IN THE HIGH COURT OF JUSTICE **CLAIM NO:**

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

THE KING
on the application of
TORTOISE MEDIA

Claimant

-and-

THE CONSERVATIVE AND UNIONIST PARTY

Defendant

STATEMENT OF FACTS AND GROUNDS

INTRODUCTION

1. By way of these proceedings the Claimant, Tortoise Media Limited ("**Tortoise Media**"), challenges the lawfulness of the decision by the Conservative and Unionist Party (the "**Party**") dated 26 August 2022 (the "**Decision**") to refuse to provide the information requested in its letter dated 17 August 2022 (the "**Request**").

2. In the Request Tortoise Media posed a number of questions relating to the internal Conservative Party leadership election process (the "**Process**"), and set out the public interest in providing the information sought (the "**Information**") so as to permit public scrutiny of the Process pursuant to which the next Party leader and Prime Minister would be chosen (the "**Public Interest**"). In the Decision the Party, whilst not disputing the Public Interest, refused the Request on the basis that, as an unincorporated association of private members, it had no obligation to provide the Information.

3. In considering the Party's conduct in issuing the Decision, the Court is invited to have regards to the Party's subsequent refusal on 16 September 2022 to issue the Claimant's journalist(s) with accreditation to attend the Conservative Party conference on 2 – 5 October 2022 whilst any legal challenge brought by the Claimant were ongoing. This petty and inappropriate attempt to try and intimidate the Claimant into not pursuing its legitimate attempts to obtain the Information for serious journalistic purposes serves to highlight the

overwhelming Public Interest in ensuring public scrutiny of the Process the outcome of which has such a profound impact on the lives of all members of the public.

SUMMARY OF CASE

4. As Lord Mance stated in *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455 at [1]:

> "Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise the press, NGOs and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection. But information can be genuinely private, confidential or sensitive, and these interests merit respect in their own right and, in the case of those who depend on information to fulfil their functions, because this may not otherwise be forthcoming."

5. The Decision by the Party, whose leader is Prime Minister, to refuse to provide the press with the Information, fundamentally undermines the accountability and transparency of the Election and, as such, democracy. No countervailing considerations said to justify the confidentiality of the Information are relied on by the Party. There is, therefore, no reason for secrecy and, on the contrary, every reason why the Party should provide the Information to enable public scrutiny of the Election Process.

6. Grounds of challenge: - The Claimant challenges the Decision on the grounds that the Party:-

   a. **Ground 1**: - Materially erred in failing to recognise that, in undertaking the *de facto* election of the Prime Minister, it was exercising a public function within the meaning of s6(3)(b) Human Rights Act 1998 (the "**HRA**").

   b. **Ground 2**: - Acted contrary to Article 10 of the European Convention on Human Rights ("**Article 10**" and "**ECHR**" respectively) by: -

      i. refusing the Request; and/or

      ii. failing to engage with the (unchallenged) Public Interest in the Information being made available to the members of the public, the vast majority of whom were not involved in and/or were excluded (by reason of their political beliefs

or otherwise) from participating in the Conservative Party leadership election ("**Election**").

c. **Ground Three:** failed to: - (i) consider any right of access to the Information enjoyed by Tortoise Media (whether under Article 10 or otherwise); and/or (ii) have regards to a relevant consideration in exercising a public function; namely the Public Interest.

7. Relief: - Accordingly, Tortoise Media invites the Court to quash the Decision and issue a mandatory order requiring the Party to: -

a. Provide the Information, or, alternatively,

b. Issue a fresh response to the Request having proper regard to: - (i) the fact that the Party was exercising a public function in conducting the Election, and (ii) Tortoise Media's right to access the Information under Article 10.

STATEMENT OF FACTS

Tortoise Media

8. Tortoise Media provides in-depth and investigative journalism. It specialises in "slow news", by which its Editor means it focuses on well-researched content rather than the headline-oriented content found in some traditional media.

The Conservative Party

9. The Conservative and Unionist Party is a political party run as an unincorporated association, being an aggregate of its members. As confirmed in the Decision, "*the Party's main objective is to see the election of candidates it supports at all levels of government whether national or local.*"

10. The Party's members are bound to each other on the terms of the Party's current constitution, first adopted in 1998 and most recently amended in January 2021 (the "**Constitution**"). The Constitution sets out the rules by which the Party is run, and imbues various entities within the structure of the Party with powers and responsibilities.

11. Pursuant to Article 12 of the Constitution, the Board of the Party is the "*supreme decision-making body in matters of Party organisation and management*". Amongst the responsibilities of the Board is the overseeing of the Process. The Board, together with the Executive Committee

of the Private Members (1922) Committee (the "**1922 Committee**"), is also responsible for setting the rules for the conduct of the ballot of the Party members as part of the Election.

The Election

12. On 7 July 2022, the incumbent Prime Minister, The Rt Hon Boris Johnson MP, resigned as the leader of the Party (the "**Resignation**") stating (emphasis added): *"it is clearly now the will of the parliamentary Conservative Party that there should be a new leader of that party and therefore a new prime minister"*.[1] The Resignation triggered the Election by the Party of its new leader.

13. Pursuant to the Constitution the Election was undertaken in two stages: -

    a. Stage 1 – Conservative MPs choose two candidates to put forward to stage two.

    b. Stage 2 – Party members are balloted. The candidate with the most votes wins.

14. A leadership contest will occur if a sitting leader resigns or if they lose a vote of no confidence of MPs. The rules for votes of no confidence are a matter for the 1922 Committee and are not available in the public domain.[2]

15. The detailed rules which were applied to Stage 1 of the Election are not in the public domain. Limited information as to the Stage 1 rules which were to be applied in this particular Election were announced on 11 July 2022 by the chair of the 1922 Committee[3].

16. In accordance with the timetable announced by the chair of the 1922 Committee the Party stated on its website that *"[o]n 5th September, we will announce the next leader of the Conservative and Unionist Party and the next Prime Minister of the United Kingdom."*[4]

17. Nine candidates put themselves forwards in the Election. These candidates included The Rt Hon Elizabeth Truss MP and The Rt Hon Rishi Sunak MP, both of whom made statements in support of their candidature (as recorded on the Party website): -

[1] https://www.bbc.com/news/uk-politics-62081380, correct at 24 September 2022.
[2] The House of Commons Library briefing paper published on 5 September 2022: Leadership elections: Conservative Party, setting out the current rules for election of a Conservative Party Leader (the '**Paper**').
[3] The rules and procedures for stage 1 of a leadership election are determined by the Executive of the 1922 Committee in consultation with the Conservative Party Board. This will include how an MP can be validly nominated. The rules are not in a publicly available document. Each time a leadership election is held the chair of the 1922 Committee will announce the rules to be followed and the timetable (the Paper; p.4).
[4] https://web.archive.org/web/20220831220606/https://www.conservatives.com/ as at 31 August 2022.

a. The Rt Hon Elizabeth Truss MP: - *"[a]s Party Leader and Prime Minister, I will deliver what we promised in 2019 and, with your help, win the next General Election.*"[5]

b. The Rt Hon Rishi Sunak MP: - "*I am standing to be Leader of the Conservative Party and Prime Minister of our great country.*"[6]

18. Stage 1 of the Election proceeded with a series of ballots of Party MPs being held, with the candidates with the lowest number of votes being eliminated until only The Rt Hon Elizabeth Truss MP and The Rt Hon Rishi Sunak MP remained, both of whom then proceeded to Stage 2 of the Election.

19. Next the Stage 2 ballot of eligible Party members was undertaken on a *"one member one vote"* basis. On this occasion, in contrast to Stage 1, only those who were members *"from the time of the call for nominations by the Chairman of the 1922 Committee for the election of the Leader"* and who had *"been members for at least three months immediately prior to the close of the ballot for the election of the Leader"* were entitled to vote (in accordance with Schedule 2 of the Constitution).

20. On 5 September 2022, The Rt Hon Elizabeth Truss MP was elected as leader of the Party (with 81,326 votes; representing 57.4% of the Party membership).[7] The Rt Hon Rishi Sunak MP promptly wrote on Twitter, at 1:21pm on 5 September 2022, *"[i]t's right we now unite behind the new PM, Liz Truss…".*[8] On the next day, following the formal resignation of the incumbent Prime Minister, The Rt Hon Elizabeth Truss MP was duly appointed as the new Prime Minister by Her late Majesty Queen Elizabeth II.

<u>The Request</u>

21. From late July 2022 Tortoise Media made a number of requests to the Party, both verbally and in writing, for information relating to the processes which the Party had in place for conducting the Election and the membership of its electorate who would be involved in the Election. This information was sought from the Party with a view to enabling public scrutiny of the Election process and, as such, to reassure the wider public as to the adequacy of the Election and thus the legitimacy of the candidate who was chosen to be appointed as Prime Minister.

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[5] ibid.
[6] ibid.
[7] Liz Truss 81,326 57.4%; Rishi Sunak 60,399 42.6%; Eligible voters 172,437; Turnout 142,379 82.6% (the Paper; p.5).
[8] https://twitter.com/RishiSunak/status/1566763533093814272.

22. The Party either failed to engage with these requests or refused to provide the information requested (relying on various reasons - including the General Data Protection Regulation ("**GDPR**") - which were not subsequently relied on in the Decision). At no stage did the Party consider or address the public interest in providing the Information to Tortoise Media (and hence the majority of the population who, by reason of not being members of the Party, were excluded from the Election).

23. Faced with this refusal to engage constructively with these legitimate requests for information, the Editor of Tortoise Media made the Request by way of letter dated 17 August 2022. This was addressed to Mr Mott OBE, CEO of the Party, and copied to Mr Ben Elliott (the then Chairman of Party) and Sir Graham Brady MP (Chair of the 1922 Committee) and invited the Party to provide the Information in response to the following nine questions (the "**Questions**"): -.

> (1) [Provide] Anonymised data you hold on the demographic of the Party's membership:
>
> (a) Particularly, we invite you to provide, where held, the number of Party members who:
>
> (i) Live abroad;
>
> (ii) Are foreign nationals; and
>
> (iii) Are under voting age.
>
> (b) We also ask you to provide data in respect of:
>
> (i) The age range of members;
>
> (ii) The geographic distribution of members; and
>
> (iii) 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) [Provide] 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:
>
> (a) How does the Conservative Party check that new members are who they say they are?

(b) 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 a 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.

The Decision

24. By letter dated 26 August 2022 the Party refused to provide the Information or respond to the Questions. In the letter, referred to herein as the Decision, the CEO of the Party, Mr Mott OBE, stated *inter alia* that:

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

b. *"The selection of a candidate by a political party, even in its safest of seats where one might argue the process is in effect selecting the MP is not regarded as a public function. The election of the MP is a matter for the electorate."*

c. *"The election of the Leader of the Conservative Party is a private matter for the members of the Party under its Constitution."*

d. *"The appointment of the Prime Minister is a matter for the Sovereign".*

25. Against that background, Mr Mott OBE concluded "*I am therefore declining to answer your questions in detail*" (emphasis added). In fact, as is likely to be common ground, no answer to any of the questions was provided.

PRELIMINARY ISSUE - AMENABILITY OF THE DECISION TO JUDICIAL REVIEW

The law

26. CPR 54.1(2) provides that a claim for judicial review may be made in respect of the lawfulness of (emphasis added) *"a decision, action or failure to act in relation to the exercise of a public function"* (for the purposes of providing relief under s.31 of the Senior Courts Act 1981).

27. It is accepted that the Party is not to be regarded as exercising a public function for *all* purposes. It is, however, submitted that in conducting the Election which resulted *de facto* in the appointment of the current Prime Minister, the Party was exercising a public function and that, as such, the Decision is susceptible to judicial review.

28. As the Divisional Court recognised in *R (on the application of the Liberal Democrats, the Scottish National Party) v ITV Broadcasting Limited* [2019] EWHC 3282 at [66] (emphasis added): -

> "There can be little doubt that the reach of judicial review has to an extent been expanded by the courts over the last few decades. Moreover, a series of cases have enunciated a number of propositions and principles of general application in this regard. Even so, the application of such propositions and principles to individual cases has on occasion, it has to be said, resulted in outcomes which do not always show an entirely coherent pattern. That said, the question of whether a particular decision is or is not amenable to judicial review in any given situation must depend on the particular background and circumstances in which the decision sought to be impugned is made. As counsel before us were rightly agreed, *context is all*."

29. In considering the *"series of cases"* which identify the principles applicable to determining the scope of judicial review, the Court in *ITV Broadcasting* took as its starting point the case of *R v Panel on Takeovers and Mergers, ex parte Datafin Plc* [1987] QB 815 in which the Court of Appeal recognised that: - (i) judicial review was no longer restricted to bodies which derived their powers from legislation or the prerogative and that, as such, (ii) it was necessary to look not only at the source of the power but also its nature. As to the latter factor: - (i) Lloyd LJ acknowledged that it may be sufficient to bring a body within the reach of judicial review if the body in question *"is exercising public law functions, or if the exercise of its functions have public law consequences"* (*Datafin* [p.847B-C]; emphasis added), and (ii) Sir John Donaldson MR, emphasised the importance of looking not just at whether the body had authority *de jure* but also whether it exercised power *de facto* (in the case of *Panel on Takeovers and Mergers* being considered in *Datafin*, Sir John Donaldson MR held that it exercised "immense power *de facto*" ([p.826C])).

30. In addition, recognising the constantly evolving and flexible nature of judicial review, Sir John Donaldson MR stated that whilst it was possible to find *"enumerations of factors giving rise to the jurisdiction"* in caselaw, it was a *"fatal error to regard the presence of all those factors as essential or as being exclusive of other factors"* (*Datafin* [p.838D]).

31. An early example of the application of these broad principles is *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909, in which the Court of Appeal concluded that decisions by the Jockey Club were not amenable to judicial review since, *"[h]owever impressive its powers may be, the Jockey Club operates entirely in the private sector and its activities are governed by private law"* (Hoffman LJ at p.931-A) and, as such, had not, for the purposes in question, been "*woven into any system of governmental control of horseracing*" (Bingham LJ at p923 – H; emphasis added).

32. More recently, the scope of judicial review was considered in *R (Beer) v Hampshire Farmers Market Limited* [2004] 1 WLR 233 where the Court of Appeal re-emphasised that *"there is no simple litmus test of amenability to judicial review"*. Dyson LJ, giving the judgment of the court, stated at [16] that:

> "It seems to me that the law has now been developed to the point where, unless the source of 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 law element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted."

33. An important factor in the Court's decision in the *Jockey Club* case that the decision of the Jockey Club was not susceptible to judicial review was the fact that the claimant had a private law remedy available to him and that, as such, *"no injustice was likely to be caused to the Claimant by the denial of a public law remedy"* (Hoffmann LJ at p.933G).

34. Whilst subsequent authorities have recognised that the absence of a remedy is not determinative[9], it remains the case that in the vast majority of cases, where the Court has concluded that a decision is not susceptible to judicial review, it has identified an alternative practical remedy which prevents (significant) injustice (see *the Jockey Club* case at [p.924-A-D); *ITV Broadcasting* at [91-93]; *Taggart v Royal College of Surgeons of England v Oxford University NHS Trust & Ors* [2022] EWHC at [91][10]).

[9] See for example *R (Ames) v Lord Chancellor* [2018] EWHC 2250 at [55] where the Court stated that the fact that an aggrieved party has no other avenue of challenge to a decision which otherwise lacks a sufficient public law element to make it amenable to judicial review, is not a reason for treating the decision as if it were a public law decision.

[10] In *R (Taggart)* Mrs Justice Hill held that the defendant's production of a report which adversely impacted on the claimant's ability to practice as a Surgeon was amenable to judicial review, notwithstanding the source of the power of the Royal College of Surgeons being contractual [77]. In reaching this conclusion Hill J attached significant weight

35. By contrast, where the Court is concerned that there is no alternative remedy for the aggrieved party it has, at the very least, applied anxious scrutiny to the position; see by way of example *R v NHS Executive, ex parte Ingoldby* [1999] COD 167, which did not proceed to a substantive hearing, in which Popplewell J granted the claimant surgeon permission to seek judicial review of an adverse report provided by an external clinical review panel in light of the claimant's lack of any private law right of action against the Panel relating to the question of procedural impropriety, and the unfairness to the claimant if the report containing deficient conclusions was published or used against him for regulatory or disciplinary purposes.

36. Whether a decision of the Party in the context of its internal disciplinary process was susceptible to judicial review was addressed in *R (Khaw) v The Conservative Party* CO/8019/2013, unreported, 21 January 2014, at a permission hearing. In this very different context the Court held that the decision was not amenable to judicial review since the Party was not a public authority. The following paragraph contains the totality of the Court's reasoning (after a hearing at which that claimant appeared in person): -

> "I am refusing permission for judicial review. The Conservative Party is an association of members which is akin to a private members' organisation. It is not a public authority and it does not carry out any public function. The decisions of its disciplinary process are not therefore susceptible to judicial review. I do not intend to address any of the substantive points, because having decided that there is no right to judicial review then clearly how the Conservative Party exercised its disciplinary procedures is not relevant to that determination."

37. In *Judicial Remedies in Public Law (6th Edition)* Sir Clive Lewis states that "*recognition that a particular function is governmental or has become suitable for legislation may be enough to render bodies actually performing that function susceptible to judicial review, even though the bodies are not set up by the government*" (paragraph 2-086) and specifically identifies recommendations made from one body to another if they have a legal significance, for example because they are a pre-condition of the exercise of a statutory power or must be taken into account by the receiving body as being the type of decision which may be amenable to judicial review (paragraph 4-027).

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to the fact that, whilst there was no contractual relationship, the provision of reports risked having a serious impact on third parties in the claimant's position [78].

Submissions on the Preliminary Issue

38. As the Court recognised in *ITV Broadcasting* in considering whether a particular decision is amenable to judicial review *"context is all"*. In this case the Decision was taken in the context of the Process used to conduct the Election undertaken: -

    a. By the Party (a non-profit making organisation whose objective is to seek secure the mandate of the electorate to govern the United Kingdom);

    b. In order to choose the new leader of the Party to be appointed as Prime Minister; and

    c. Which led to the resignation of the incumbent Prime Minister and the appointment of the leader of the Party, The Rt Hon Elizabeth Truss MP, as Prime Minister of the United Kingdom.

39. Whilst it is accepted that, technically, it was Her late Majesty Queen Elizabeth II who appointed the Prime Minister, there is no doubt that in reality the Election led to the election of the Prime Minister (as recognised by the statements of the Party and the candidates on the Party website and elsewhere; see paragraphs 12, 16, 17 and 20 above for some examples).

40. Considered in this context, the Election is the paradigm example of the exercise of a public function. It was undertaken by a body whose objective is to attain control over governmental functions, and its entire purpose was to select the person who, by virtue of becoming leader of the Party, would then be appointed Prime Minister with ultimate decision-making authority over how government powers are exercised.

41. In circumstances where, as is likely to be common ground, the outcome of the Election affected every member of the public, the refusal by the Party to provide the Information requested on the grounds that the Election *"is a private matter for the members of the Party"* and, as such, not susceptible to judicial (or any other) scrutiny would, if correct, give rise to an untrammelled risk of significant injustice.

42. Whilst the Process is not governed by statute or regulations, it is on any view intrinsically *"woven into"* the governmental system. Indeed, given that its completion was a precondition to the appointment of Prime Minister, it can fairly be said that in these particular circumstances the Process was not merely *"woven into"* the system, but a fundamental component of the proper functioning of the current government.

43. It is instructive to note that the analogous process of Parliamentary elections (one outcome of which is in practical terms precisely the same as the Election; namely the leader of the majority party being appointed as Prime Minister) is governed by statute; namely the Representation of the People Act 1983 (the "**1983 Act**").

44. Under the 1983 Act the criteria for persons eligible to vote are set out in the section *"Registration of parliamentary and local government electors"* (ss.23-30 8 – 13D) as are the rules governing parliamentary elections (ss.23-30). In addition, the 1983 Act provides for a procedure which permits a parliamentary election and/or return to Parliament to be 'questioned' by way of a petition complaining of an undue election or undue return which is then tried by two judges *"on the rota for the trial of parliamentary election petitions"* (ss.120-123.). The 1983 Act provides for a similar process in relation to local elections (see by way of example of the latter the petition considered in *The Conservative and Unionist Party v the Election Commissioner & Ors* [2010] EWCA 285 at [5]).

45. As such, in the context of Parliamentary elections and, indeed, local elections it is clear that the process being undertaken reflects the exercise of a public function, with a right of independent scrutiny by an Election Commissioner whose decisions are amenable to judicial review. This, in turn, provides powerful support for the conclusion that the Election, which in the same way identified the person who was appointed Prime Minister, has the "*public law element, flavour and character to bring it within the purview of public law*" (*R(Beer)* at [16]).

46. The fact that the Election is not currently governed by legislation does not exclude the Administrative Court jurisdiction; on the contrary, as pointed out by Sir Clive Lewis in *Judicial Remedies in Public Law (6th Edition)*, *"recognition that a particular function is governmental or has become suitable for legislation may be enough to render bodies actually performing that function susceptible to judicial review"* (paragraph 2-086).

47. Recognition that the function exercised by the Party in conducting the Election is amenable to judicial review would be entirely consistent with the legislative and judicial direction of travel.

48. In recent years Parliament has increasingly seen to fit to legislate in relation to the internal activities of political parties given their importance in the country's democratic processes. In particular:

a. The Political Parties and Referendum Act 2000 (the "**2000 Act**") established the Electoral Commission and, amongst other things, made provision about the registration and finances of political parties; about donations and expenditure for political purposes; about election and referendum campaigns and the conduct of referendums; about election petitions and other legal proceedings in connection with elections.[11]

b. The Equality Act 2010 introduced "*Special provision for political parties*" (ss.104 to 106) including requirements in relation to the selection of candidates and information about diversity in range of candidates.

49. This reflects the fact that, as Lord Sumption recognised in *Khuja v Times Newspapers* [2017] UKSC 49 at [13], the significance of public scrutiny has "*if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions*".

50. An additional compelling factor in favour of the Decision being susceptible to judicial review is that, if there is no recourse to the Administrative Court, then members of the public (in particular those who do not belong to the Party) have no means of obtaining any information concerning the Process nor to have any independent scrutiny of any concerns relating to the Process.

51. The consequences which would flow from the absence of any form of judicial or independent scrutiny are highlighted by the stance adopted by the Party in: -

a. Dealing with the Request. In particular, in the Decision the Party does not even attempt to engage with the Public Interest, saying simply that the "*election of the Leader of the Conservative Party is a private matter for the members of the Party under its Constitution*".

[11] The Neil Committee Report of October 1998 into '*The Funding of Political Parties in the United Kingdom*', the recommendations of which led to the 2000 Act, referred to the seven Principles of Public Life and stated (at 2.9) that three of those principles were especially relevant to the funding of political parties, namely Integrity, Accountability and Openness. In relation to Openness, the Report stated that: "Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands." The Electoral Commissioner publishes quarterly figures which confirm that the Party does receive public funds.

b. Not publishing the detailed rules governing the Process (which we understand to be amenable to change at any time at the absolute discretion of the 1922 Committee).

52. Whilst it is *no* part of Tortoise Media's case to challenge the outcome of the Election, the stance adopted by the Party in the Decision demonstrates that, without access to the supervisory jurisdiction of the Administrative Court, there is no transparency or accountability in relation to the Process. If this is correct then, taking a hypothetical example, if information were available that the Process was flawed but the Party refused to address this, there would be no remedy which, in turn, would risk having profound consequences for all members of the public.

53. Lastly, Tortoise Media acknowledges the importance of Courts not interfering with political matters. In this case, however, the Decision relates to the refusal to provide Information which would enable the vast majority of the public who are not members of the Party, and thus who were unable to participate in the Election, to understand the Process which resulted in The Rt Hon Elizabeth Truss MP being chosen to be appointed as Prime Minister. As such, the challenge is to all intent purposes 'apolitical' in that it relates to information concerning those who participated in the Process as opposed to the outcome of the Election.

GROUND ONE

54. For the same reasons as those referred to above which establish that the Decision is amenable to judicial review, the Decision reflects an exercise of a public function within the meaning of s6(3)(b) of the HRA. It would be counter intuitive if the Decision had a sufficient "*public law element, flavour and character*" so as to render it susceptible to judicial review, but not to bring it within the application of the HRA.

55. Whilst recognising that the issue of whether a relevant defendant is a public authority for the purposes of s.6 of the HRA does not necessarily involve precisely the same principles as the question of whether a decision of a particular entity is susceptible to judicial review, the Courts have consistently recognised the similarity in language and character of the two issues, the overlap of factors which come into play in considering both issues and the fact that in most cases the same answer is reached on both issues (see Lord Neuberger in *YL v Birmingham City Council* [2007] UKHL 7, [2008] 1 AC 95 at [156]; *R (Beer)* at [29] in which the Court of Appeal observed that "*on the facts of most cases the two issues march hand in hand: the answer to one provides the answer to the other*").

56. In *ITV Broadcasting* the Court at [72] held that the following was a "*useful summary of some of the propositions to be extracted from the opinions of the majority in the YL case*" relevant to deciding whether a function fell within the purview of the HRA: -

a. The fact that a service is for the public benefit does not mean that providing the service is a public function;

b. The fact that a function has a public connection with a statutory duty of a public body does not necessarily mean that the function is itself public;

c. The fact that a public authority could have performed the function does not mean that the function is a public one if done by a private body;

d. The private profit-making motivation behind a private body's operations points against treating it as a person with a function of a public nature; and

e. Functions of a public character are essentially functions which are governmental in nature.

57. Addressing the relevant factors from this summary in the context of the present challenge:-

a. It is understood that the Election was undertaken for the public benefit;

b. There is no profit-making motivation underpinning the Party's operation generally or, specifically, the Election; and

c. The function of the Election was to identify the person who would have ultimate decision-making power in relation to all governmental functions and, as such, was intrinsically governmental in nature.

58. Accordingly, in conducting the Election the Party was exercising a public function and, for this reason, the Decision relating to the Election is also an exercise of a public function for the purposes of the HRA.

GROUND TWO

59. The Party materially erred in law in failing to have regards to and/or give effect to Tortoise Media's right under Article 10(1) of the ECHR to access the Information. In particular the Decision failed to have regards to the fact that the Request was made in connection with

journalism and so as to provide information of undoubted public interest to members of the public.

The law

60. Article 10 of the ECHR entitled "Freedom of Expression" provides: -

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

61. The Strasbourg Court has long recognised the freedom for journalists to be informed so as correctly to impart information to others: see *Atkinson v United Kingdom* (1990) 67 DR 244 and *Grupo Interpres SA v Spain* (1997) 89B DR 150. More recently the European Court of Human Rights ("ECtHR") in *Shapovalov v Ukraine* [2012] ECHR 1655 expressly acknowledged that "*the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom*" (at [68]).

62. At a domestic level the two most recent cases in which the Supreme Court considered the right to access to information under Article 10 are *British Broadcasting Corpn v Sugar (No 2)* [2012] UKSC 4; [2012] 1 WLR 439 and *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455.

63. *Sugar*: - Lord Brown of Eaton-under Heywood (with whom Lord Mance agreed) held that, by reference to the Strasbourg jurisprudence then available[12], Article 10 involved no positive right of access to information, nor any obligation on the State to impart such information, at [94-97].

[12] Specifically *Leander v Sweden* (1987) 9 EHRR 433, *Gaskin v United Kingdom* (1989) 12 EHRR 36, *Guerra v Italy* (1998) 26 EHRR 357 and *Roche v United Kingdom* (2005) 42 EHRR 599.

64. <u>*Kennedy*</u>*:* - the Supreme Court, by way of *obiter dicta*, reviewed the position under Article 10 by reference to subsequent Strasbourg case law not available at the time *Sugar* was heard.[13]

65. The narrow issue which fell to be considered in *Kennedy* was whether s.32(2) of the Freedom of Information Act 2000 ("**FOIA**") provided an absolute exemption from disclosure of material obtained/created by the Charity Commission for the purposes of undertaking an inquiry into the activities of charities. By way of a majority decision the Supreme Court held that the exemption in s.32(2) was absolute, but that this did not breach Article 10 since there were alternative routes available to obtain the information which was the subject of the exemption in relation the request made under the FOIA. Whilst this addressed the issue in the appeal the Supreme Court went on to consider whether Strasbourg case law recognised a right to access under Article 10 information held by a public body.

66. Lord Mance, whose judgment contains the most detailed analysis of the Strasbourg case law relating to Article 10, posed the following question (emphasis added, at [90]):-

> "*What to make of the Strasbourg case law in the light of the above is not easy*. One possible view is the various Section decisions open a way around the Grand Chamber statements of principle in circumstances where domestic law recognises or the European Court of Human Rights concludes that it should, if properly applied, have recognised, a domestic duty on the public authority to disclose the information. The *Österreichische* case might perhaps be suggested to fit into this pattern, though it does not appear to have represented any part of the First Section's thinking. Alternatively, the *Österreichische* case may be regarded as a special case, influenced by what were, on the First Section's reasoning, the Commission's clear breaches of article 6."

67. In addressing this question Lord Mance against the background of the "*present unsatisfactory state of the Strasbourg case law*", at [94], held that, had it been necessary to do so, he would have concluded that there was no obligation under Article 10 on the State to impart such information.

68. Lord Toulson, who "*dealt shortly with the Strasbourg decisions*" at [143], whilst recognising that "*what is so far lacking from the more recent Strasbourg decisions, with respect, is a consistent and clearly reasoned analysis of the 'right to receive and impart information' within the meaning of Article 10 particularly in light of the earlier Grand Chamber decisions*" at [144], reached the same conclusion as Lord Mance (see [147-148]). Lord Sumption agreed with Lord Mance and Lord Toulson, at [154].

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[13] Specifically *Gillberg v Sweden* (2012) 34 BHRC 247, *Shapovalov v Ukraine* (Application No 45835/05) (unreported) given 31 July 2012, *Youth Initiative for Human Rights v Serbia* (2013) 36 BHRC 687 and, *Osterreichische Vereinigung zur Erhaltung, Starkung und Schaffung v Austria* (Application No 39534/07) (unreported) given 28 November 2013.

69. In the minority, Lord Wilson, with whom Lord Carnwarth agreed, considered that a right to require an unwilling public authority to disclose information could arise under Article 10, at [189] and [219].

70. *Magyar*: - Approximately 3 years after the Supreme Court heard the appeal in *Kennedy*, the Grand Chamber delivered its judgment in *Magyar Helsinki Bizottsag v Hungary* (18030/11) (2020) 71 E.H.R.R. 2, [2016] 11 WLUK 953 ("*Magyar*") in which it recognised in unambiguous terms that Article 10 ECHR could carry a positive obligation on a public to provide information to the public (emphasis added): -

> "156. In short, the time has come to clarify the classic principles. The Court continues to consider that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him." Moreover, "the right to receive information cannot be construed as imposing on a State positive obligation to collect and disseminate information of its own motion". The Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, *secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right*"."

71. The Grand Chamber identified four threshold criteria that need to be met in order for there to be a right under Article 10 to access information held by a body exercising a public function, at [158] – [170]: -

a. First, the request must be to enable the applicant's exercise of the freedom to receive and impart information and ideas to others. In this regard, it is relevant to consider whether the request is in connection with journalism or the "watchdog" function of an NGO.

b. Second, the information sought must meet a public interest test [162-163].

c. Third, an important consideration in assessing whether a state has interfered with Article 10 rights by denying access to documents is the role of the applicant: in particular whether the applicant is seeking information in order to provide information to the public, in the capacity of a public "watchdog".

d. Fourth, the court will have regard to the fact that information is "ready and available", and does not necessitate collection of data by the government.

72. Post-*Magyar*: - Subsequently Mr Kennedy made an application to the ECtHR in which he again sought to challenge the exemption in s32(2) of FOIA. The ECtHR in *Times Newspapers Limited and Kennedy v the United Kingdom Application* No. 64367/14 declared this application to be inadmissible on the grounds that Mr Kennedy had not exhausted his domestic remedies. In the course of its judgment the ECtHR, having set out the Supreme Court's analysis in *Kennedy*, recorded that, following *Magyar*, there was '*now*' a right of access under Article 10 under "certain conditions" to information [82]: -

> "While the Court has now recognised that Article 10 § 1 of the Convention might, under certain conditions, include a right of access to information (see Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11, § 149, 8 November 2016), it does not include a right of access to information by a particular legislative scheme. What matters, therefore, is whether the legislative framework as a whole satisfies the requirements of Article 10 of the Convention, read in light of the Court's most recent jurisprudence."

73. As such, the position under ECHR law, is now clear:-

a. Article 10 does not in terms confer a general right of access to information held by a public body/body exercising a public function (a "**Public Body**").

b. Where an applicant has under domestic law an established right to the requested information, a failure by a Public Body to give effect to that right, will constitute an interference with a right protected by Article 10(1).

c. Where there is no domestic law entitlement (whether generally or because of limitations to entitlement or applicable exemptions), where an applicant performing a 'social watchdog' role is involved in the legitimate gathering of information on a matter of public importance with the intention of imparting that information (or information relying upon it) so as to contribute to public debate on that matter, that individual has (or can have) under Article 10(1) an individual right of access to information relating to that matter.

74. At a domestic level, however, the position is less clear cut.

75. In *Moss v Information Commissioner* [2020] UKUT 242 (AAC) Judge Wright, sitting in the Upper Tribunal, held that *Magyar* should not be followed. Judge Wright accepted: -

> "…that *Magyar* is, and was intended to be, a watershed case in terms of the reach of Article 10 of the ECHR. That is what the Grand Chamber was referring to, in my view, when it said "the time has come to clarify the classic principles". That 'clarification' was to the effect that in certain circumstances the right guaranteed by Article 10 may cover a right of access to information held by a public authority." [40].

76. However, whilst recognising that "*as a matter ECtHR law [Article 10] now covers, albeit in limited circumstances, a right of access to information*" [59], Judge Wright held that no such right existed in domestic law since he was bound by the rules of precedent to follow the view of the majority in *Kennedy*:

> "the view of five members the Supreme Court in *Kennedy*, as well as the Court of Appeal in *Kennedy* and two if not three members of the Supreme Court in *Sugar (No.2*), in my judgment, is that domestic law does not consider Article 10(1) extends to include a right of access [to] information, and I consider myself bound by the rules of precedent to follow this view." [59]

77. Thereafter, the Upper Tribunal in *Foreign Commonwealth and Development Office v Information Commissioner* [2022] 1 WLR refused to depart from *Moss*, on the grounds that to do so would require "*revisiting the reasoning in*" *Kennedy* and *Sugar* [82].

Article 10 – the right to access information

78. Under ECHR law there is a now an established right under Article 10 to access information where the four threshold criteria identified by the Grand Chamber in *Magyar* are met.

79. In such circumstances, as Lord Mance recognised in *Kennedy* at [59], citing the words of Lord Rodger of Earlsferry stated in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at [98] "*Strasbourg has spoken, the case is closed*". In other words, 'Strasbourg' has recognised the right to access information, and this right now should be recognised by national courts.

80. The difficulty facing the Supreme Court in *Kennedy*, which was critical to the analysis of the majority, was that as recognised by Lord Mance [59] (emphasis added): -

> "The *Strasbourg jurisprudence is neither clear nor easy to reconcile.* …In the present case, Strasbourg has spoken on a number of occasions to apparently different effects. Further, a number of these occasions are Grand Chamber decisions, which do contain apparently clear-cut statements of principle. But they are surrounded by individual section decisions, which appear to suggest that *at least some members of the court disagree with and wish to move on from the Grand Chamber statements of principle. If that is a correct reading,* then it may be unfortunate that the relevant sections did not prefer to *release the matter before them to a Grand Chamber.*"

81. The position has been transformed by the decision of the Grand Chamber in *Magyar*. The Strasbourg jurisprudence has now been "*reconciled*". It is no longer in the "*unsatisfactory state*" referred to by Lord Mance, at [94]. The "*matter*" relating to Article 10 has now been placed before a Grand Chamber which has in unequivocal terms: -

    a. confirmed that the "*apparently clear-cut statements of principles*" in the Grand Chamber decisions relied on by the majority in *Kennedy* do *in fact* provide for a right of information under Article 10; and

    b. in so doing provided precisely the "*clearly reasoned analysis of the 'right to receive and impart information'*" within the meaning of Article 10 sought by Lord Toulson (which had been "lacking" when Kennedy was decided [144]).

82. It is for this reason that in *Times Newspapers*, in the context of their analysis of the Supreme Court's judgment in *Kennedy*, the ECtHR stated in terms that there "*now*" existed a right to access information under Article 10 recognised in *Magyar* ([82]; cited at para. 77 above).

83. As such, the edifice underpinning the reasoning of the majority judgments in *Kennedy*; namely the absence of a clear decision from the Grand Chamber on the issue of whether Article 10 provides for a right to information, cannot stand. Indeed, applying Lord Mance's reference to the dicta of Lord Rodger of Earlsferry in *AF (No 3)* at [98] it would follow from the fact that "*Strasbourg has [now] spoken*" that the "*case is [now] closed*" that there is a right to information under Article 10.[14]

84. The analysis of the majority in *Kennedy* is obiter and, as such, is not binding.[15] In any event, it has now been overtaken by developments in the Strasbourg law which undermine the very premise of the reasoning of the majority, and confirms in broad terms the conclusions of Lord Wilson and Lord Carnwath (in their majority judgments in *Kennedy*). Accordingly,

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[14] Whilst it is accepted that section 2(1) of the HRA does not require the domestic courts to follow Strasbourg judgments, it is highly unusual for domestic courts to decline to follow any clear and constant jurisprudence of the Strasbourg court: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295; *R (Ullah) v Special Adjudicator* [2004] 2 AC 323; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] AC 1312 and *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2011] 2 AC 104. In the context of Article 10 and the right to access information this is entirely consistent with direction of travel of domestic law and the "*growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions*" (per Lord Sumption in *Khuja*.. There is, therefore, no reason to consider that the domestic court would deny access to the limited right to access information recognised in Magyar.

[15] See eg *Barton and Booth v R* [2020] EWCA Crim 575: even in the Criminal jurisdiction, where there is *"a looser approach to precedent than applies in the Civil Division"* [96] *obiter dicta* of the Supreme Court is not binding on the lower courts save for where *"all the judges in the appeal in question in the Supreme Court agree that to be the effect of the decision"* [104].

Kennedy poses no bar to this Court applying the principles set out in *Magyar* in giving effect to rights under Article 10.

85. Furthermore, the decision in *Magyar* is not in any event inconsistent with the judgment of Lord Brown in *Sugar* and, in particular, his conclusions at (emphasis added) [94]: -

> "In my judgment these three cases fall far short of establishing that an individual's article 10.1 freedom to receive information is interfered with *whenever*, as in the present case, *a public authority*, acting consistently with the domestic legislation…, *refuses access to documents*. Of course, every public authority has in one sense the censorial power of an information monopoly in respect of its own internal documents. But that consideration alone *cannot give rise to a prima facie interference with article 10 rights whenever the disclosure of such documents is refused.* …The applicant's difficulty to my mind is rather that article 10 creates *no general right* to freedom of information and *where*, *as here*, the legislation expressly limits such right to information held otherwise than for the purposes of journalism, it is not interfered with when access is refused to documents which are held for journalistic purposes."

86. In *Magyar* the Grand Chamber, consistently with Lord Brown's analysis, confirmed that there is no "*general right to*" access information "*whenever…a public authority…refuses access to documents*". It went on, however, to recognise that there exists a limited right to information where four specific criteria are met. Whether a limited right to access information existed under Article 10 was not addressed by Lord Brown in *Sugar*. As such, there is nothing in Lord Brown's judgment which is inconsistent with a limited right to access information under Article 10.

87. Accordingly, Judge Wright erred in *Moss* in concluding that: - (i) he was bound by *Kennedy*, and (ii) this prevented him from giving effect to the Article 10 rights recognised in *Magyar*.

Is Article 10 engaged by the Request?

88. The Party does not deny possessing the Information. Accordingly, addressing the four criteria in *Magyar* in turn:

89. First, the request is made by Tortoise Media in connection with journalism.

90. Second, the Information meets the public interest test set out at [160-162] in *Magyar* (emphasis added)-

> "160. The Court has previously found that the denial of access to information constituted an interference with the applicants' right to receive and impart information in situations where the data sought was… "information about a constitutional complaint" and "*on a matter of public importance*" (see *Társaság*, cited above, §§ 37-38),…attaching weighty

> consideration to the presence of particular categories of information considered to be in the public interest.
>
> 161. Maintaining this approach, the Court considers that the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, *inter alia*, *disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large*.
>
> 162. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about."

91. The Information relates to the Election; a matter of undeniable "*public importance*" which is of "*interest for society as a whole*". Moreover, the nature of the Information sought will assist in *providing* "*transparency in the manner of conduct in public affairs*" and "*thereby allow participation in public governance by the public at large*". On any view of the public interest test it is met by the Request. The matters which are of particular concern to Tortoise Media, in its assessment of the public interest, are set out in WS/JH at paragraphs 35 – 41.

92. Third, the Request was made with the intention of providing the Information to the public.

93. Fourth, it is not suggested by the Party that the Information is not readily available, nor is there any reason to consider that the Information is not readily available. Furthermore, if in fact the Party doesn't have the Information, then this is of equally compelling public interest. It would suggest inadequate checks or internal scrutiny concerning the Party's membership and, as such, those who voted in the Election. In this regard it should be noted that Tortoise Media made applications for membership of the Party on behalf of two foreign nationals, a fictional individual using the maiden name of the late Prime Minister Margaret Thatcher, and a tortoise, all of which were granted, with membership packs being sent by the Party.

94. Accordingly, as the Request meets the threshold criteria in *Magyar,* Tortoise Media has a right of access to the Information under Article 10.

GROUND THREE – THE DECISION IS MATERIALLY FLAWED

95. The Decision proceeds on the misconceived basis that the Party "*does not carry out public functions*" and, as such, is under no legal obligation to provide the Information.

96. The Decision materially errs in: -

a. Treating the fact that the Party is not a public body (which is accepted) as being determinative of whether it carries out public functions; or

b. Failing to address adequately or at all why it said that the Party is not exercising a public function in conducting the Election.

97. Accordingly, if it is established that the Party is exercising a public function in conducting the Election, the Decision is materially flawed on the grounds that the Party has failed to: -

a. Consider adequately or at all any right of access to the Information enjoyed by Tortoise Media (whether under Article 10 or otherwise); and/or

b. Have regards to a relevant consideration in exercising a public function; namely the Public Interest (which, as Lord Sumption recognised in *Khuja* at [13], "attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions".

98. Indeed, it is apparent from the Decision that no consideration was given to the substance of the Request or whether to provide some or any of the Information. Rather the position that was taken was simply the Election "*is a private matter for the members of the Party*". Even if, which is denied, the Party is under no legal obligation to provide the Information, it is nevertheless a damning indictment on the Party's commitment to transparency and openness that no consideration was given to voluntarily providing some or all of the Information.

CONCLUSION AND RELIEF SOUGHT

99. Accordingly, Tortoise Media invites the Court to quash the Decision and order the Party to provide the Information or, alternatively, to issue a further response to the Request having proper regard to: - (i) the fact that the Party was exercising a public function in conducting the Election, and (ii) Tortoise Media's right to access the Information under Article 10.

100. In its response to the letter before action the Party suggests, without identifying where, that the Information is publicly available. This is not accepted by Tortoise Media. That being said, insofar as the Party has already made the Information publicly available, then there would seem to be no reasonable basis for refusing to reply to the Questions. In particular it

is not suggested answering the Questions would involve significant effort (which, if the Party is correct, would reflect the fact that the Information has already been made publicly available).

101. For all of the reasons set out above, Tortoise Media submits that permission to proceed with this claim for judicial review should be granted: the claim is clearly arguable. Further or alternatively, the Court is invited to: - (i) order a rolled up permission hearing so that full argument can be heard in relation to the matters of significant wider public importance raised in this claim, and/or (ii) to exercise its discretion on an exceptional basis to grant permission, see in this regards *ITV Broadcasting* at [118]).

ALAN PAYNE KC
AARON MOSS

5 ESSEX COURT
TEMPLE

7 October 2022