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Registrar of the Supreme Court and Registrar of the Privy Council
Parliament Square
LONDON
SW1P 3BD

Our Ref: SM/EM/JN/WIG/317/1

Your Ref:

13 November 2018

BY E-MAIL

Dear Registrar

Wightman & Others v Secretary of State for Exiting the European Union UKSC 2018/0209

1. An application for permission to appeal to the Supreme Court has been made by the Secretary of State in the above matter. The appeal is against a judgment of the Inner House of the Court of Session delivered on 21 September 2018 – [2018] CSIH 62 – and an interlocutor, or order, of that Court of 3 October 2018 referring to the Court of Justice of the European Union various questions concerning the revocability of the notification of the United Kingdom's withdrawal from the European Union under Article 50 of the Treaty on European Union.

2. That preliminary reference to the CJEU is being dealt with under the Court's expedited procedure and will be heard on 27 November 2018. The Secretary of State lodged his application for permission to appeal with this Court against the making of a preliminary reference only on 12 November 2018.

3. The Respondents addressed the substance of the application by Form 3 and accompanying Final Grounds of Opposition filed last night.

4. The present correspondence concerns a preliminary matter of open justice.

5. It will be apparent from the nature of the Secretary of State's application alone that both the fact and the content of that application is of very considerable public interest:

   (1) The application and the accompanying Written Case, and Observations filed before the CJEU on the preliminary reference, set out in detail the Secretary of State's position on the revocability of the Article 50 notification, as well as on the propriety of the CJEU ruling on the matter.

(2) The application, Written Case and Observations make various references to the Secretary of State's position as to the role of Parliament in respect of any possible of the Article 50 notification, including under section 13 of the European Union (Withdrawal) Act 2018.

(3) The United Kingdom's withdrawal from the EU, and HM Government's position concerning revocation of the Article 50 notification, are matters of uniquely public, political and constitutional interest. Indeed, as the time for a 'deal' on withdrawal to be agreed with the European Commission – let alone obtaining the approval of the UK and European Parliaments – expires that public interest only increases.

(4) The considered legal stance on the matters addressed in the application, Written Case and Observations are the best and clearest indication of the position of HM Government and constitute a particularly significant source of information in the public and Parliamentary debates on the progress and propriety of withdrawal.

6. The Respondents have enquired of the Secretary of State, through the Office of the Advocate General, whether there is any objection to them making available to the public the legal arguments advanced by the Secretary of State in his application, Written Case and Observations in this matter (and if there is objection, the reason for it). The Secretary of State has refused to agree to the Respondents making its pleadings available, on the sole basis that they are not in the public domain.

7. Publicity of the position and arguments of parties to legal proceedings is a fundamental aspect of the principle of open justice:

(1) Lord Scarman observed in *Home Office v Harman* [1983] 1 AC 280, 316 that: "*When public policy in the administration of justice is considered, public knowledge of the evidence and arguments of the parties is certainly as important as expedition*".

(2) In *Scott v Scott* [1913] AC 417, 477 Lord Shaw commented (citing Jeremy Bentham) that "*Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.*"

(3) In the colourful and robust language of Toulson LJ in *R (Guardian News & Media) v City of Westminster Magistrates Court* [2013] QB 618 at [1]: "*Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes—who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse.*" At [70], Toulson LJ noted that "*the Supreme Court does not require statutory authority to determine how the principle of open justice should apply to its procedures*" because open justice was a principle of the common law.

8. These observations underline the central importance of open justice – recognised and applied by the Supreme Court in the context of closed material procedures in

Bank Mellat v HM Treasury (No.1) [2013] UKSC 38 and in rule 27 of the Supreme Court Rules 2009 – but they cannot be narrowly confined to the conduct of judicial hearings. On the contrary, as Toulson LJ explained at [79] of *Guardian News & Media*: "*The purpose is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice system of which the courts are the administrators.*"

9. The basic starting point, applying the principle of open justice, is that any document filed with the Supreme Court for the purpose of an appeal is or should be publicly accessible unless there is good reason for a different approach and a specific Order is made to restrict such information or documents. That starting point must be especially strong in the case of pleaded legal arguments, which must be assumed to be a recorded version of what the party intends to say in a public forum at any hearing of the appeal.

10. This basic position is recognised in rule 39(3) of the Supreme Court Rules 2009, which provides that:

    "*All documents held by the Court may be inspected by the press or members of the public on application to the Registrar but the Registrar may refuse an application for reasons of commercial confidentiality, national security or in the public interest.*"

11. It will be noted that the Secretary of State has made no suggestion, rightly, of the applicability of any of those exclusively listed exceptions.

12. Rule 39(3) is supplemented by paragraph 7.2.6 of Practice Direction 7, which provides that "*Documents filed for the use of the Court may be inspected by persons who are not a party to the appeal on application under rule 39. Such persons must comply with any anonymity orders, data protection requirements and/or conditions imposed by the Registrar under rule 39.*" Again, none of the caveats in the second sentence of paragraph 7.2.6 would be applicable in this context.

13. Accordingly, the Supreme Court's Rules and Practice Directions recognise that any document filed with the Court can be requested, copied and disclosed more widely – because no control is placed on subsequent use – and that in the absence of special and limited exceptions, such a request <u>will</u> be granted. This is obviously an appropriate and justified position for the Court's Rules to take, given that public importance is an aspect of the permission to appeal criteria and that the work of the Court will invariably be of the highest public and constitutional significance.

14. It follows from the right provided for in rule 39(3) and paragraph 7.2.6 of Practice Direction 7 that a person who <u>already</u> has a copy of a document filed for the use of the Court is not prevented from making that document public, unless there is some Order or outstanding application for an Order which prohibits him from doing so.

15. If a non-party were to seek the same document, the Court would grant him access. It cannot be the case that a party is in a worse position than a non-party.

16. Of course, the Respondents accept that it would not ordinarily be appropriate for a party to publicise documents filed with the Court without first checking with the

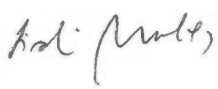
Court that there was no Order or application for an Order imposing restrictions, and with the serving party to understand whether any of the limited exceptions provided for in the Rules are said to apply. The Respondents have made those enquiries and no such objections have been articulated. The statement that the documents are not yet in the public domain is true but irrelevant.

17. The present case is, for the reasons set out above, a matter of the highest public interest and the legal arguments of the Secretary of State are matters which cannot be said to require secrecy.

18. In the circumstances, the Respondents request that the Registry confirm that the principle of open justice, read with rule 39(3), means that they may place in the public domain the Secretary of State's application for permission to appeal, his Written Case, and his Observations on the preliminary reference to the CJEU.

19. In the alternative, and should it be necessary to do so, the Respondents apply to the Registrar in their capacity as members of the public for inspection and copies of the aforementioned documents on an unrestricted basis under rule 39(3) of the Rules.

Yours faithfully



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