

IN THE ADMINISTRATIVE COURT
THE HIGH COURT OF JUSTICE

Claim Number: CO/6524/2016

THE QUEEN
upon the application of
(1) ADRIAN YALLAND
(2) PETER WILDING
(Claimants)

And

THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION
(Defendant)

A Judicial Review of the lawfulness of the position of Her Majesty's Government on the UK's relationship with European Economic Area after the UK leaves the European Union. Listed for a preliminary hearing on 03 February 2017, after 10am, in the Administrative Court, the High Court of Justice, London.

CLAIMANT'S BRIEFING NOTE FOR MEDIA

What is the "Single Market"?

1. The correct name for the "single market" is the European Economic Area, or the "EEA";
2. The single market is not an EU institution (although membership of the single market has become conflated with membership of the EU in the minds of the public). The single market grew out of the EU's internal market but is now separate from it;
3. The single market is a free trade treaty between
 - (1) the EU
 - (2) the member states of the EU individually (*sui generis*)
 - (3) Norway
 - (4) Iceland
 - (5) Liechtenstein
4. The single market allows free trade, free movement of goods and workers, as well as rights to establish businesses across the EEA states without barriers or tariffs;
5. Through the EEA Act [1993] Parliament gave the Government permission to sign the EEA Agreement [1994] (the treaty behind the single market). The UK signed the treaty as a "contracting party" in its own right, not as a member of the EU, and only after securing Parliamentary permission to do so (although we are **also** members through the EU);
6. Parliament, through its 1993 Act, has allowed the EEA treaty to confer fundamental rights and obligations which arise separately to those arising under EU law (the *Acquis Communautaire*). The Government cannot use Royal Prerogative to remove those rights and freedoms because they have been conferred by Parliament;
7. Whilst the EEA treaty reflects the EU's "four freedoms", the EEA treaty gives non-EU members much greater power to restrict the freedoms – including effective border control through quotas. Liechtenstein has successfully negotiated quotas whilst remaining full

members of the EEA. Quota places are filled according to national need. This is not an exception but a precedent other contracting parties can follow to firstly restrict “free movement of people” to “free movement of workers” and secondly subject such freedoms to much stricter controls than arise under the EU treaties - see EEA Agreement [1994] Article 112;

“If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a Contracting Party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113”

8. Leading Eurosceptics (including Matthew Elliott, Dan Hannan MEP and Nigel Farage MEP) agree that the EEA is governed by rules which all parties, including non-EU states, have a significant say in drawing-up from inception through to implementation, including, as Norway has proven, **the right of veto over EU legislation** should it wish to not implement certain EU law;
9. Norway has participation rights in many EU programmes, bodies and initiatives whilst still outside the EU. Its “contribution” to the EU budget, as per Article 117 (protocol 38) the EEA Agreement [1994] solely covers the costs of these programmes so EU states do not subsidise them. Beyond that its “payment” for “being in” the single market does not go to the EU budget but to the “Norway Grants Scheme” – poverty alleviation schemes in Southern Europe which it, **not the EU**, has full discretion over and manages through EFTA, **not the EU** (see Article 115). This is a model the UK could follow legitimately using the International Development budget to fund. The per capita cost to Norway for membership of the EEA is still less than the UK per capita payment for EU membership;
10. Nigel Farage estimates Norway implements only 9% of EU legislation. However of the 23,000 EU laws currently enacted, Norway has incorporated just over 20%¹ (17% of regulations and 68% of directives). All are related, or rather restricted, to matters concerning trade as would be expected with any free trade area. Nigel Farage described “Remain” descriptions of Norway’s “fax democracy” as “a lie”;
11. The single market is outside the EU customs union, so non-EU EEA membership does not restrict a contracting party’s ability to make its own trade deals with the rest of the world – just as Norway already does. Norway has numerous free trade deals, some agreed through EFTA and some bi-laterally;
12. The single market is outside the Eurozone so non-Eurozone membership of the single market does not tie non-Eurozone EEA members into the Eurozone, thus insulating it from any further Eurozone bailouts. It is outside the Schengen Zone so the UK would maintain full management of borders if we remained in the EEA;
13. The single market accounts for 41-44% of UK exports, about 57% of UK imports, 24% of global GDP (about £12trn), and 500m consumers. Leaving the single market means we would lose our ability to have a say (and a veto) over future trade rules, including in areas where the single market will soon “complete” – including digital, energy and services (which accounts for 80% of our economy). We would only have access via a trade deal or under WTO rules – neither of which allow us to influence or veto single market rules and both would probably cost us more than having a Norway-style agreement;

¹ http://www.efta.int/eea-lex?l=English&lang=Icelandic&type=All&f0=field_case_status_short_desc%3A11

The UK's Legal Position regarding the single market:

14. Parliament took us into the EEA treaty. Only Parliament can take us out;
15. Under the "*Better Regulation Framework Manual*" Government would have been obliged to conduct an impact assessment on the merits of the United Kingdom leaving the EEA, including consideration of whether the objectives and downsides of such withdrawal can be mitigated by less extreme forms of exit. **However the obligation was "withdrawn" by the Government on 17 January 2017** and it has so far not confirmed whether such an impact assessment will now be published;²
16. **This means not only is Parliament being denied a vote on the UK leaving the EEA, but the Government may have removed its obligation to publish an assessment of the impacts of doing so;**
17. The Government believes, wrongly, our membership of the EEA is predicated upon our membership of the EU, and that when we leave the EU our EEA membership, rights and obligations will automatically fall away. This is because the Government misunderstands Article 126 EEA [1994], believing it limits the "territories" to which the agreement applies to EU and (the three) EFTA states;

"The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway." Article 126 (1)
18. However if the intent of Article 126(1) was as the Government states, the norm would be to use either "member state" (as in EU treaties) or "contracting party" (as elsewhere in the EEA Agreement [1994]). The use of "territory" at article 126(1) is therefore incongruous if that were the article's intent. However its real intent becomes obvious from Article 126(2) - it is not about restricting the agreement to EU/EFTA "territories" but is simply listing those "territories" beyond the borders of the "contracting parties" for which the contracting party has a diplomatic responsibility but remains outside the scope of the agreement. This view is supported by the following clause (Article 127) which clearly states the formalities for how a contracting party may withdraw from the treaty:

"Each Contracting Party may withdraw from this Agreement provided it gives at least twelve months' notice in writing to the other Contracting Parties"
19. Therefore we do not leave the single market treaty "automatically" but only if and when the United Kingdom complies with the proper formalities of Article 127. Until it does the obligations and rights which the treaty confers upon UK citizens will most likely (either in full or in part) continue to exist because the UK is a member of the EEA treaty both through EU membership **and** *sui generis*, as a contracting party in its own right. The UK is listed as a contracting party in the agreement itself and will remain as such until it chooses to trigger Article 127. Triggering Article 50 of the Lisbon Treaty is insufficient to serve as "notice" under Article 127 of the EEA treaty because it is addressed to different countries and EU institutions - Article 127 has its own *sui generis* status and is addressed to non-EU nations;
20. The Government may say the agreement becomes "unworkable". But that may not be the case, and depends on what "unworkable" means. However, the operational frustration of an agreement does not actually end the rights and obligations conferred on individuals in law;

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/583871/bis-13-1038-Better-regulation-framework-manual.pdf

21. Furthermore, if after leaving the EU but before formally leaving the EEA, the Government either acts positively to violate or frustrate those rights or obligations or fails to ensure adequate legal protection for them, it will be in default of its obligations under international law and therefore acting unlawfully;
22. The European Union Referendum Act [2015] s1(1) made no mention of EEA membership and it was not listed in the referendum question as something we were voting on. EEA membership was not something Parliament therefore intended the UK to vote on in the EU referendum. This is important because the single market is not an EU institution - it is a free-trade agreement governed by its own international legal order enshrined in a separate, non-EU treaty and listed as a separate treaty in the Constitutional Reform and Governance Act [2010]. Therefore, even though a mandate exists for leaving the EU, there cannot be a mandate for leaving the EEA arising from the referendum. The Government cannot rely on its mistaken belief regarding Article 126(1) or the effects of Article 50 TEU to create one;
23. The EEA Agreement [1994] creates a distinct source of rights for individuals and businesses to access and enjoy the single market. Those rights were conferred on UK individuals by Parliament under the EEA Act [1993] which implemented the EEA treaty into domestic law. Because the EEA treaty bestows fundamental rights upon UK citizens, only Parliament can take those rights away. It must give Government explicit permission in an Act of Parliament to trigger Article 127 EEA [1994]. This view is supported by *ex P Miller* not least of all at §82;

"We cannot accept that a major change to UK constitutional arrangements can be achieved by a ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation."

24. Irrespective of whether we should withdraw, remain or use the EEA as a transitional option, it is contrary the rule of law that the rights Parliament has conferred on us through the EEA treaty should be arbitrarily removed without Parliamentary consent. This is a concept which is at the heart of our constitution dating back to Magna Carta;

*"No free man shall be stripped of his rights except by the law of the land"
Clause 39*

25. The statements of politicians equating leaving the EU with leaving the single market should not be used by Government to justify withdrawal from the EEA because this view was based on a misunderstanding of the law;

(1) S1(1) EU Referendum Act [2015] makes no mention of EEA membership so there is no statutory basis for ending EEA membership under the EU referendum – *ex Parte Miller §82 & 121*;

(2) we do not leave the EEA “automatically” upon leaving the EU meaning the formalities of Article 127 must be observed which requires a Parliamentary vote to repeal the EEA Act [2993] - *ex Parte Miller §82 & 121*;

- i. many “Leave” spokespeople repeatedly and publicly advocated remaining in the EEA meaning there was no uniform position on the EEA issue and;
- ii. because in the alternative, statements of this sort are not binding in nature and are no more enforceable than suggestions that (for example) £350m a week extra could go to the NHS. Such comments create neither an obligation upon Government to act specifically nor a mechanism for doing so where one does not pre-exist in statute:

26. As the judgment in *ex P Miller* notes:

"Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation." (§121).

The Judicial Review

27. The first stage of the Judicial Review commences on Friday 03 February 2017 in the Court of Administration of the High Court, London, currently listed for 2pm. A second hearing, and possibly a third substantive hearing will follow if the Court allows the Judicial Review to proceed. The Government is opposing the application. It is likely that if successful a "rolled-up" permission and substantive hearing will be ordered by the court.

The purpose of the Judicial Review

28. The claimants seek a declaration from the court that:

(1) It would be unlawful for the Defendant or the Prime Minister to leave, or propose to leave, the European Economic Area and thereby remove or frustrate the rights conferred under the EEA Act [1993] without prior Parliamentary authorisation, in the form of an Act of Parliament, and by serving a withdrawal notice under Article 127 of the EEA Agreement [1994].

(2) Absent such lawful Article 127 notification, the UK remains bound as a Contracting Party to the EEA Agreement [1994] and must adhere to and abstain from undermining its objectives, including the promotion of the single market.

29. The Government is opposing the application for Judicial Review on the grounds that *inter alia* no decision to leave the EEA has yet been made and there is therefore no reviewable decision to challenge.

The claimant's legal team are:

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Our solicitors are Marcus Sinclair

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ⁱ <https://twitter.com/stallum20/status/81747455597979648/video/1>