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Case No: CO/3098/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2019

Before:

MR. JUSTICE SWIFT

Between:

The Queen

on the application of

Rachael Andrews
- and -

Claimant

Minister For The Cabinet Office

Defendant

Mr. Tim Buley QC (instructed by Leigh Day) for the Claimant
Mr. Hanif Mussa (instructed by GLD) for the Defendant

Hearing dates: 6th March 2019

Approved Judgment

Mr. Justice Swift

A. Introduction

1. The premise for parliamentary elections under the Representation of the People Act 1983 (“the RPA 83”) is that votes are cast by making a mark on a paper ballot. The issue in this litigation concerns the extent of the steps available under the RPA 83 to accommodate the needs of blind and partially-sighted voters.
2. Rachael Andrews suffers from myopic macular degeneration. She has no sight in one eye and very little sight in the other. She has been registered blind since 2000. She cannot read standard print. If she is to read a hard-copy document each letter must be 4 or 5 cm high, and she has to hold the page right up against her face. In practice she is unable to vote without assistance, either from the Presiding Officer at a Polling Station or a companion. Her contention in these proceedings is that Regulations made under rule 29(3A) of Schedule 1 to the RPA 83 have failed to achieve the purpose of prescribing the use of a device that enables blind and partially sighted voters to vote without assistance. In the remainder of this judgment, simply as short hand, I will refer to “blind voters” rather than “blind and partially-sighted voters”.

B. Representation of the People Act 1983

3. Schedule 1 to the RPA 83 contains the parliamentary election rules (“the Rules”), which govern the conduct of parliamentary elections in the United Kingdom. By section 23(2) RPA 83, it is the “*general duty*” of the Returning Officer for each constituency

“... to do all such acts and things as may be necessary for effectively conducting the election in the manner provided by [the Rules]”.

4. If more than one candidate is nominated for election in a constituency, the Rules require that the election take the form of a poll (Rule 17); that votes at the poll are given by ballot (Rule 18); and that the ballot of every voter must comprise a ballot paper printed with the name and particulars of each candidate (Rule 19). The order of names on the ballot paper must be the same as in the statement of persons nominated (Rule 19(3)), namely an alphabetical order by surname (Rule 14(3)).
5. Rule 37 requires a ballot paper be provided for every voter who applies for one. Rule 37(5) and (6) then prescribe the process of voting as follows:

“(5) The voter, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station and there secretly mark his paper and fold it up so as to conceal his vote, and shall then show to the presiding officer the back of the paper, so as to disclose the number and other unique identifying mark, and put the ballot paper so folded up into the ballot box in the presiding officer’s presence.

(6) The voter shall vote without undue delay, and shall leave the polling station as soon as he has put his ballot paper into the ballot box”.

6. The equipment that a Returning Officer must provide to the Presiding Officer at each polling station is specified at Rule 29. In addition to ballot boxes, ballot papers, and other paraphernalia, Rule 29(3A) provides that

“(3A) The returning officer shall also provide each polling station with –

- (a) at least one large version of the ballot paper which shall be displayed inside the polling station for the assistance of voters who are partially-sighted; and
- (b) a device of such description which may be prescribed for enabling voters who are blind or partially-sighted to vote without any need for assistance from the presiding officer or any companion (within the meaning rule 39 (1)).”

The reference to “blind or partially-sighted” is, as I see it, intended to cover all persons who because of a defect of sight are unable to complete a ballot paper without assistance. The words “partially-sighted” are apt to cover a range of persons, including those who like the Claimant, have very little ability to see at all.

7. The Rules make express provision for assistance of blind and other disabled voters either from the Presiding Officer or from so-called companions. As to Presiding Officers, Rule 38(1) is as follows:

“(1) The presiding officer, on the application of a voter –

- (a) who is incapacitated by blindness or other disability from voting in manner directed by these rules, or
- (b) who declares orally that he is unable to read,

shall in the presence of the polling agents, cause the voter’s vote to be marked on a ballot paper in manner directed by the voter, and the ballot paper to be placed in the ballot box.”

By Rule 39, if on application by (among others) a blind person to vote with the assistance of someone at the polling station with him (a companion), a Presiding Officer is satisfied that the voter is blind, the Presiding Officer may permit the

companion to assist the blind voter if: (a) the companion has made the required declaration (Rule 39(5)); (b) the companion is “qualified” (Rule 39(3)); and (c) the companion has not previously assisted more than one voter at the election (Rule 39(2)(b)(ii)). Rule 39(2) then provides that once the permission of the Presiding Officer has been obtained,

“... then anything which is by these rules required to be done to or by that voter in connection with the giving of his vote may be done to, or with the assistance of, the companion”

8. The matter in issue in this claim is the scope of the power at Rule 29(3A)(b) to prescribe a device “... *for enabling voters who are blind or partially-sighted to vote without any need for assistance from the presiding officer or any companion*”. Rule 29(3A) was inserted into the Rules by section 13(2) of the Representation of the People Act 2000 (“the RPA 2000”) with effect from 16 February 2001. The power at Rule 29(3A) was exercised by regulation 12 of the Representation of the People (England and Wales) Regulations 2001 (“the 2001 Regulations”). That regulation, which also came into force on 16 February 2001, provides as follows:

“12. — Device referred to in rule 29(3A)(b) of parliamentary elections rules

(1) The device referred to in rule 29(3A)(b) of the rules in Schedule 1 to the 1983 Act shall be of the description set out in this regulation.

(2) The device must be capable of being attached firmly to a ballot paper and of being removed from it after use without damage to the paper.

(3) On the right-hand side of the device there shall be tabs of equal size which satisfy the conditions in paragraphs (4) to (7) below.

(4) The tabs shall be capable of being positioned on the ballot paper so that each one is above one of the spaces to the right of the particulars of the candidates on which the vote is to be marked (“the relevant space”).

(5) Each tab shall be numbered so that, when the device is positioned over a ballot paper, the number of each tab corresponds to that of the candidate whose particulars are to the left of the relevant space covered by the tab in question.

(6) Each number on a tab shall be in raised form so that it can be clearly identified by touch.

(7) Each tab shall be capable of being lifted so as to reveal the relevant space and so that there is sufficient room to allow a voter to mark a cross on that space.”

9. The device prescribed is known as the Tactile Voting Device or TVD. It is made from a sheet of transparent plastic which is as long as the ballot paper, and is placed on top of the ballot paper. On the right-hand side of the TVD are flaps, numbered from 1 at the top and so on down the page, so that the number of flaps corresponds to the number of candidates standing in the constituency. The number printed on each flap is raised so that it can be felt by touch, and adjacent to each flap, the flap number is printed in Braille, to assist those who are blind and Brailleists. But no other information is present on the TVD. In particular, there is no way using the TVD alone, that a blind person can know the name of the candidate, or the name of the party the candidate represents. The TVD will only permit a blind person to vote without assistance, if she memorised the order of candidates on the ballot paper either before she went to the polling station or while she was there.
10. The Claimant contends this is unsatisfactory. Unless she has assistance from the Presiding Officer or a companion, she is not able to mark her ballot paper against the name of the candidate she wishes to vote for, because the TVD does not identify candidates' names. It is not realistic, she says, to expect her to memorise the order in which the candidates appear on the ballot paper. In the 2017 general election there were 6 candidates in the constituency she voted in; at a by-election in 2009 there were 12 candidates. The position becomes even more complicated if more than one election takes place on the same day. The Claimant gives the example of May 2015 when Parish Council, District Council and Parliamentary elections all took place on the same day. The Claimant says she finds the continual need for assistance humiliating. In practice, she says, she is denied the opportunity to cast her ballot in secret.
11. This latter point requires some qualification. Under the Rules the ballot is secret. No ballot paper may be marked in such a way as (by the mark itself) to disclose the voter's identity; and no voter is required to declare her vote. Save for the former restriction, it is for each voter to decide whether to tell anyone who she has voted for. That freedom is preserved by obligations placed on Returning Officers, Presiding Officers, and others by section 66 of the RPA 83. Section 66(5) RPA 83 requires companions to maintain the secrecy of the vote of any person they have assisted to vote in the following way.

“(5) No person having undertaken to assist a blind voter to vote shall communicate at any time to any person any information as to the candidate for whom that voter intends to vote or has voted, or as to the number or other unique identifying mark on the back of the ballot paper given for the use of that voter.”

Thus, the point the Claimant can fairly make in this regard is not that the secrecy of her ballot is without protection; it is not. Rather if she wishes to exercise her right to vote effectively she will have to tell either the Presiding Officer or her companion who she wishes to vote for.

12. Nevertheless, in these proceedings the Claimant does say that the TVD is not a device of the type specified by Rule 29(3A) because it is not a device that enables her to vote “*without any need for assistance from the presiding officer or any companion*”. Her case is that if the TVD were to meet the objectives specified in Rule 29(3A) it would, as a minimum, need to have, row by row down the ballot, the name and party name of

each candidate written in raised writing or in Braille. The case for the Minister for the Cabinet Office is to the contrary. His position is that the prescription of the TVD was a lawful exercise of the power under Rule 29(3A), and that in fact the scope of that power does not permit prescription of the sort of device that the Claimant contends for.

C. Decision

13. What I must decide in this case is the meaning of the words in Rule 29(3A):

“... a device ... for enabling voters who are blind or partially-sighted to vote without any need for assistance from the presiding officer or any companion ...”

One starting point is to consider the nature of the assistance that may be provided by Presiding Officers and companions. The extent of assistance that companions may provide is explained in the final words of Rule 39(2). What may be done is described in the widest of terms – “*anything*” required to be done by the voter can be done with the assistance of the companion. Thus, a companion may assist a blind voter to identify the candidate she wishes to vote for; she could assist the voter to vote for that candidate by guiding the voter’s hand to make a mark against the candidate’s name; or the companion could, at the request of the voter, mark the ballot paper on behalf of the voter. So far as concerns Presiding Officers, under Rule 38(1) a Presiding Officer may mark the blind person’s vote on the ballot paper in accordance with the voter’s instructions. In argument before me, it was common ground that it would be open to a Presiding Officer to assist in ways falling short of this. For example, by reading the list of candidates to the blind voter; telling a blind voter the number of the candidate she wished to vote for; or even assisting her to find the right part of the ballot paper so as to vote for that candidate.

14. On this basis, a device that enabled a blind voter to vote without the need for the assistance that could be provided by a Presiding Officer or companion would need to do more than the present TVD. It would, at the least, have to comprise a fuller TVD of the sort suggested by the Claimant, which in addition to the numbered tabs has the name of each candidate and/or the party she stands for, either in raised lettering, or Braille, or both.
15. However, that is not a complete answer to the issue in this litigation. The submission made by the Minister for the Cabinet Office is that any construction of Rule 29(3A) must focus on what it is the device must enable the blind voter to do without assistance – namely “*to vote*”. The submission is to the effect that on a proper construction of the Rules, voting means marking a ballot paper; the TVD does allow a blind voter to vote without assistance because the flaps on the right-hand side shows where the mark is to be made; and a valid mark made under any of those flaps will be a valid vote in that for the purposes of Rule 47(2), it would show an intention to vote for one or the other of the candidates.

16. This submission was carefully advanced by Mr. Hanif Mussa, counsel instructed on behalf of the Minister for the Cabinet Office, both by reference to the provisions of the rules themselves, and by reference to the pre-legislative materials relating to the amendments made to Rule 29 by section 13(2) of the RPA 2000.
17. I consider there are two linked points that must be decided. The first point is whether it is correct that a device such as the present TVD represents the full extent of the assistance that may be provided in exercise of the power under Rule 29(3A). The second point is whether even if the present TVD does not amount to the full extent of the assistance that could be provided in exercise of the Rule 29(3A) power, is regulation 12 of the 2001 regulations nevertheless a lawful exercise of that power? Both issues turn on the meaning to be given to the phrase in rule 29(3A) “... *to vote without any need for assistance*...” (my emphasis).
18. “Vote” is a defined term – see section 202(1) of the RPA 83, which so far as material, states the following.

“... “voter” means a person voting at an election ... and “vote” (whether noun or verb) shall be construed accordingly, ...”

Yet since the definition goes no further than explaining that “*voting*” is that which is done by a “*voter*”, it does not resolve the point in dispute in this case, which concerns whether the vote is the mere making of the mark in one of the areas indicated on the ballot paper, or whether a person votes only when making the mark against the name of her candidate of choice.

19. The meaning, in this context, of “*to vote*” was considered on the application for permission to apply for judicial review in *R(Kolendowicz) v Proper Officer of the Greater London Authority* (CO/1672/2016). In that case Hickinbottom J, on paper, concluded that voting meant no more than the ability to mark a ballot paper independently. Thus Rule 29(3A) gave rise to no requirement for the TVD to show the position of each candidate on the ballot paper. The renewed application for permission was refused by Blake J, who, I am told, reached the same conclusion. I am not formally bound by either decision, and it is clear from Hickinbottom J’s determination on the papers that the application for permission in that case failed for various other reasons, entirely independent of his conclusion on the meaning of Rule 29(3A)(b). Having reflected on the arguments made to me, I take a different view on the meaning of the disputed words in Rule 29(3A)(b).
20. As a simple matter of language, it is possible to equate the words “*to vote*” with the simple marking of the ballot paper. But that conclusion does not survive if those words are construed in their context. Rule 18 provides that the outcome of an election is determined by the count of votes given to each candidate. This makes a point which is obvious as a matter of common experience, that voting is an act of choosing between the candidates who have been nominated. A description of voting only in terms of marking a ballot paper focuses on the physical act but pays no attention at all to the purposes of the act, namely for the voter to state her preferred candidate. I do not consider it possible to separate the act from its purpose.
21. The appropriateness of this purposive characterisation is underlined by Rule 47, which concerns whether or not, for the purposes of the count, a ballot paper is to be

rejected. Rule 47(1) provides, amongst other things, that a ballot paper that is void for uncertainty should not be counted. As to whether a ballot paper is void for uncertainty, Rule 47(2) provides as follows:

“(2) A ballot paper on which the vote is marked –

(a) elsewhere than in the proper place, or

(b) otherwise than by means of a cross, or

(c) by more than one mark,

shall not for such reason be deemed to be void if an intention that the vote shall be for one or other of the candidates clearly appears, and the way the paper is marked does not itself identify the voter and it is not shown that he can be identified by it.”

This reflects the clear (and to my mind obvious) connection between marking the ballot paper and choice. Voting under the rules means marking a ballot paper so as to indicate an intention to vote for one or other candidate.

22. This is the notion that stands behind both Rule 37(5) which prescribes that each voter “... *secretly mark his paper...*”, Rule 38(1) which permits a Presiding Officer to cause a blind voter’s vote “... *to be marked on a ballot paper in manner directed by the voter ...*”, and also Rule 29(3A) when it refers to a device “...*enabling voters who are blind ... to vote without any need for assistance ...*”. A device that does no more than enable blind voters to identify where on a ballot paper the cross can be marked, without being able to distinguish one candidate from another, does not in any realistic sense enable that person to vote. Enabling a blind voter to mark ballot papers without being able to know which candidate she is voting for, is a parody of the electoral process established under the Rules.
23. Some voters may of course, choose to mark their ballot paper at random, rather than on the basis of any considered view of the candidates or the political parties they represent. But that is not to the point. If a sighted voter decides to act in that way that is his choice; it is not because it is the option that is foisted upon him.
24. Thus, by reference to a proper construction of the Rules, and an ordinary understanding of the language used taking account of the context in which the words are used, my conclusion is that the power at Rule 29(3A) to provide a device “... *for enabling voters who are blind ... to vote without assistance from the presiding officer or any companion ...*” is not limited to the provision of a device such as the present TVD.
25. The provisions of the RPA 2000 which inserted Rule 29(3A) into the Rules were preceded by two reports, both of which were referred to in the Explanatory Notes as containing the purposes that lay behind the section 13(2) of the RPA 2000.
26. The first was the report of the Working Party on Electoral Procedures, chaired by George Howarth MP, and commissioned by the Home Office. The Working Party

reported in October 1999. Its report covered a wide range of issues. Under the heading “Disability Issues” the report stated as follows at paragraphs 4.3.1 to 4.3.3

“Assistance to vote in person

4.3.1 We accept that some additional assistance is however required to allow disabled voters to vote more easily and in person. Our review has looked at two further specific areas of legislation directly relevant to voting by disabled electors. Both proposals arise from representations made by disability organisations.

4.3.2 **We recommend** the introduction of changes to the election rules governing the provision of posters and equipment in polling stations to allow large print posters of the ballot paper to be displayed and for simple ballot paper templates or polling aides to be provided in polling stations. Changes of this kind will benefit the more than 1 million people in the United Kingdom with partial sight.

4.3.3 **We also recommend** that the existing provisions which allow blind voters to be assisted to vote by a companion should be extended to allow similar assistance to be given to other electors who otherwise would not be able to cast a vote. Assistance provided in this way should be subject to the same arrangements as those which currently operate for companions of blind voters”

27. The second report was the report by the House of Commons Select Committee on Home Affairs, on Electoral Law and Administration (the 4th Report of the 1997 – 1998 Parliamentary Session), published on 19 October 1999. This report was also wide-ranging. I have been referred to paragraph 85 to 93 of the report. At paragraph 92 the report states the following:

“We believe, however, that as a minimum the size and clarity of all ballot papers, including the type size for the candidate’s description, should be improved with a large print reference copy displayed in each polling station. The Home Office should also pilot the use of Braille and large print templates. We therefore welcome the announcement that, subject to legislative opportunity, the Government now intend to make possible the introduction of polling aids for disabled people generally.”

The Government response to that recommendation was in the following terms:

“We have accepted the working party’s recommendation for the introduction of changes to the election rules governing the provision of posters and equipment in polling stations to allow large print posters of the ballot paper to be displayed and for simple ballot paper templates or polling aides to be provided in

polling stations. Changes of this kind will benefit more than 1 Million people in the United Kingdom with partial-sight”

28. Even assuming this material to be admissible I can discern nothing from it that has any material impact on the proper construction of the power then inserted into the Rules by the new Rule 29(3A). In particular, I can see nothing in this material to the effect that the only purpose of the proposed templates was to permit blind voters to be able to mark ballot papers without concern for voting for one candidate or another. To the extent that this material indicates the “mischief” that the power in what became 29(3A) was intended to address, it does no more (so far as concerns the issue in this litigation) than make clear that blind voters should be provided with additional assistance to vote. Given that the Rules as they then stood included the powers of the Presiding Officer under rule 38(1), and the role for companions under Rule 39, any additional provision would logically be directed to enabling blind voters to vote without help from any such second party.
29. For sake of completeness I note that I was also referred to Hansard material with a view to a contention that the TVD as specified in regulation 12 of the 2001 Regulations, is the device that specifically represents the parliamentary intention encapsulated in section 13(2) of the 2000 Act. Given the observations in *R v Secretary of State for the Environment Transport and the Regions ex parte Spath Holme Ltd* [2001] to AC 349 per Lord Bingham at 392B – D, and per Lord Hope at 407G to 408F as to the in-principle limitations on reference to Hansard material to determine the scope of a statutory power, I approach the Hansard material in this case with significant caution. Yet even if the comments made by Jack Straw MP (then Home Secretary) and Mike O’Brien MP (then Parliamentary Under-Secretary for the Home Office) are taken at face value, none is prescriptive. The comments do refer to the use of a ballot template, but in context, the comments made fall into Lord Bingham’s category of “*helpful answers*” rather than that of “*categorical assurance*” as to the use of the power in the Bill; *a fortiori* as to the specific form or content of any ballot template.
30. Drawing these matters together, my conclusion is that the present TVD does not represent the fullest possible use of the power at Rule 29(3A). In order to enable a blind person to vote, a device must allow the blind voter to mark the ballot paper against the name of her candidate of choice. A device in the form of the present TVD would achieve this if, in addition to the flaps and raised/braille numbers on the right-hand side, the names of the candidates and/or the names of their political parties were present in Braille and/or raised lettering in corresponding position, on the left-hand side of the device.
31. The second issue is whether regulation 12 of the 2001 Regulations represents a permissible use of the Rule 29(3A) power. In light of the conclusion I have already stated on the meaning of the words “... *device ... for enabling voters who are blind ... to vote without any need of assistance ...*”, the answer here is that the present TVD is not a device within the scope of Rule 29(3A) power. The present TVD is a navigational tool for blind voters – it directs them to the place on the right-hand side of the ballot paper where votes are marked. But the present TVD does not enable blind voters to vote “*without any need for assistance*” because it does not assist the blind voter when it comes to marking her vote against the candidate of her choice. Had it been that it was not possible to conceive of a device that could achieve that

purpose, there would be strong grounds for a different approach to the meaning of the power at Rule 29(3A)(b) and the effect of regulation 12 of the 2001 Regulations. But that is not the position. A device along the lines of the one I have described at paragraph 30 above, is capable of achieving that purpose.

32. Any electoral system which, as the one under the RPA 83, is premised on votes cast only by marks made on paper ballots which are required to be in a prescribed and uniform style, is likely to place blind voters at a disadvantage when compared to sighted voters. Regulation 29(3A) of the rules encapsulates a laudable objective – that of enabling blind voters to vote without assistance. The TVD prescribed by regulation 12 of the 2001 Regulations does provide assistance, but it does not itself meet the purpose specified in Rule 29(3A).

D. Relief

33. The Claimant seeks a declaration in respect of regulation 12 of the 2001 Regulations, but does not seek an order quashing regulation 12. Given the conclusion I have reached on the meaning and effect of Rule 29(3A) I agree that a declaration is appropriate. Even if the Claimant had sought a quashing order, it is unlikely I would have made such an order – the present TVD may not enable blind voters to vote without assistance, but it does provide help along the way. Pending further consideration of the use of the Rule 29(3A) power, an order quashing regulation 12 would have been retrograde, and would have promoted no discernible public interest. As it is, I will grant declaratory relief alone, directed to regulation 12 of the 2001 Regulations.
34. The parties may make submissions as to the form of that relief, and as to any other consequential matters.