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Case No: CO/1915/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2008

Before :

LORD JUSTICE RICHARDS
and
MR JUSTICE MACKAY

Between :

The Queen (on the application of Wheeler)
- and -
(1) Office of the Prime Minister
(2) Secretary of State for Foreign and
Commonwealth Affairs
- and -
Speaker of the House of Commons

Claimant

Defendants

Interested Party

Rabinder Singh QC and Jessica Simor (instructed by Burges Salmon) for the Claimant
Jonathan Sumption QC, Philip Sales QC, Julian Milford and Ian Rogers (instructed by The
Treasury Solicitor) for the Defendants
Clive Lewis QC and Eleanor Grey (instructed by The Treasury Solicitor) for the Interested
Party

Hearing dates: 9-10 June 2008

Approved Judgment

Lord Justice Richards :

This is the judgment of the court.

1. The Treaty establishing a Constitution for Europe (“the Constitutional Treaty”) was signed in October 2004 but required ratification by all member states before it came into effect. The then Prime Minister, Tony Blair, promised a referendum on whether the United Kingdom should ratify it; and the European Union Bill introduced into Parliament following signature of the treaty provided for the treaty to be given effect in domestic law subject to the outcome of a referendum. In the event, however, following “no” votes in referendums held in France and the Netherlands, the European Union instituted a period of reflection in relation to the treaty, and the domestic Bill did not proceed to a second reading. In due course, in June 2007, the European Council agreed a mandate for a new treaty, and subsequent negotiations led to the signing of the Treaty of Lisbon (“the Lisbon Treaty”) in December 2007. The British Government made clear that it did not intend there to be a United Kingdom referendum in relation to the Lisbon Treaty, and no provision for a referendum was included in the European Union (Amendment) Bill introduced into Parliament to provide for the treaty to be given effect in domestic law. The present proceedings are directed towards securing such a referendum.
2. The claimant contends that the promise to hold a referendum in relation to the Constitutional Treaty involved an implied representation that a referendum would be held in relation to any treaty having equivalent effect, giving rise to a legitimate expectation that such a referendum would be held. It is said that the Lisbon Treaty is a treaty having equivalent effect to the Constitutional Treaty and that the failure to hold a referendum in relation to it, or at least to take steps towards the holding of a referendum, is a breach of the claimant’s legitimate expectation. The claim is brought against the Prime Minister and the Foreign Secretary, whose essential stance is that the claimant’s case is a fundamentally misconceived and unsustainable attempt to get the court involved in a purely political and Parliamentary matter. The Speaker of the House of Commons has intervened in the proceedings in order to ensure that the relevant law of Parliamentary privilege is properly understood and applied.
3. The hearing took place just before a referendum on the Lisbon Treaty was held in Ireland. That referendum resulted in a “no” vote which has serious implications for the future of the Lisbon Treaty. When questioned about this possibility, however, counsel for the parties did not accept that a “no” vote in the Irish referendum would render the present case academic. Since the United Kingdom Parliament has subsequently approved the treaty and the British Government has made clear its intention to ratify it notwithstanding what has happened in Ireland, it is plainly right for us to proceed to a judgment in the case.

The facts

4. The Constitutional Treaty was the subject of prolonged negotiation in an intergovernmental conference between October 2003 and June 2004. Political agreement was reached on the text in June 2004 and the treaty was signed in Rome on 29 October 2004. As its full title indicates, the treaty was to establish a constitution for Europe. It was to rescind the existing EC and EU treaties in their entirety and substitute for them a single instrument, which would replace the existing entities of

the EC and EU with a new legal entity, the European Union, with its own attributes and institutions.

5. On 20 April 2004 the Prime Minister made a statement to the House of Commons about the negotiations (see Hansard, cols 155 *et seq.*). We do not understand there to be any objection to reference to this and other Parliamentary statements as part of the history: we will consider later the further use to which such material can properly be put in these proceedings. In his statement the Prime Minister said that the proposed treaty “is designed both to answer the challenge of enlargement and to bring together in one treaty what is currently found in two separate treaties” and that it “does not and will not alter the fundamental nature of the relationship between member states and the European Union”. He expressed the view that if the treaty contained certain essentials it would be in Britain’s interest to sign it, but he also said that since its inception the “myths” propagated about it had multiplied in certain quarters hostile not just to the treaty but to Britain playing a central role in Europe, and he referred to an “unrelenting, but ... at least partly successful campaign to persuade Britain that Europe is a conspiracy aimed at us, rather than a partnership designed for us and others to pursue our national interest properly in a modern, interdependent world”. He continued:

“It is right to confront this campaign head on. Provided that the treaty embodies the essential British positions, we shall agree to it as a Government. Once agreed ... Parliament should debate it in detail and decide upon it. Then, let the people have the final say.

...

The question will be on the treaty, but the implications go far wider – as I believe we all know. It is time to resolve once and for all whether this country, Britain, wants to be at the centre and heart of European decision making or not; time to decide whether our destiny lies as a leading partner and ally of Europe or on its margins. Let the Eurosceptics, whose true agenda we will expose, make their case. Let those of us who believe in Britain in Europe ... make our case, too. Let the issue be put and battle be joined.”

In response to a question, he stated (at col 164) that the referendum should go ahead even if another member state held a referendum first and rejected the constitution.

6. In a White Paper on the Treaty establishing a Constitution for Europe, dated September 2004, the then Foreign Secretary stated in the preface:

“The Constitution will come into force once ratified under the constitutional arrangements of each Member State. In the UK, this will be by legislation considered by both Houses of Parliament and then endorsement in a referendum.”

7. On 25 January 2005 the European Union Bill was introduced into Parliament. Pursuant to the government’s earlier commitment, it provided for effect to be given to

the Constitutional Treaty in domestic law if ratification was approved in a referendum. The Bill did not complete its progress through Parliament before the general election in May 2005. The Labour Party manifesto for the election repeated the commitment to hold a referendum. Following the general election the government's policy of holding a referendum was confirmed in Parliament. In accordance with that policy the European Union Bill, still containing provision for a referendum, was reintroduced into Parliament on 24 May 2005.

8. The promise to hold a referendum was also repeated on numerous occasions to the media in the context of newspaper, radio and television interviews and press conferences. For example, the Prime Minister was reported in the Sun newspaper on 13 May 2005 as saying:

“We don't know what is going to happen in France, but we will have a referendum on the constitution in any event – and that is a government promise.”

9. In referendums held on 29 May and 1 June 2005 respectively, the French and Dutch rejected the Constitutional Treaty. The Foreign Secretary stated in the House of Commons on 6 June 2005 that the government did not consider it sensible for the European Union Bill to proceed to a second reading until the consequences of the French and Dutch referendums were clear. He was asked in terms for an assurance “that there will be no attempt to introduce any part of this constitution by the back door, and that any further transfer of power away from the British people will result in a referendum” (col 993). He gave no such assurance, but made clear on the contrary that the commitment to a referendum related specifically to the Constitutional Treaty:

“The hon. Gentleman asked me whether we are intending to introduce any part of the constitution by the back door. The answer to that is no, we are not, but there is a question here ... There is a real ‘but’ for serious Members of the House. I understand the points of engagement and of controversy about this constitution. I would have looked forward to that engagement in the country as a whole. However, many parts of the constitution were reforms that were widely agreed in all parts of the House. For example, there were the proposals to give real flesh to the idea of subsidiarity, the proposals to give national Parliaments a new and better say over EU legislation, and the proposals to provide for yellow cards.

If the Commission or the Council were themselves to suggest that we should introduce these things by other means, it would be absurd to put such proposals to a referendum. We ought to agree them straight away.

...

We are not proposing that this constitutional treaty – the only constitutional treaty before Europe or before this country – should be agreed by this country save by a referendum” (cols 994-995).

10. The European Union initiated a year-long period of reflection. This was subsequently extended to June 2007 and the German Presidency was given a mandate to undertake extensive consultation with member states with regard to the Constitutional Treaty and possible new developments. At a meeting of the European Council on 21-22 June 2007 agreement was reached on a mandate for the drawing up of a new treaty by the intergovernmental conference. The mandate provided that the new treaty was to amend the existing treaties and that “the constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called ‘constitution’ is abandoned”. The new treaty was to introduce into the existing treaties the innovations resulting from the 2004 intergovernmental conference.
11. Pursuant to that mandate the intergovernmental conference engaged in intensive discussion between July and October 2007. The text of the Lisbon Treaty was agreed at a meeting of the European Council on 17-18 October and the treaty itself was signed on 13 December 2007.
12. Over this period the government had made clear its position concerning a referendum on any new treaty. At a press briefing on 18 April 2007 the Prime Minister, at that stage still Tony Blair, said that a conventional amending treaty of the kind envisaged would not require a referendum. It was not a constitutional treaty altering the basic relationship between Europe and the member states. He said in relation to the Constitutional Treaty that people believed that what they were getting was something different from a conventional treaty, and he referred to the need in practical politics to have regard to public perception. Later, in evidence to the House of Commons Committee on Liaison on 18 June 2007, just before the mandate for the new treaty was agreed, he said:

“Now, in my view if people want an agreement this week we have to go back to a conventional amending treaty Europe needs to work more effectively. What it does not need is a Constitutional Treaty or a treaty with the characteristics of a constitution In my view, we should be very clear about this – and it gives me an opportunity today to make this absolutely clear – here and also to our European colleagues. First, we will not accept a treaty that allows the Charter of Fundamental Rights to change UK law in any way. Secondly, we will not agree to something which displaces the role of British foreign policy and our foreign minister. Thirdly, we will not agree to give up our ability to control our common law and judicial and police system. Fourthly, we will not agree to anything that moves to Qualified Majority Voting, something that can have a big say in our own tax and benefit system, we must have the right in those circumstances to determine it by unanimity. Now, those are four major changes, obviously, in what was agreed before

... If we achieve those four objectives I defy people to say what it is that is supposed to be so fundamental that could require a referendum.”

13. This was picked up by the new Prime Minister, Gordon Brown, in a BBC interview on 24 June, soon after the mandate had been agreed. He, too, referred to the abandonment of the constitutional concept and to the fact that the new treaty was to be an amending treaty rather than a constitution. Having touched upon the four objectives or “red lines” set down by the United Kingdom, he continued:

“Well of course there’s going to be a debate about this, but my judgement is that if we were to get these four red lines achieved, and my judgement is that we have achieved these four really demands that Britain had of the European Union, that that means that just in the case of all the other amending treaties, the Nice and Maastricht and so on, that the people would not therefore expect there to be a referendum”

14. Consistently with those statements, when the European Union (Amendment) Bill was introduced into the House of Commons following signature of the Lisbon Treaty, it did not include any provision for the holding of a referendum on the treaty. The Foreign Secretary told the House of Commons on the Bill’s second reading that ministers did not propose that a referendum should be held. Amendments proposing the introduction of clauses providing for a referendum were debated and defeated both in the House of Commons and in the House of Lords. The Bill completed all its Parliamentary stages on 17 June 2008 and received the Royal Assent the following day. The main provisions of the European Union (Amendment) Act 2008, as it then became, came into force on Royal Assent.

Legislative framework

15. Ratification of a treaty is, as a matter of domestic law, an executive act within the prerogative power of the Crown. That power is, however, circumscribed in a relevant respect by statute. Section 12 of the European Parliamentary Elections Act 2002 provides that no treaty which provides for an increase in the powers of the European Parliament is to be ratified by the United Kingdom unless it has been approved by an Act of Parliament. The Lisbon Treaty is such a treaty, so that the Crown must not ratify it unless it has been approved by an Act of Parliament. The European Union (Amendment) Act 2008 contains such approval as well as providing for the treaty to be given effect in domestic law.
16. Statutory authority is also required for the holding of a referendum. The conduct of referendums provided for by an Act of Parliament or, in certain circumstances, by a Bill which has been introduced into Parliament is regulated by Part VII of the Political Parties, Elections and Referendums Act 2000. “Referendum” is defined in s.101(2)(a) of that Act as “a referendum or other poll held, in pursuance of any provision made by or under an Act of Parliament, on one or more questions specified in or in accordance with any such provision”. By s.101(4), “if the Secretary of State by order so provides, (a) subsection (2) shall apply to any specified Bill which has been introduced into Parliament before the making of the order as if it were an Act; and (b) any specified provisions of this Part shall apply, subject to any specified modifications, in relation to any specified referendum for which provision is made by the Bill”. By s.156(4)(e), such an order must be laid before Parliament and is subject to approval under the affirmative resolution procedure.

17. The effect of those provisions is that the question whether to hold a referendum, including any referendum on the Lisbon Treaty, is a matter for decision by Parliament. Provision must be made for it in a Bill (whether in the form in which it is introduced into Parliament or by way of amendment) and Parliamentary approval must then be obtained for it in one of two ways: by approval of the Bill itself, leading to its enactment as a statute; or by approval of an order made by the Secretary of State whereby a referendum can be held before the Bill passes through the full Parliamentary procedures and becomes a statute.

The claimant's case

18. Mr Rabinder Singh QC, for the claimant, described his case as a very simple one. The government promised to consult the people by way of a referendum on the Constitutional Treaty and should keep to its promise. The promise applied by implication to any treaty having equivalent effect to the Constitutional Treaty. The Lisbon Treaty is a treaty having equivalent effect: it is in substance the same as the Constitutional Treaty and indeed “is nothing more than the Constitutional Treaty by another name”, as it was put in the claimant’s original skeleton argument. The promise was in respect of the procedure to be adopted prior to the decision to ratify. It gave rise to a legitimate expectation, based on principles of good administration and fairness, that the procedure would be followed. By refusing a referendum on the Lisbon Treaty, the government is acting in breach of that legitimate expectation. That is a justiciable error of law which, on ordinary principles of public law, will flaw any decision taken by the government to ratify the treaty. The case is not political in character but about the rule of law.
19. Mr Singh submitted that the case fell within the scope of the principle applied in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, where the Privy Council quashed a removal order that had been made against an illegal entrant without giving him an opportunity, as promised in a statement of government policy, to make representations as to why he should not be removed. The court held, as summarised in the headnote, that where a public authority charged with the duty of making a decision promised to follow a certain procedure before reaching that decision, good administration required that it should act by implementing the promise, provided that its implementation did not conflict with the authority’s statutory duty. Such a procedural (as opposed to substantive) legitimate expectation is the fourth of the categories identified in *R v Devon County Council, ex p Baker* [1995] 1 All ER 73 at 88-89 and the second of those identified in *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 at para 57. But the relevant underlying principle is the same whether the legitimate expectation is procedural or substantive. As Laws LJ put it in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363, where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so: this is “a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public” (para 68).
20. It was further submitted that the claimant does not need to establish detrimental reliance on the promise. There was no such reliance in *Attorney General of Hong Kong v Ng Yuen Shiu* and it was not held to be necessary in this kind of case in *R v Falmouth and Truro Port Health Authority, ex p South West Water Ltd* [2001] QB

445, at 459E-460A. In *R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115, at 1133D, Sedley LJ stated that he had no difficulty with the proposition that in cases where government has made known how it intends to exercise powers which affect the public at large “it may be held to its word irrespective of whether the applicant has been relying specifically upon it”. The court in *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292 expressed agreement with that proposition. Alternatively, if detrimental reliance is needed, Mr Singh suggested that it might be found in the claimant’s loss of the vote promised to him.

21. A further aspect of the submissions was that, on the principles reiterated and applied in *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76, the issue of legitimate expectation is justiciable by the courts even if a decision to ratify an international treaty is not generally susceptible to judicial review. What matters is the subject-matter in the particular case and its suitability for review. Moreover, on the principles in *JH Rayner (Mincing Lane) Ltd v Department of Trade* [1998] 2 AC 418, in particular at 500-501, it is permissible for the court to carry out a *factual* comparison between the terms of the Constitutional Treaty and the Lisbon Treaty even though international treaties are generally outside the purview of the courts.
22. Mr Singh was at pains to disavow any intention on the part of the claimant to interfere with the privileges or internal affairs of Parliament. He submitted that this case is about the executive, not Parliament, and in particular about the failure of the executive to act outside Parliament in relation to the holding of a referendum.
23. We note, however, that one of the striking features of the claimant’s case is how it has had to be reformulated and cut back in an attempt to meet the difficulties created for it by the position of Parliament. The legitimate expectation as formulated in the claim form was that the claimant would be able to vote in a referendum, and the relief claimed was a declaration that “the refusal to hold a referendum is unlawful as in breach of the claimant’s legitimate expectation”. This was plainly untenable, since the final decision whether to hold a referendum lies with Parliament. By the time of the claimant’s second supplementary skeleton argument, the breach of legitimate expectation was said to lie in the decision of the executive “not to take all reasonable steps within their power” to give effect to the promise that a referendum would be held, and the relief sought was a declaration in corresponding terms. Faced with an argument that the taking of all reasonable steps would appear on the face of it to include the taking of steps in Parliament (by way of speaking in support of a referendum, applying the party whip and so forth), Mr Singh made clear in his oral submissions that he sought no more than to require the executive to introduce into Parliament a Bill (or to move an amendment to an existing Bill) providing for a referendum, and possibly also to lay before Parliament an order under s.101(4) of the Political Parties, Elections and Referendums Act 2000. Whether even that would trespass impermissibly upon territory reserved to Parliament is one of the matters that we will consider later in this judgment.
24. Those changes forced upon the claimant’s original case give it an unpromising start. Closer analysis of the case merely adds to its difficulties. Despite the characteristic skill and moderation with which it was presented by Mr Singh, in our judgment it faces insurmountable obstacles.

Was there an implied promise of a referendum in respect of the Lisbon Treaty?

25. It is common ground that the then Prime Minister made statements promising to hold a referendum in respect of the Constitutional Treaty (a promise which must be understood as having been conditional upon Parliamentary approval of a referendum). The relevant statements were made both in Parliament and outside it. We will consider later whether reliance can properly be placed for this purpose on statements made in Parliament. For the time being we will assume that it can be.
26. The claimant's first difficulty, as it seems to us, is that the promise related specifically to the Constitutional Treaty and not to the Lisbon Treaty, which on any view is a distinct treaty, agreed more than three years later than the Constitutional Treaty and stemming from a separate mandate and set of intergovernmental negotiations. The claimant's case depends upon reading into the statements about the Constitutional Treaty an implied representation that there would be a referendum in respect of any treaty having equivalent effect. In our view there is no room for such an implication.
27. First, the decision whether to hold a referendum involves a sensitive political judgment, which must depend upon the particular issue to be resolved and the wider prevailing circumstances. The very fact that the government (and indeed Parliament) reached different decisions in relation to the Constitutional Treaty and the Lisbon Treaty illustrates that point, as do the reasons given for the different decisions. At a time when the only treaty under consideration was the Constitutional Treaty, one would not have expected an advance commitment to be given in relation to a potential future treaty, the very existence of which was contingent on the demise of the Constitutional Treaty. The natural course would have been to reserve a decision in relation to any future treaty and to take that decision at a later date in the light of the terms of the treaty itself and the circumstances prevailing at the time. That tells strongly against the *implication* of such an advance commitment into statements that said nothing in terms about a future treaty.
28. Secondly, the factual history shows that, once doubts were cast on the Constitutional Treaty by the French and Dutch referendums and the possibility of some alternative came to be considered, the government declined to give any advance commitment in relation to whatever alternative might emerge. This was the Foreign Secretary's position in the House of Commons on 6 June 2005. It hardened into a decision not to hold a referendum once the move was made in 2007 towards what became the Lisbon Treaty. Thus the government's express statements, albeit made at a later date because only then did the point arise for debate, were inconsistent with the implied representation for which the claimant contends.
29. In the absence of the implied representation contended for, the claimant's case falls at the first hurdle.
30. But even if the implied representation contended for were accepted, it would be for the claimant to satisfy the court that the Lisbon Treaty had "equivalent effect" to the Constitutional Treaty so as to come within the scope of the implied representation. For the reasons set out below, the claimant has failed to satisfy us of that point.
31. We have already noted the essential point sought to be conveyed by use of the expression "equivalent effect": it is said that the Lisbon Treaty is in substance the

same as the Constitutional Treaty. In similar vein, the claimant's statement of facts and grounds alleges at para 26 that there is "no material difference" between the two treaties. In his oral submissions, Mr Singh stressed that what matters is substance, not form.

32. There are undoubted differences between the two treaties. Unlike the Constitutional Treaty, the Lisbon Treaty does not purport, either by its title or in its terms, to lay down a constitution for Europe. Unlike the Constitutional Treaty, it does not repeal the existing treaties and replace them by a single text, but proceeds by way of amendment of the existing treaties; and it leaves in place the existing entities and institutions (save that the European Community is subsumed into the European Union) rather than replacing them with a new legal entity. We see no basis for dismissing such differences as obviously immaterial even if they are treated as differences of form rather than of substance.
33. There are also, on any view, differences of substance. Mr Sumption QC referred the court to an analysis by Professor Steve Peers, of the University of Essex, which identified 35 substantive differences between the two treaties. That analysis is not accepted by the claimant and has been the subject of debate between Lord Blackwell and Baroness Ashton (the Leader of the House of Lords) in correspondence that we were shown. Thankfully, detailed argument before us was confined to 5 specific examples which were said by Mr Sumption to be illustrative and were set out in a written schedule, to which Mr Singh helpfully responded in a counter-schedule. They relate in part to matters on which the United Kingdom set down its "red lines" for the negotiation of the Lisbon Treaty. They are as follows:
 - i) The first concerns the opt-out for the United Kingdom in the area of freedom, security and justice (Protocol 21 to the treaties as amended by the Lisbon Treaty): the opt-out is extended so as to cover matters of policing and criminal law in addition to matters of immigration and civil law which were covered by the corresponding opt-out in the Constitutional Treaty. Mr Singh did not deny that there was an extension, but referred to the existence of opt-in provisions in Articles 3 and 4 of Protocol 21 and submitted that the scope of the extended opt-out was limited by a declaration made by the United Kingdom on Article 75 of the Treaty on the Functioning of the European Union (the new name given to the EC Treaty by the Lisbon Treaty). Limited though it may be, the extension of the opt-out cannot in our view be dismissed as obviously immaterial.
 - ii) The second example was presented in terms of the conferment of additional powers on national parliaments to delay or resist EC legislation by reference to principles of subsidiarity. The point turns on a new provision, in Article 7(3) of Protocol 2 to the treaties as amended by the Lisbon Treaty, whereby the Commission must review a measure if there is a majority of votes from national parliaments that the measure does not comply with the principle of subsidiarity. In addition, the period of response for national parliaments has been extended from 6 weeks to 8 weeks. Mr Singh made the cogent point that it is unlikely in practice that a majority of national parliaments will respond with the required reasoned opinions even within an 8 week time-frame, and that even if they do it alters the procedure but not necessarily the outcome.

Again, however, we do not think that the change can be dismissed as obviously immaterial.

- iii) The third example relates to changes with regard to the application of the Charter of Fundamental Rights to the United Kingdom. The Charter formed an integral part of the Constitutional Treaty, whereas under the Lisbon Treaty the position is more complex. The Charter is not part of the treaties, but the amended Article 6(1) of the Treaty on European Union provides that the Union recognises the rights, freedoms and principles set out in the Charter “which shall have the same value as the Treaties”. However, Article 1 of Protocol 30 provides that the Charter does not extend the ability of the Court of Justice or national courts to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms; and in particular, that nothing in Title IV of the Charter (concerning economic and social rights) creates justiciable rights applicable to the United Kingdom “except in so far as ... the United Kingdom has provided for such rights in its national law”. The precise legal consequences of those provisions will have to be worked out by the courts. Again, however, we take the view that the differences in this respect between the two treaties cannot be dismissed as obviously immaterial.
- iv) The fourth example concerns an amendment by the Lisbon Treaty to Article 4(2) of the Treaty on European Union, which provides *inter alia* that the Union shall respect the essential state functions of member states, “including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”. As a result of the amendment this is followed by an additional sentence: “In particular, national security remains the sole responsibility of each Member State”. Mr Singh submitted that the addition of that sentence did not amount to a substantive change, both in the light of the preceding sentence, which was contained in identical form in the Constitutional Treaty, and in the light of the further provision in Article 72 of the Treaty on the Functioning of the European Union, as amended by the Lisbon Treaty, that Title V of Part Three (on the area of freedom, security and justice) “shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”: that provision, too, was contained in identical form in the Constitutional Treaty. Although the additional sentence in Article 4(2) does seem relatively minor, we do not think it possible to conclude that an express statement that national security remains the “sole” responsibility of the member states is of no materiality.
- v) The final example concerns Article 352 of the Treaty on the Functioning of the European Union, as amended by the Lisbon Treaty. The article confers residual powers for the adoption of measures necessary for the attainment of treaty objectives where the treaties have not otherwise provided the necessary powers. Article 352(4) provides that the article “cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and that any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union”. No such limitation was contained in the corresponding provision of the Constitutional

Treaty. Mr Singh submitted that the limitation is likely to have limited, if any, substantive significance. In our view, however, one cannot dismiss as obviously immaterial a provision of this kind limiting the scope for European Union measures in the field of foreign and security policy.

34. We have expressed ourselves cautiously on the materiality of those various differences between the Constitutional Treaty and the Lisbon Treaty. We have done so because there is a further and deeper difficulty facing the claimant in relation to this issue. The court is in a position to determine the extent of factual differences between the two treaties, but how is it to assess the materiality of the differences that it finds? Whether the differences are sufficiently significant to treat the Lisbon Treaty as falling outside the scope of an implied representation to hold a referendum in respect of a treaty “with equivalent effect” must depend primarily, as it seems to us, on a political rather than a legal judgment. There are, as Mr Sumption submitted, no judicial standards by which the court can answer the question. The wide spectrum of opinion, both within and outside the United Kingdom, to which the parties have drawn the court’s attention with regard to the extent of similarity or difference between the two treaties serves to underline the point.
35. For example, the claimant points to the views expressed by the House of Commons European Scrutiny Committee in an October 2007 report on the *European Union Intergovernmental Conference* (HC 1014). Again, we leave aside for the time being the question whether it is permissible to rely on such material for this purpose. The committee prepared and annexed a table of concordance between the Constitutional Treaty and the proposed Lisbon Treaty (or the Reform Treaty, as it was described at that time) and made the following observations, at para 45 of the report, on what the table showed:

“It shows that, in accordance with the IGC Mandate, the Reform Treaty will introduce into the existing Treaties all the ‘innovations’ resulting from the 2004 IGC (apart from I-8 on symbols). It also shows that wherever the Constitutional Treaty restated the provisions of the EU and EC Treaties in an amended form, those amendments have been taken up in the Reform Treaty. Taken as a whole, the Reform Treaty produces a general framework which is substantially equivalent to the Constitutional Treaty. Even with the ‘opt-in’ provisions on police and judicial cooperation in criminal matters, and the Protocol on the Charter, we are not convinced that the same conclusion does not apply to the position of the UK under the Reform Treaty. We look to the Government to make it clear where the changes they have sought and gained at the IGC alter this conclusion in relation to the UK.”

On a narrower issue, the House of Commons Foreign Affairs Committee, in a January 2008 report on *Foreign Policy Aspects of the Lisbon Treaty* (HC 120-I), stated at para 27 of its conclusions:

“We conclude that there is no material difference between the provisions on foreign affairs in the Constitutional Treaty which the Government made subject to approval in a referendum and

those in the Lisbon Treaty on which a referendum is being denied.”

In addition, the claimant has quoted statements made by a number of political leaders and institutions across Europe to the effect, as he puts it, that the Lisbon Treaty and the Constitutional Treaty are substantially the same and that any changes do not affect the core elements.

36. The defendants, on the other hand, point to the advice given by the Dutch Council of State on 12 September 2007 on the mandate of the intergovernmental conference that led to the Lisbon Treaty. The Council of State reached this conclusion at section 3.5:

“The Council concludes that the proposed Reform Treaty will be a treaty whose content, methodology and goals are in keeping with the EU’s constitutional development as described in Section 3.1. Taken individually, many of the differences between the proposed Reform Treaty and the Treaty establishing a Constitution for Europe amount in strictly legal terms to shifts in emphasis, changes of form and abolition of symbols; the same was true, but in reverse, of the Treaty establishing a Constitution for Europe in relation to earlier treaties. Taken together, more far-reaching significance should be attached to changes such as the abandonment of the idea of a single written constitution, the decision not to include the whole of the Charter of Fundamental Rights, the sharper delimiting of the Union’s competences (including those in the protocol on services of general interest and of general economic interest) and the decision not to include the symbols of European unification.

The purpose of all these changes is to rid the proposed Reform Treaty as far as possible of the elements from the Treaty establishing a Constitution for Europe which could have formed a basis of the development of the EU into a more explicit state or federation. This means that the proposed Reform Treaty is substantially different from the Treaty establishing a Constitution for Europe.”

37. To the extent that such opinions concern the differences between the two treaties as a matter of fact, they are irrelevant, since it is for the court to make its own assessment of the facts. But in our view they help to show that an assessment of the substantiality or materiality of such differences as exist depends on political perspective and political judgment. That must also be true of the specific question whether the differences are sufficiently material to warrant a different decision on the holding of a referendum. In this case the government has decided that they are. We doubt whether the correctness of such an assessment is a justiciable issue at all. At best, it is a matter to be approached on a *Wednesbury* basis; and on that basis we are far from persuaded that the assessment is an unreasonable one. We reach that conclusion despite the fact that, on their face, the reasons originally given by the then Prime Minister for the holding of a referendum on the Constitutional Treaty (myths about Europe) are to a large extent capable of applying also to the Lisbon Treaty. There

was still proper scope, in our judgment, for a different assessment in relation to the Lisbon Treaty.

38. If, contrary to those views, it is for the court to make the primary assessment not just of the factual differences between the two treaties but also of the materiality of those differences, the claimant has failed to satisfy us, as he must do, that the differences are immaterial and that the Lisbon Treaty is to be regarded as having equivalent effect to the Constitutional Treaty for the purposes of the putative implied representation as to the holding of a referendum.
39. The problem to which we have just referred can be analysed in another way. In order to found a legitimate expectation, a representation must in general be “clear, unambiguous and unqualified” (*R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1570B). As stated in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, at para 72, “it is clear that it will only be in an exceptional case that a claim that a legitimate expectation has been defeated will succeed in the absence of a clear and unequivocal representation”. The implied representation relied on here depends for its application on an essentially political judgment as to whether, in the context of a decision as to the holding of a referendum, a later treaty is substantially similar to, or materially different from, the Constitutional Treaty. Such a representation, however, lacks the precision that is needed if it is to be capable of being enforced by the courts as a matter of public law; and there is nothing exceptional about the case that could enable the claim to succeed in the absence of a clear and unequivocal representation.
40. In summary, for the various reasons we have given, we are of the clear view that the claimant has failed to establish the existence of the promise upon which his case depends, namely a promise to hold a referendum on the Lisbon Treaty.

Can a promise of this kind give rise to an enforceable legitimate expectation?

41. Even if we had accepted that the relevant ministerial statements had the effect of a promise to hold a referendum in respect of the Lisbon Treaty, such a promise would not in our view give rise to a legitimate expectation enforceable in public law, such that the courts could intervene to prevent the expectation being defeated by a change of mind concerning the holding of a referendum. The subject-matter, nature and context of a promise of this kind place it in the realm of politics, not of the courts, and the question whether the government should be held to such a promise is a political rather than a legal matter. In particular, in this case the decision on the holding of a referendum lay with Parliament, and it was for Parliament to decide whether the government should be held to any promise previously made.
42. In *R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115, the government had stated while in opposition that it would abolish the state-funded assisted places scheme but had given undertakings that children already holding places under the scheme would continue to receive funding. However, the legislation enacted after the government came to power provided that those already holding places would continue to be funded only until they had completed the primary stage, save where the Secretary of State determined in an individual case that a longer period should apply. An additional complexity was that a letter from the Secretary of

State to another member of the public but seen by the applicant's mother had stated by mistake that the original promise would be honoured, and it had been some weeks before that error was corrected. The applicant challenged, on grounds that included breach of legitimate expectation, the Secretary of State's decision not to exercise his discretion to allow the applicant funding beyond the primary stage. The main basis on which the legitimate expectation challenge failed was that it would require the Secretary of State to act inconsistently with the legislative intention; but the reasoning of the court went wider than that. Laws LJ, with whom Sedley LJ agreed, said this at 1130F-1131D:

“As it seems to me the first and third categories explained in the *Coughlan* case ... are not hermetically sealed. The facts of this case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, although unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear. The local government finance cases, such as *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, exemplify this. As Wade and Forsyth observe (*Administrative Law*, 7th ed (1994), p.404):

“Ministers' decisions on important matters of policy are not on that account sacrosanct against the unreasonableness doctrine, though the court must take special care, for constitutional reasons, not to pass judgment on action which is essentially political.”

In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players. Here, with respect, lies the importance of the fact in the *Coughlan* case ... that few individuals were affected by the promise in question. The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, falling to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.

There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies in what may inelegantly be

called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by the earlier policy."

43. We recognise that those remarks proceeded from consideration of categories of legitimate expectation which relate or may relate to a substantive benefit rather than to a procedural requirement as contended for here. They also focused on the court's supervisory role in determining whether it is an abuse of power to disappoint a legitimate expectation, rather than on whether a legitimate expectation can be said to have arisen in the first place. What was said, however, about decisions in the macro-political field involving questions of general policy affecting the public at large can be applied equally to the threshold question, if it is in truth a separate question, whether a promise is of a kind that the courts will recognise as generating a legitimate expectation capable in principle of being enforced through the legal process (or, as Peter Gibson LJ put it in *ex p Begbie* at 1125C, "a legitimate expectation, in the sense of an expectation which will be protected by law"). In our view a promise to hold a referendum lies so deep in the macro-political field that the court should not enter the relevant area at all. If the government, on election, had promised the electorate that it would call a further general election after, say, three years in office, it is to our mind unthinkable that this would be held to give rise to a legitimate expectation enforceable in the courts: the consequences of going back on such a promise would be a matter for Parliament and, when the opportunity next arose, for the electorate to determine. The same must be true of a promise to afford the electorate the opportunity to vote in a referendum on a particular issue such as the Lisbon Treaty. Indeed, the position may be considered stronger in relation to such a referendum since, unlike the calling of an early general election, the decision lies as we have said with Parliament and not with the executive.
44. In reaching that view we proceed on the basis that it is relevant but not decisive that the promise is made to and affects the public at large. There is authority that the doctrine of legitimate expectation cannot reasonably extend to the public at large, as opposed to particular individuals or bodies who are directly affected by the executive action under consideration: *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 per Lord Keith at 545H, applied in *R v Secretary of State for Wales, ex p Emery* [1998] 1 All ER 367, 374g-375d. By contrast, we have already referred at para 20 above to the passage in *ex p Begbie* in which Sedley LJ said he had no difficulty with the proposition that in cases where government has made known how it intends to exercise powers which affect the public at large it may be held to its word irrespective of whether the applicant has been relying specifically on it. It is sufficient for our purposes to refer back to what Laws LJ said in *ex p Begbie* about questions of general policy affecting the public at large and to repeat that Sedley LJ agreed with his reasoning.

The implications of the privileges and role of Parliament

45. In our reasoning to date we have taken account of the fact that any decision on a referendum lies in Parliament. But the position of Parliament gives rise to further, more specific difficulties for the claimant's case.
46. In his submissions on behalf of the Speaker, Mr Lewis QC drew attention to two distinct constitutional principles relating to the position of Parliament. They are conveniently summarised by Stanley Burnton J (as he then was) in *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin), at para 46, following citations from *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 and other authorities:

“These authorities demonstrate that the law of Parliamentary privilege is essentially based on two principles. The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers, which in our Constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature. These basic principles lead to the requirement of mutual respect by the Courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the Courts.”

47. The first of those principles is particularly relevant to the use to which certain Parliamentary material may be put, and is considered later. The second goes to the core of the claimant's case. In *R v Parliamentary Commissioner for Standards, ex p Al Fayed* [1998] 1 WLR 669, 670, Lord Woolf MR said it was clearly established that “the courts exercise a self-denying ordinance in relation to interfering with the proceedings of Parliament”. In *R v Her Majesty's Treasury, ex p Smedley* [1985] QB 657, 666C-E, Sir John Donaldson MR said that “it behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so”; and against that background he went on to say, in relation to the particular Order in Council under challenge in those proceedings, that “it would clearly be a breach of the constitutional conventions for this court, or any court, to express a view, let alone take any action, concerning the decision to lay this draft Order in Council before Parliament or concerning the wisdom or otherwise of Parliament approving the draft”. The court in that case was willing to consider whether such an Order, if approved by Parliament, would be *ultra vires* the enabling statute, but made very clear the care that needed to be exercised in relation to the limits of the court's role.
48. In the light of that principle, the claimant has already cut back his claim heavily, in the ways we have indicated (paras 22-23 above). The case as reformulated still depends, however, on satisfying the court that the defendants are in breach of legitimate expectation by failing to introduce a Bill into Parliament to provide for a referendum (or, as might have been the case while the European Union (Amendment) Bill was still before Parliament, by failing to move an amendment providing for a

referendum). That reformulation creates an unsatisfactory disconnection between the expectation originally asserted and the relief now claimed, as well as producing the odd result that the defendants are said to be under a duty to introduce into Parliament a Bill which they can then work to defeat by their own votes and by all other means available to them. More importantly, it also fails to meet the problem created for the claimant's case by the principle to which we have referred.

49. In our judgment, it is clear that the introduction of a Bill into Parliament forms part of the proceedings within Parliament. It is governed by the Standing Orders of the House of Commons (see, in particular, standing order 57(1)). It is done by a Member of Parliament in his capacity as such, not in any capacity he may have as a Secretary of State or other member of the government. *Prebble* (cited above) supports the view that the introduction of legislation into Parliament forms part the legislative process protected by Parliamentary privilege. To order the defendants to introduce a Bill into Parliament would therefore be to order them to do an act within Parliament in their capacity as Members of Parliament and would plainly be to trespass impermissibly on the province of Parliament. Nor can the point be met by the grant of a declaration, as sought by the claimant, instead of a mandatory order. A declaration tailored to give effect to the claimant's case would necessarily involve some indication by the court that the defendants were under a public law duty to introduce a Bill into Parliament to provide for a referendum. The practical effect of a declaration would be the same as a mandatory order even if, in accordance with long-standing convention, it relied on the executive to respect and give effect to the decision of the court without the need for compulsion.
50. There was also a certain amount of argument addressed to the question of laying before Parliament an order under s.101(4) of the Political Parties, Elections and Referendums Act 2000. In our view, however, that is not the proper focus of attention. It is clear from the statements made by the Prime Minister and the Foreign Secretary in 2004 that the promised referendum on the Constitutional Treaty was to take place after the Parliamentary process had been completed: it was not envisaged that there would be a referendum before the relevant Bill had become a statute. Moreover an order under s.101(4) cannot be made unless there is before Parliament a Bill containing provision for a referendum. The question therefore comes back to the introduction of a Bill into Parliament to provide for a referendum, and we are not concerned with the laying of an order before Parliament under powers conferred by an existing statute, where different considerations might apply.
51. The fact that the claim would involve an interference by the court with the proceedings of Parliament is a further decisive reason why the claim must fail.
52. In any event, Parliament has now passed the European Union (Amendment) Act 2008 and in so doing has expressly rejected amendments that would have provided for a referendum on the Lisbon Treaty. It must be taken to have done so in full knowledge of the relevant history. In those circumstances it would in our view be wholly inappropriate, as well as futile, to require the defendants to raise the same issue with Parliament again. It is unrealistic to suppose, as the claimant suggested, that the court's intervention might at this late stage change the political atmosphere. Those considerations would lead at the very least to the refusal of relief in the exercise of the court's discretion even if, contrary to our findings, there were otherwise any substance to the claimant's case.

53. There are subsidiary points concerning Parliament which we should address briefly, out of deference to the submissions made by Mr Lewis on behalf of the Speaker. They relate to the use to which Parliamentary material can properly be put in these proceedings. First, Mr Lewis went so far as to submit that a case of legitimate expectation could not be founded on the Prime Minister's statements to Parliament, because it would involve questioning what was said in Parliament, contrary to Article 9 of the Bill of Rights 1689 and the wider principle of Parliamentary privilege based on the need to avoid interfering with free speech in Parliament. We doubt whether that is right, and we note that the defendants as well as the claimant took issue with it. There are several cases where the courts have entertained claims of breach of a legitimate expectation founded on ministerial statements in Parliament: see, for example, *In re Findlay* [1985] AC 318, 326-328; *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHHR 76, para 91; and *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, paras 2-3. In such cases the claimants are not questioning what has been said, but relying on it. The view that Parliamentary statements may be used for such a purpose also derives support from the judgment of the Privy Council in *Toussaint v Attorney General of Saint Vincent and the Grenadines* [2007] 1 WLR 2825. We do not, however, need to decide the question because it is common ground that the promise to hold a referendum on the Constitutional Treaty was repeated to the media outside Parliament and that no question of Parliamentary privilege arises in relation to statements to the media.
54. Secondly, Mr Lewis objected to the claimant's reliance on passages from reports of Parliamentary committees in support of his case, for example the report of the House of Commons European Scrutiny Committee expressing a view as to substantial equivalence between the Lisbon Treaty and the Constitutional Treaty. The authorities to which he referred included *R (Bradley) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin), *R (Federation of Tour Operators) v Her Majesty's Treasury* [2007] EWHC 2062 (Admin) and *Office of Government Commerce v Information Commissioner* (cited above). There are some differences of approach as between those cases, but we derive these two points from them: first, that the *opinion* expressed by a Parliamentary committee will generally be irrelevant to the issue of *fact* to be decided by the court; and, secondly, that reliance by one party on the opinion expressed by a Parliamentary committee creates the risk that the other party will contend that the opinion was wrong and will therefore give rise to, or risk giving rise to, the questioning of proceedings in Parliament, in breach of Parliamentary privilege. The way in which the claimant deployed the committee reports in the present case created problems in both respects (though Mr Singh sought to get round those problems by adopting the relevant parts of the reports as part of his own submissions). No such problems arise, however, in relation to the use we have made of the material in this judgment. We have relied on it only as an illustration of the diversity of views expressed in relation to the similarity or difference between the Constitutional Treaty and the Lisbon Treaty. The material is relevant to that issue, and such deployment of it creates no risk of its being questioned in breach of Parliamentary privilege.

Other issues

55. The arguments before us raised numerous other issues, on none of which do we think it necessary to reach any decision. One issue is the extent to which a decision to ratify a treaty is amenable to judicial review at all. That such a decision is not altogether outside the scope of judicial review is illustrated by the fact that s.12 of the European Parliamentary Elections Act 2002 makes statutory approval a condition precedent to the ratification of any treaty which provides for an increase in the powers of the European Parliament: Mr Sumption realistically conceded that a decision to ratify without such approval would be amenable to review. It may also be noted that the challenge in this case relates (at least in its avowed target) to the procedure followed in reaching the decision to ratify rather than to any potentially sensitive issue of policy involved in the decision itself. Nevertheless it seems to us that the limits of reviewability should be determined on a case by case basis if and when the need arises.
56. Other issues relate to specific aspects of the doctrine of legitimate expectation: for example, whether this is really a case of procedural rather than substantive legitimate expectation and whether that makes any difference; and whether there is a need for detrimental reliance and, if so, whether denial of a vote in a referendum amounts to anything more than disappointment rather than detrimental reliance. Mr Sumption also advanced an argument that, for a statement to found a legitimate expectation, it must be made by the decision-maker (he cited, *inter alia*, *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326, 339E) and that the decision-maker on the holding of a referendum is Parliament and not the executive; whereas Mr Singh contended that the claimant's case concerns matters within the power of the executive and in particular that it relates to the procedure followed in respect of a decision that lies within the power of the executive, namely the decision to ratify. A yet further argument advanced by Mr Sumption was that there does not exist in this case any legal right or obligation that could properly be the subject of declaratory relief. Such issues are no doubt interesting but they do not appear to us to have the same importance for this case as the points on which we have concentrated in this judgment.

Conclusion

57. For the reasons we have given, we are satisfied that the claim lacks substantive merit and should be dismissed. Even if we had taken a different view of the substance of the case, in the exercise of the court's discretion we would have declined to grant any relief, having regard in particular to the fact that Parliament has addressed the question whether there should be a referendum and, in passing the European Union (Amendment) Act 2008, has decided against one.
58. At a late stage in the proceedings, a few days before we expected to hand down judgment, we were informed by the Treasury Solicitor that, following Royal Assent to the European Union (Amendment) Act 2008, the government "is now proceeding to ratify the Treaty of Lisbon". We were concerned that the government might be intending to pre-judge or pre-empt the decision of the court by ratifying the treaty while the lawfulness of doing so without a referendum was still in issue before the court. The Prime Minister, however, acted promptly to remove our concern by

making clear that ratification would not take place before the judgment was handed down.

59. In the event, the decision of the court is itself clear. We have found nothing in the claimant's case to cast doubt on the lawfulness of ratifying the Lisbon Treaty without a referendum.