [1990] 1WLR 1545 at 1569. In the context of what he described as the “*valuable, developing doctrine of legitimate expectation*,” Lord Justice Bingham said at 1569G:
- “Secondly, it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification.”*
38. The argument can be simply put. Mr Sales submits that the commitment on which the claimant relies was not a clear, unambiguous and unqualified commitment that there would be a referendum on the Treaty of Lisbon. On the contrary the commitment was made in relation to the earlier treaty, the Constitutional Treaty, which in the event was not ratified by all member states and was not incorporated into domestic law. He submits that no representation at all was made in relation to the Treaty of Lisbon.
39. The claimant’s argument can be equally shortly stated. Mr Rabinder Singh seeks to meet the objection by submitting that the promise made in relation to the Constitutional Treaty extended “*by implication to any document with a different name having equivalent effect*.” He submits that the court will be concerned with substance not form, and that if, as he asserts, it be the case that there is no material difference between the treaties, then the obligation to hold the promised referendum cannot be avoided simply by the fact that it now bears a different name.
40. In my judgment this point is also arguable.
41. Thus the claimant seeks to advance an arguable case, and it follows that there will be permission to apply for judicial review.

