IN WESTMINSTER MAGISTRATES' COURT

MARCUS BALL

APPLICANT

V

ALEXANDER BORIS de PFEFFEL JOHNSON

PROPOSED DEFENDANT

DECISION AND REASONS OF DISTRICT JUDGE M. COLEMAN

THE APPLICATION

1. The court is dealing with an application, dated 20th February 2019 and received by this court on the 25th February 2019, for a summons against the proposed defendant, Alexander Boris de Pfeffel Johnson, for three offences alleging misconduct in a public office.
2. Although there is no obligation on the court to give written reasons why an application for a summons is granted or refused (*R v Worthing Justices, ex parte Norvell [1981]1 WLR 413)* this is an unusual and exceptional application with a considerable public interest and it is right that full reasons are provided to the unsuccessful party.
3. The information makes the followings allegations:

"The proposed defendant was a holder of 2 public offices. He was a Member of Parliament and also the Mayor of London. The prosecution focuses on 2 timeframes. The first is the period between 21 February 2016- 23 June 2016, with the earlier date reflecting the date when Mr Johnson announced his decision to vote to leave the European Union (EU) and the later date being that of the EU referendum.

The second period is between 18 April 2017- 3 May 2017 which reflects the period commencing upon the date when the 2017 general election was announced until the date when Parliament was dissolved.

The proposed defendant was at all material times a member of Parliament. Further, during the first period, he was until 8 May 2016 the Mayor of London.

During both time periods outlined above, the (proposed) defendant repeatedly lied and misled the British public as to the cost of EU membership, expressly stating, endorsing or inferring that the cost of EU membership was £350 million per week. Whilst doing so he was acting as a public officer and using the platforms and opportunities offered to him by virtue of his public office. Further the defendant knew that such comments were false or misleading in that he had on other occasions used accurate figures and showed a clear understanding of how to quantify UK spending in respect of the EU. Lying on a national and international platform undermines public confidence in politics, undermines the integrity of public referendums and brings both public offices held by the (proposed) defendant into disrepute.

The law dictates that misconduct to such a degree requires a criminal sanction. There is no justification or excuse for such misconduct. To that end Mr Johnson was written to by the prosecution (applicant) on 16th November 2018 and invited him to provide an explanation and grounds for his belief in the accuracy and truth of the comments made. The prosecution (applicant) expressly informed the proposed defendant that it could provide any such exculpatory material to the court at this stage. Whilst the proposed defendant was not obliged to, he has tendered no such explanation or material."

PROCEDURAL HISTORY

4. The application was given to me to consider on the 8th March. On the 15th March the proposed defendant was written to inviting him to make written representations about the application.
5. The proposed defendant instructed solicitors. An exchange of correspondence led to my holding a closed hearing on the 14th May 2019 dealing with disclosure of the documents referred to in the information and an earlier legal opinion given to the applicant. A public hearing took place on the 23rd May 2019 at which the proposed defendant's lawyers could make oral representations as to why a summons should not be granted. I had fully considered Criminal Procedure Rule 7.12 which directs that the

court may determine an application to issue a summons without a hearing, or at a hearing (which must be in private unless the court otherwise directs.)

6. As stated above, as this is an unusual and exceptional application with a considerable public interest, and because there was already a great deal of publicity in the public domain about the application being made, I believed that the principles of open justice required that the application be in open court.
7. This is my reserved decision from the hearing on the 23rd May.
8. Before the hearing I was provided with a significant quantity of papers in an agreed bundle. Following court directions both sides provided their written representations to me in advance of the hearing. Each party had the opportunity to develop their submissions at the public hearing.
9. Mr Lewis Power QC represented the applicant. Mr. Adrian Darbishire QC represented Mr. Johnson.
10. I am extremely grateful to each of them for their thorough and clear written representations.

THE OPEN HEARING

11. At the outset of the open hearing I was asked by Mr. Darbishire QC to consider reporting restrictions. Having considered CPR 6 I ruled that restrictions were not required in this case.
12. The concern at a preliminary hearing is that the proposed evidence would be in the public domain and could potentially compromise the integrity of any future trial. In this case the main evidence, (what Mr Johnson's alleged misconduct is said to be) which was likely to be placed before a jury, is already in the public domain and no reference at this hearing was to be made about the supporting evidence referred to in the application. That evidence would be made available in due course in the usual way. The hearing was to consist of submissions on points of law.
13. In the interests of open justice, no reporting restrictions were imposed.
14. The granting of the summons is opposed by the proposed defendant. His position, as set out below, is lifted from the defence submissions and reproduced with the kind permission of the defence team:

15. "MR JOHNSON'S POSITION IN SUMMARY:

As Lord Widgery CJ succinctly observed in Klahn[1], when faced with an application of this sort:

> *"The magistrate must be able to satisfy himself that it is a proper case in which to issue a summons."*

This application is brought for political purposes. The position presented to the Court is that this is a disinterested attempt to improve the standards of political debate. The reality of this enterprise is different. The 'Prosecutor' (a limited company) is 'Brexit Justice Limited'. Brexit Justice Limited is the product of a campaign to undermine the result of the Brexit referendum, and/or to prevent its consequences. The company and this application owe their existence to the desire on the part of individuals such as Mr Ball to undermine the referendum result. The 'Brexit justice' which is ultimately sought is no Brexit.

The application is a (political) stunt. Its true purpose is not that it should succeed, but that it should be made at all. And made with as much public fanfare as the prosecution can engender. While all questions of law are of course for the Court, it is relevant to note that, in taking this course, the Applicant disregarded distinguished advice against prosecution, preferring to impugn the competence and integrity of the source of that advice. The Applicant insists that the intention is that the case should proceed to a trial, yet it is in no position for that to happen. These are relevant facts for the Court to consider, when addressing the necessarily broad question which must be answered, is the Court satisfied that this is a proper case for the issuing of a summons?

Consistent with it bearing a political motive, the application does not disclose an evidential and legal case for the issuing of a summons. The application represents an attempt, for the first time in English legal history, to employ the criminal law to regulate the content and quality of political debate. That is self-evidently not the function of the criminal law. Specifically, a complaint about the way in which a political campaigner has deployed publicly-available statistics in the services of a political debate is not a proper basis for the criminal offence of misconduct in public office.

[1] *R v West London Metropolitan Stipendiary Magistrate*, ex parte *Klahn* [1979] WLR 933, at 936E

In any event, the alleged facts here do not come close to establishing the kind of misconduct with which the offence is concerned. The misconduct offence depends upon proof of the serious abuse of the powers of the office (or a grave failure to exercise them at all). The nature of the alleged misconduct and the context of it are far from the scope of this offence. The essence of the offence is of abuse of the public office, not poor conduct by a public official. It follows that, even if there were evidence of conduct which reflects on the fitness of the office holder or even shows him to be unfit to hold the office, that is nothing to the point unless it amounts in itself to an abuse of the powers or duties of the office itself."

16. MATTERS TO BE CONSIDERED BY THE COURT IN RELATION TO THE GRANTING OF A SUMMONS

17. BASIC PRINCIPLES

- The discretion to issue a summons is not unfettered or unlimited. The general principle is that a summons ought to be issued pursuant to a properly laid information unless there are compelling reasons not to do so, most obviously if an abuse of process or impropriety is involved, or whether it would be vexatious to issue a summons, in other words whether there is the presence of an improper ulterior purpose and/or long delay. The consequences may be significant but the threshold to grant a summons is low.
- There is no obligation or requirement for a person seeking the issue of a summons to approach the police first, though this may be a relevant circumstance in any particular case.
- The court at this stage **is not making any findings of fact and is not adopting the role of a court of trial.**

18. The factors to be considered by the court were set out by Lord Widgery CJ in *R v West London JJs ex parte Klahn (sic)*

It would appear that the magistrate should at the very least ascertain:

a) the allegation is of an offence known to law, and if so, that the essential ingredients of the offence are prima facie present
b) the offence alleged is not out of time
c) the court has jurisdiction
d) the informant has the necessary authority to prosecute
e) the court may and indeed should consider whether the allegation is vexatious

f) since the matter is properly within the magistrate's discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given stop plainly he should consider the whole of the relevant circumstances.

19. The court is also entitled to consider at this stage if it would be an abuse of the process of the court to issue proceedings. That issue however can also be raised by defendants at a later stage. *(D v A [2017] EWCA Cri 1172)*
20. Dealing with these matters in turn:
21. **IS MISCONDUCT IN A PUBLIC OFFICE AN OFFENCE KNOWN TO LAW**? Yes, it is, and it is contrary to common law.
22. **ARE THE INGREDIENTS OF THE OFFENCE PRIMA FACIE PRESENT?**
23. The elements of misconduct in a public office were set out in *Attorney General's Reference (Number 3 of 2003) [2004] EWCA Crim 868* :

1. a public officer acting as such.
2. wilfully neglects to perform his duty/or wilfully misconducts himself.
3. to such a degree as to amount to an abuse of the public's trust in the officeholder.
4. does so without reasonable excuse or justification.

24. PUBLIC OFFICER
25. The defence accepts that the proposed defendant was a Member of Parliament and Mayor of London at the relevant times. What constitutes "public officer" was considered by Sir Brian Leveson PQD in *R v Mitchell [2014] EWCA Crim 318*. He said, at paragraph 16,

"*in our judgement, the proper approach is to analyse the position of a particular employee or officer by asking 3 questions:*

- *What is the position held?*
- *What is the nature of the duties undertaken by the employee or officer in that position?*
- *Does the fulfilment of those duties represent the fulfilment of one of the responsibilities of government such that the public have a significant interest in the discharge of that duty which is additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty?*

If the answer to the last question is "yes" the relevant employee or officer is acting as a public officer: if "no", he or she is not acting as a public officer

26. I accept the assertion made by the applicant that there can be no doubt that a Member of Parliament is indeed a public officer. I equally accept that being Mayor of London is also a public office.
27. ACTING AS SUCH
28. Mr Power QC asks me to consider the *Attorney General's Reference (Number 3 of 2003) [2004] EWCA Crim 868*, mentioned above, in which the Attorney General sought the opinion of the High Court about the ingredients of the common law offence of misconduct in a public office. The court said "*Roderick Evans J rightly acknowledged the "great variety of circumstances" in which the offence of misconduct in a public office may be charged. It is clear from the authorities that the defendant must be a public officer acting as such. In the absence of submissions on those ingredients, which may in some circumstances present problems of definition, we do not propose to elaborate on them.*
29. Mr Power has referred me to the Law Commission's paper on Misconduct in a Public Office, dated 20 January 2016. The commissioners observe in respect to "acting as such" that *it appears to be sufficient that there is an improper use of the opportunity afforded by a public office. All that this element serves to exclude is an act performed by the officer in a private capacity to which his or her position is simply irrelevant* (paragraph 2.119) Relying on a Law Commission paper may not be the applicant's strongest point.
30. The applicant's position is that in respect of counts 1 and 2, which allege misconduct between 21 February 2016- 23 June 2016 whilst a Member of Parliament (count one) and whilst Mayor of London (count 2) the proposed defendant, as a highly prominent supporter of the campaign to leave the European Union, used his status and his high profile, to lead the "Vote Leave" campaign for the 2016 referendum.
31. As Mayor of London the proposed defendant signed off several letters in that capacity when expressing his views on Brexit. The proposed defendant's chief of staff, Mr Ed Lister, informed the mayor's staff that it was "*official mayoral policy*" to support the case for the leaving the EU. A policy being deemed official, and therefore of the office, would make any campaigning thereafter by the proposed defendant official and pursuant to his office.
32. Mr. Darbishire QC puts forward the following argument, reproduced with his consent from his skeleton argument:

"For present purposes, it is accepted that a Member of Parliament and/or the Mayor of London are "public officials", parts of the duties associated with those roles forming, as the test was put in Cosford[2] (per headnote), "the fulfilment of one of the responsibilities of government."

As will be seen below, that of course does not mean that everything done by such a person will itself form part of the responsibilities of government, or the discharge of that office. Electoral or referendum campaigning is not the 'fulfilment of one of the responsibilities of government'.

The Committee on Standards in Public Life ("CSPL") observed as long ago as 1998 that the government does not participate in general election or referendum campaigns. While the conduct of an election (returning officers, election officials, provision of polling stations etc.) is undoubtedly the fulfilment of one of the responsibilities of government, the actual conduct of campaigning is not.

The offence is concerned with the manner in which the specific powers or duties of the public office are discharged. This element is in part reflected in the requirement that, at the time of the misconduct alleged, the individual must be acting as a public official. This element is obviously closely connected with the requirement that the evidence must show a breach of the duty of the office, which is addressed below. We recognise that the arguments overlap to a significant extent, although the result is the same however the elements are approached.

Here, the misconduct alleged concerns Mr Johnson's adoption and repetition of the Vote Leave campaign message concerning the £350m per week. No allegation is made, nor could any be made, that Mr Johnson adopted or commended that figure for any purpose other than in the course of a contested political campaign. The claim was based upon information that was, at all times, freely available to all. As with very many claims made in political campaigns, it was challenged, contradicted and criticised, and many examples of this process are furnished in the material supplied by the Applicant.

In drawing upon freely-available public statistics for the purpose of a political argument, Vote Leave, and those who supported and spoke for that campaign, were clearly not acting as public officials, nor exercising any public power. They made no claim to special knowledge of the sums expended by the UK, they exercised no official powers in promoting that message and the provision of figures about UK spending formed no part of Mr Johnson's official duties.

[2] [2013] EWCA Crim 466; [2013] 3 W.L.R 1064

There is no example where a public official has been taken to be 'acting as such' in remotely comparable circumstances. The Applicant has, with respect, overlooked for the purposes of their argument the substance of the misconduct cases. Certainly, there are examples of relevant breaches of duty where the public official abused the power given to him by virtue of his office, albeit that the misconduct fell outside the scope of his authority (see below). In all of these cases, the individuals concerned were exploiting the official powers of the office for corrupt private advantage. That is the gist of the misconduct offence.

The allegation made here is of a wholly different kind. The claim is that, on the campaign trail, Vote Leave (and Mr Johnson specifically) twisted or mis-represented public statistics to make a political point. Such conduct, if proved, lacks entirely the necessary relationship with the actual duties and powers of the public offices concerned.

> ***The kernel of the offence is that an officer, having been entrusted with powers and duties for public benefit, has in some way abused them, or has abused his official position."***

The alleged conduct here is the misuse of statistics in the course of non-party, national debate, in order to burnish a very public political argument, participation in which is not a duty of any official position nor the exercise of any official power. The situation here shares none of the features of the "various circumstances in which the offence has been applied" and does not begin to 'bear the indicium' of the harm which the offence is designed to address. As noted, the offence is not concerned with poor behaviour by public officials, but with the abuse of official power: the proper territory of the offence is serious misconduct in the discharge of a public office and not poor conduct by someone who is a public official (even when that takes place in public).

The misconduct alleged here could not sensibly be characterised as being "incompatible with the proper discharge of the responsibilities of his public offices"; it has, in truth, nothing to do with the discharge of those offices. And that link is essential; the conduct must be incompatible. In other words, it must be logically or practically impossible for the individual to engage in the misconduct alleged, whilst simultaneously exercising the specific powers and discharging the duties of his/her office in a proper way."

33. I have considered Mr. Darbishire's skilfully argued submissions but at this stage I am considering only whether there is prima facie evidence, which will be made available before trial, of the necessary ingredients of this aspect of the offence. I consider that the defence arguments set out above are trial issues to be determined following service of all the evidence. That stage has not yet been reached.
34. WILFULLY NEGLECTS TO PERFORM HIS DUTY/OR WILFULLY MISCONDUCTS HIMSELF

35. This element of the offence has been found to describe circumstances in which a public officer does not conduct himself properly; act in accordance with the requirements of his position; or does not act within the limits of his authority.
36. In its paper the Law Commission recently expressed the view that this may include a member of Parliament who fails to comply with the standards of honesty and integrity required by the code of conduct for Members of Parliament. "*Wilful*" is deliberate. *Negligent* is now understood to be satisfied by "recklessness" as identified by the Supreme Court in *R v G [2004] 1AC 1034.*
37. The prosecution at this stage needs to show there is prima facie evidence that the proposed defendant was aware of the factual circumstances which make his position a public office; that his conduct risks breaching one of the duties of the position; and that he deliberately engaged in the conduct which breaches the relevant duty. The applicant's case is that there is ample evidence that the proposed defendant was aware that being a member of Parliament and Mayor of London are public offices. It is wholly inconsistent with either office to lie to the public or to misuse statistics. To do so would be contrary to the oath of Mayor and contrary to the Nolan principles and code of conduct as applied to Members of Parliament. The applicant argues there is little doubt given the frequency of the occurrence that the proposed defendant intended to align himself to the inaccurate and misleading figures of £350M per week being sent to the EU.
38. The applicant's case is there is ample evidence that the proposed defendant knew that the statements were false. One example is given that in a televised interview in May 2016 the proposed defendant stated, "we send the EU £10 billion per year" and that therefore he knew that the £350 million per week figure (£20 billion per year) was incorrect. A further example is given at paragraph 37 of Mr. Power's note which accompanied the application.

"It is further served that the UK statistics authority described the figure as misleading. The Institute for Fiscal Studies described the same as plain "absurd" Further, the UK Statistics Authority has said that the EU membership figure of £19 billion a year or £350 million per week is "not an amount of money that the UK pays to the EU each year." Moreover, the Authority Chair has described the use of the figure by Mr Johnson as "a clear misuse of official statistics" The Chair, Sir David Norgrove, observed further directly to Mr Johnson that:

"I am surprised and disappointed that you have chosen to repeat the figure of £350 million per week in connection with the amount that might be available extra public spending when we leave the European Union"

39. The defence case rejects that there is prima facie evidence of this ingredient of the offence.
40. Mr. Darbishire says there must be a link between the conduct and the powers of the office. There is clearly an overlap with the argument about "acting as such" He argues that what his client is accused of is not about the discharge of his powers either as a Member of Parliament or as Mayor of London. He says there needs to be evidence of corruption or an abuse of power to do with the discharge of the office.
41. The defence argue that the offices held by the proposed defendant provide status but that does not translate into power. Statements and speeches made on the hustings are not an exercise of the power of the State. Mr Darbishire's representations, lifted from his skeleton, summarise his conclusion on this point:

"It is submitted that the facts alleged by the Applicant do not come close to establishing a qualifying breach of duty. None of the acts complained of took place in the course of Mr Johnson's direct parliamentary or mayoral duties, but in the course of political campaigning. In no case is there the slightest connection between the statistic in issue and Mr Johnson's public duties, and at no point is it alleged that he had, or claimed to have, any special knowledge or authority in relation to them. There is no trace in the allegation of the abuse of the powers of the office, of corruption or of any dishonest motive. The motive alleged is that, like all those involved in any form of political debate, Mr Johnson sought to present the publicly available facts in a manner which supported the position he wished to advance.

The Applicant complains that in doing so, Mr Johnson "failed to check the accuracy of that which he chose to advance", or that he presented the statistics in a manner which, by reason of the use of a gross figure when a net figure was called for, was misleading and wrong. These are common complaints, the kinds of complaints which are the proper substance of political debate, public contradiction and the judgment of the electorate, all of which ensued in this instance.

If there were some genuine element of impropriety, the conduct would presumably merit investigation by the bodies charged with the maintenance of the standards of the office holder, here the Greater London Authority and the Parliamentary Commissioner for Standards. The latter of course is

responsible for ensuring compliance with the very Code of Conduct upon which the Applicant now relies. The Applicant has made no such complaints."

42. I do not accept those submissions for the purpose of considering whether there is prima facie evidence of this aspect of the offence. I accept that the public offices held by Mr. Johnson provide status but with that status comes influence and authority.
43. I am satisfied there is sufficient to establish prima facie evidence of an issue to be determined at trial of this aspect. I consider the arguments put forward on behalf of the proposed defendant to be trial issues.

44. TO SUCH A DEGREE AS TO AMOUNT TO AN ABUSE OF THE PUBLIC'S TRUST IN THE OFFICE HOLDER
45. I can take this very shortly. Conduct is required which breaches a high threshold; conduct which is so serious that it deserves criminal sanction, not merely civil or regulatory. High culpability and significant harm need to be established.
46. It is alleged that the conduct of which the proposed defendant is accused was a huge lie calculated to mislead the electorate by using inaccurate and misleading statements.
47. The statements were repeated on numerous occasions.
48. Mr Derbyshire argues that the allegations here do not begin to approach the very high threshold level of the common law offence. He submits that the applicant has bolstered his argument by relying upon the suggestion that the likely consequences here satisfy the requirement.
49. The applicant has statements from members of the public which addresses the impact the apparent lie had on them. Mr Power submits there will be seldom a more serious misconduct allegation against a Member of Parliament or Mayor than to lie repeatedly to the voting public on a national and international platform, in order to win your desired outcome.
50. I am satisfied this element of the offence is prima facie satisfied.

WITHOUT REASONABLE CAUSE OR JUSTIFICATION

51. I can take this equally shortly.
52. I have to be satisfied that there is prima facie evidence that the conduct complained of is not readily explainable. As Mr Power puts it *"can the proposed defendant defend the*

comment, and if so, could the prosecution prove beyond doubt that the "defence advanced" was unreasonable and/or without justification."

53. I am told there is evidence that in a television interview in May 2016 the proposed defendant stated: "*we send the EU £10 billion a year."* The applicant relies on this comment as prima facie evidence that the proposed defendant knew that the £350 million per week figure (£20 billion per year) was incorrect.
54. They will also rely on other evidence, including evidence provided by the Institute for Fiscal Studies and the UK Statistics Authority. The applicant submits that the proposed defendant must have known from the outset that the comments complained of without clarification as a standalone comment were inaccurate, untrue or the very least misleading.
55. I am satisfied there is prima facie evidence of an issue to be determined at trial in relation to this aspect of the offence.

IS THE PROSECUTION VEXATIOUS

56. I accept the defence submission that when the applicant commenced his consideration of whether to bring a private prosecution against the proposed defendant, some three years ago, there may have been a political purpose to these proceedings. However, the information for the summons was laid on the 28th February 2019 and that argument in my view is no longer pertinent.
57. I do not accept the application is vexatious.

DECISION

I repeat what is stated above. The allegations which have been made are unproven accusations and I do not make any findings of fact. Having considered all the relevant factors I am satisfied that this is a proper case to issue the summons as requested for the three offences as drafted. The charges are indictable only.

This means the proposed defendant will be required to attend this court for a preliminary hearing, and the case will then be sent to the Crown Court for trial. The charges can only be dealt with in the Crown Court.

29th May 2019.