



Neutral Citation Number: [2019] EWHC 641 (Admin)

Case No: CO/150/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 March 2019

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

Between :

THE QUEEN
on the application of
NEIL COUGHLAN

Claimant

- and -

THE MINISTER FOR THE CABINET OFFICE

Defendant

- and -

BRAINTREE DISTRICT COUNCIL
AND OTHERS

Interested
Parties

Michael Fordham QC, Sarah Sackman and Natasha Simonsen
(instructed by Leigh Day & Co) for the Claimant
Hanif Mussa and Emily MacKenzie
(instructed by Government Legal Dept.) for the Defendant
The Interested Parties were not represented

Hearing date: 7 March 2019

Approved Judgment

Mr Justice Supperstone :

Introduction

1. On 3 November 2018 the Cabinet Office announced in a press release that eleven local authorities across England would be “taking part in Voter ID pilots for the 2019 local elections... [to] provide further insight into how best to ensure the security of the voting process and reduce the risk of voter fraud”. They include Braintree District Council (“Braintree”), whose pilot scheme “will require voters to present either one form of photo ID or up to two forms of non-photo ID”.
2. The Claimant lives in Witham, Essex, which is within Braintree. He served as a district councillor for Braintree East (2003-2007) and as a town councillor for Witham North (2013-2015). In his first witness statement he explains his concerns about the proposed Voter ID scheme. He believes that Voter ID requirements in elections “will serve to further disenfranchise the poor and vulnerable who already struggle to have their voices heard” (para 16).
3. Voter ID schemes are controversial. It is therefore important to make clear that this court is not concerned with the merits of the decision to introduce the pilot schemes. The only issue for this court is whether the decision to do so is lawful. That turns on the proper interpretation of section 10 of the Representation of the People Act 2000 (“the 2000 Act”), which empowers orders in respect of approved pilot schemes for voting in local government elections.
4. In essence, the central question is whether the voter ID pilots are schemes within the meaning of s.10(2)(a), that is, whether they are schemes for testing “how voting... is to take place”. The Claimant contends that the requirement to produce voter ID does not concern “how” voting takes place, but whether voting is permitted to take place at all. The Defendant contends that the pilot schemes do fall within the scope of s.10(2)(a). They make provision differing in a relevant respect from that contained in secondary legislation made “under or by virtue of the Representation of the People Acts as regards ... how voting at the elections is to take place”. The Defendant contends the words Parliament used include procedures for demonstrating an entitlement to vote as part of the voting process, including a requirement to prove identity. Current procedures permit entitlement to vote to be demonstrated through questioning.
5. On 28 January 2019 Lang J ordered the application for permission to apply for judicial review to be listed in court as a “rolled-up hearing”.

Factual Background

6. The factual background to the making of the pilot schemes is set out in the witness statement of Mr Paul Docker, head of the Electoral Administration Team in the Cabinet Office, dated 8 February 2019.
7. On 10 September 1998 the House of Commons’ Home Affairs Committee (“the Committee”) published its Fourth Report titled “*Electoral Law and Administration*”. The introduction to the report began by stating, “If democracy is to be properly safeguarded, the laws relating to the running of elections need to be efficient and effective” (para 1). The introduction went on to explain the two main arguments for

reform that had been put to the Committee, both of which it accepted. First, the Committee “regard[ed] it as important for the health of the democratic and political system that participation in the electoral process be as high as possible.” The Committee “consider[ed] that there is a need to examine all aspects of the British electoral process, including therefore the election procedures, to establish what practical steps can be taken to increase participation”. Second, the Committee “conclude[ed] that there is a need to bring election administration up-to-date so as to maximise its effectiveness and its relevance to modern needs”.

8. Section D of the report is titled “**Making it easier to cast a vote**”. Paragraph 56 states:

“It is difficult or impossible to make any close estimate of how many people do not vote for any of [the] reasons [referred to in para 55 above]. No-one believes that the problem of low turnout will be completely cured by making the physical process of casting a vote easier any more than it will be cured by improving the accuracy of the register. Nevertheless, changes in technology and in modern society (such as working patterns and mobility) mean that the basic model of voting in a local polling station may not be the most convenient method for many voters who do vote. On the grounds then of both the greater convenience which might be available both to those who currently do vote and of the small increase in turnout it might generate **we conclude that the time is right to consider a range of possible reforms to the physical process of casting a vote.**” (Emphasis in original)

9. Paragraph 57 continues:

“We consider some of the possible changes in more detail below. But we must stress immediately one general point. Change must not be allowed to threaten the integrity of the election process. **Reforms must therefore be approached cautiously and changes which are based on visions of what new technology can offer must be assessed not simply on the basis that they are ‘modern’ or ‘exciting’ but on whether they are safe and effective.** Change must not be introduced to a system which works well simply for changes sake.” (Emphasis in original)

10. Section E of the report is titled “**Fraud**”. The Committee noted that “Witnesses to the inquiry were confident that there was relatively little fraud in elections in England, Scotland and Wales” (para 94). Nevertheless, this situation cannot be taken for granted. There were some points of limited concern which were raised, which the Committee examined. These included abuse of proxy and postal voting; impersonation and vote tracing; and ballot papers. Under the heading “**Impersonation and vote tracing**” the Committee stated (at para 99):

“Anecdotal evidence also exists that there is a certain measure of fraud in the form of impersonation... of registered voters at polling stations. In Great Britain, prospective voters are not required to provide proof of identity to establish that they are in

reality the person listed on the register they are claiming to be. The presiding officer may, if doubtful about the person's identity or if requested to do so by a candidate's agents, only put two specific questions, set out in the Election Rules, asking the person to confirm that s/he is the person registered and to confirm that s/he has not already voted, ... though we understand that no record is kept as to how frequently such questions are in fact asked..."

The Committee continued (at para 102):

"We broadly agree that there is at present no great problem with impersonation in British elections outside Northern Ireland, and we do not see a need to introduce any additional requirements to prove identity before being given a ballot paper..." (Emphasis in original)

11. Following the general election in 1997 the then Secretary of State for Home Affairs, the Rt. Hon. Jack Straw MP directed that a review of electoral procedures should be carried out. A Working Party on Electoral Procedures was established at the beginning of 1998 under the chairmanship of Mr George Howarth MP, then Parliamentary Under Secretary at the Home Office. A final report was submitted to the Secretary of State on 8 October 1999 and published on 19 October 1999 ("the Howarth Report").

12. The relevant section of the Howarth Report is headed "**Improving voting arrangements and making voting easier**". At paragraph 3.1.2 the working party stated:

"The fact that many of our procedures were first drawn up over one hundred years ago does not of course mean that they are necessarily inadequate or ineffective: throughout our review we have been reminded that voting procedures have been tested and have largely retained the electorate's trust and support over that time. But the evidence of falling turnout at all elections and an apparent disenchantment with the traditional forms of democratic participation through the ballot box suggested to us strongly from early in our review that it is now time to consider a fundamental modernisation of the electoral process."

13. The Howarth Report recommended that different voting arrangements be tested in pilot schemes for local government elections (paras 3.1.3-3.1.6). The following suggestions, which break down into three broad categories, were made:

"When to vote

3.1.7 Suggestions include

- changing polling hours to allow variations around the opening and closing of the poll

- moving polling to an alternative weekday or weekend day or allowing voting over more than one day
- opening some polling stations in the days immediately before polling day itself to allow voters to cast their votes early

...

Where to vote

3.1.9 Pilot schemes could address a number of issues about the location of polling, including

- out of area voting, allowing electors to vote in any polling station in the electoral area, or even outside it
- mobile polling, taking the ballot box to identified groups of voters, for example by visiting residential and convalescent homes

...

How to vote

3.1.11 Pilot schemes might propose moving away entirely from the present paper ballot and polling station arrangements to a more remote voting system. Suggested possibilities include

- all postal ballots, allowing an election to be held on the basis of postal voting only
- automated voting or vote counting, replacing manual voting and vote counting with electronic polling machines or ballot paper scanners
- telephone voting, using domestic telephones linked to automatic voice recognition and recording equipment at one or more central locations
- electronic voting, on-line from publicly sited terminals and other access points such as digital television using the Internet”

14. The Howarth Report recognised that pilot schemes should take account of the need to safeguard the integrity of the proposed voting arrangements; for example, early voting would require close control over the register to prevent double voting using different polling stations (para 3.1.8, and see para 3.1.10 and 3.1.12).
15. The Howarth Report’s “Summary of Recommendations” stated in the section headed “**Making voting easier**”:

“We recognise the consensus which is developing for new approaches to voting which will more clearly reflect modern patterns of behaviour and which can assist in reinvigorating the public’s interest and participation in the democratic process. Local authorities and electoral administrators in particular are very keen to test out the effectiveness of allowing electors to vote in more flexible ways.

We think that the time is now right to test alternatives to the present voting arrangements in pilot schemes at local elections.

Examples of innovative approaches which might be included in pilots includes

- Polling hours: variations in polling hours to allow earlier starts or finishes
- Polling days: moving polling to an alternative weekday or a day at the weekend or allowing voting over more than one day
- Early voting: opening a limited number of polling stations in the period before polling day at accessible locations to allow any eligible elector to vote
- Mobile polling: providing a mobile polling station which could take the ballot box to groups of voters, for example, by visiting residential and convalescent homes
- Out of area voting: allowing electors to vote at any polling station in the electoral area, or even outside it
- All postal ballots: allowing an election to be held on the basis of postal voting only
- Electronic voting: supplementing polling booths and polling stations with automated voting equipment, telephone or on-line remote voting via the internet.

We recommend that the Secretary of State should be authorised to amend electoral legislation to approve pilot schemes involving one or more of the above proposals. Pilot schemes would encourage innovation and diversity and offer a real opportunity to see exactly how different approaches can be effective in re-engaging the electorate. Evaluation of such schemes will allow informed judgements to be made as to the effectiveness and security of each new process before a decision is taken to roll it out more widely.”

16. Mr Docker noted (at para 12) that the Government responded to the Committee’s report after the publication of the Howarth Report. The response of 8 November 1999 reflects

the conclusions set out in the Howarth Report. The Government's response stated, so far as is relevant:

“(21) We conclude that the time is right to consider a range of possible reforms to the physical process of casting a vote (Paragraph 56)

We have accepted the Working Party's recommendation that legislation should allow the Home Secretary to authorise and evaluate pilot schemes of alternative voting arrangements.

...

(41) We broadly agree that there is at present no great problem with impersonation in British elections outside Northern Ireland, and we do not see a need to introduce any additional requirements to prove identity before being given a ballot paper (paragraph 102).

We agree.”

17. On 9 March 2000 the relevant provisions of ss.10 and 11 of the 2000 Act came into force. As from 1 July 2001 those provisions were amended due to the establishment of the Electoral Commission pursuant to the Political Parties, Elections and Referendums Act 2000.
18. Pilots under ss.10(1) and (2) of the 2000 Act have been conducted in 2000, 2002-2004, 2006-2007 and 2018. Mr Docker refers to remote electronic voting over the internet being tested on a number of occasions between 2002 and 2007 (at paras 26-45). The pilot schemes required identification mechanisms to ensure that electronic voting could take place securely. In 2006 and in 2007 a requirement to provide a signature at a polling station before being provided with a ballot paper was tested (paras 51-57). Other pilot schemes included postal voting signature checking, and postal vote tracking.
19. In January 2014 the Electoral Commission published a report entitled “Electoral Fraud in the UK, Final Report and Recommendations”. The Report noted numerous examples of impersonation offences occurring, but also stated that “Perceptions of fraud can be as damaging as actual incidents of electoral fraud. Voters must be able to have confidence in the system and in our review we looked at what more could be done to ensure they can” (p.1). The Commission recommended that voter identification requirements be introduced at polling stations. The report was followed by a further report in December 2015 entitled “Delivering and costing a proof of identity scheme for polling station voters in Great Britain”, which set out further details of the proposals.
20. In 2015 Sir Eric Pickles conducted a review into electoral fraud. In August 2016 his report entitled “Securing the Ballot” was published (“Pickles Report”). The Pickles Report made 50 recommendations. One of them was that a requirement for voters to provide identification at polling stations should be considered by the Government and tested by pilot schemes.

21. In December 2016 the Cabinet Office published a response to the Pickles Report, entitled “A Democracy that Works for Everyone”. The Foreword by Mr Chris Skidmore MP, then Minister for the Constitution, stated that the focus would include piloting the use of ID in polling stations. The Electoral Commission welcomed the Government’s reaction and highlighted that, in its view, the use of photographic identification would be “the most effective proof against personation” (Electoral Commission press release, 27 December 2016). Subsequently, Mr Docker states (at para 84) that “for the purposes of the general election in June 2017, a Conservative Party manifesto commitment was made in respect of confidence in the democratic system and to legislate to ensure that a form of identification must be presented before voting, and to improve other aspects of the electoral process”.
 22. In March 2017 the Cabinet Office published a prospectus titled “Electoral Integrity Pilots” in relation to a plan to conduct voter identification pilots in the May 2018 local elections. This stated that the 2018 pilot would have two objectives:
 - “Objective 1: That proposed ‘ID at polling stations’ policy measures are proportional to the policy objective of reducing the opportunity for electoral fraud.
 - Objective 2: That the proposed ‘ID at polling stations’ policy measures enhance public confidence in the security of the electoral system.”
- Five local authorities were ultimately selected to take part in trials of identification requirements at polling stations. Pilot orders were made in respect of each area. The pilots took place and were evaluated by both the Electoral Commission and the Cabinet Office.
23. In July 2018 the Electoral Commission published reports on the pilots carried out in each area and also published a summary report titled “May 2018 voter identification pilot schemes: findings and recommendations”. The key findings of the report included the finding that the schemes “worked well” overall; there was “a small number of people who were unable to vote because they did not have, or did not bring with them, the right type of identification”; there was some evidence to suggest the identification requirements “had a positive impact on public confidence in the May 2018 elections, although this picture was not consistent within the individual pilot areas and there was evidence that wider local circumstances also have an impact”; and whilst it was not possible to evaluate whether the pilot schemes prevented actual attempts to commit electoral fraud they were likely “to have had some positive impact on reducing the potential for electoral fraud by impersonation at polling stations”.
 24. The Commission recommended that the Government should conduct further trials of voter identification requirements in the May 2019 elections. It was recommended that these involve a wide range of local councils from diverse areas with different demographic profiles.
 25. On 18 July 2018 the Cabinet Office 2018 report entitled “Electoral Integrity Project – Local Elections 2018 – Evaluation” was published, which also concluded that the pilots had been a success.

26. Mr Docker acknowledges (at para 98) that “the 2018 pilots proved to be controversial in some quarters”. Some organisations, such as the Electoral Reform Society, were opposed to them.
27. In around June 2018 a “pre-prospectus” was approved by the Minister and circulated to local authorities. This explained that the Cabinet Office would like to start working with authorities on the potential of pilots in May 2019. In August 2018 the Cabinet Office published a full prospectus “Electoral Integrity Pilots: Prospectus 2018”, approved by the Minister, inviting local authorities to take part in further voting identification pilots. The Introduction included the following:

“We want councils to get involved and work with us to pilot in their area to help us promote greater confidence in our democratic process.” (para 2)

“We are seeking to encourage voting by improving the integrity of the voting system and voter confidence. We owe it to voters to ensure they know their voices are being heard and their right to vote is being protected. The impact of electoral fraud on voters can be significant and takes away their right to vote as they want – whether through intimidation, bribery or by impersonating someone and casting their vote. These are not victimless crimes. No level of electoral crime should be accepted when we have the ability to tackle it.” (p.5)

28. In Chapter 2, titled “Objectives”, the prospectus stated:

“2.1 Wider Objectives

...

2. ... The Government wishes to see in place systems that can mitigate risks to the integrity of our electoral process and address the perception of voter fraud, if voters have confidence in the integrity of the electoral system then they are more likely to participate in that process.

...

2.2 Pilot Objectives for 2019

1. Voter ID pilots at next year’s local elections would enable the three models trialled this year to be refined, and implemented in different areas and with new partners, providing additional evidence and experience in preparation for national rollout.

2. We are looking to take forward pilots in authorities representing a diverse range of relevant socio-economic and demographic conditions and different types of areas (e.g. metropolitan, rural, urban). We would also encourage

applications from authorities that have a history of electoral fraud.”

29. Chapter 4 of the prospectus stated that provision would be made to ensure that those who did not already possess relevant identification documents are none-the-less able to vote:

“1. The Government remains aware that not all types of identification are universally held by individuals who are eligible to vote in polls in the UK and it is essential that we maintain the accessibility of the polls. At the same time, we must enhance voters’ confidence in the system in which they are participating on polling day. The types of ID we are testing through these pilots will aim to balance these two requirements.

2. The types of ID that the Government is interested in testing will be for each pilot one of the following: photographic ID, a combination of photographic and non-photographic ID or poll cards, whether or not enabled by additional technology.

3. Any elector unable to produce the required identification must have the option to apply to their returning officer for a locally produced document that satisfies the voter ID requirement and which will be issued to the elector free of charge.” (p.10)

30. On 3 November 2018 the Cabinet Office announced in a press release that eleven local authorities had been chosen to participate in the pilot schemes (see para 1 above).
31. On 26 February 2019 orders were made in relation to the photographic identification schemes. On 27 February 2019 orders were made in relation to the poll card schemes. On 4 March 2019 orders were made in relation to the remainder of the pilot schemes, including the pilot scheme for Braintree. There are now ten local authorities participating in the pilot schemes.

Legislative Framework

Representation of the People Act 2000

32. Part II of the 2000 Act titled “Conduct of Elections” with a sub-heading “New electoral procedures” provides, so far as is material:

“10. Pilot schemes for local elections in England and Wales

(1) Where—

(a) a relevant local authority submit to the Secretary of State proposals for a scheme under this section to apply to particular local government elections held in the authority’s area, and

(b) those proposals are approved by the Secretary of State, either—

(i) without modification, or

(ii) with such modifications as, after consulting the authority, he considers appropriate,

the Secretary of State shall by order make such provision for and in connection with the implementation of the scheme in relation to those elections as he considers appropriate (which may include provision modifying or disapplying any enactment).”

33. S.10(1A) requires the Secretary of State to consult the Electoral Commission before making an order. Pursuant to s.17(2), an enactment includes “any provision of an Act” (s.17(2)(a)), and “any provision of subordinate legislation” (s.17(2)(d)).

34. S.10(2) defines “a scheme under this section” for the purposes of the power under s.10(1). It provides as follows:

“A scheme under this section is a scheme which makes, in relation to local government elections in the area of a relevant local authority, provision differing in any respect from that made under or by virtue of the Representation of the People Acts as regards one or more of the following, namely—

(a) when, where and how voting at the elections is to take place;

(b) how the votes cast at the elections are to be counted;

(c) the sending by candidates of election communications free of charge for postage.”

35. The “Representation of the People Acts” referred to in s.10(2) include the Representation of the People Act 1983 (“the 1983 Act”) and the 2000 Act (see s.207(1) of the 1983 Act and s.17(1) of the 2000 Act).

36. S.10(6) of the 2000 Act provides that where an order has been made following the election to which it relates the Electoral Commission shall prepare “a report on the scheme”. Ss.10(7)-(9) provide, so far as is relevant:

“(7) The report shall, in particular, contain—

...

(c) an assessment of the scheme’s success or otherwise in facilitating—

(i) voting at the elections in question, and

(ii) (if it made provision as respects the counting of votes cast at those elections) the counting of votes,

or in encouraging voting at the elections in question or enabling voters to make informed decisions at those elections.

(8) An assessment under sub-section (7)(c)(i) shall include a statement by the authority concerned as to whether, in their opinion—

(a) the turnout of voters was higher than it would have been if the scheme had not applied;

(b) voters found the procedures provided for their assistance by the scheme easy to use;

(c) the procedures provided for by the scheme led to any increase in personation or other electoral offences or in any other malpractice in connection with the election;

(d) those procedures led to any increase in expenditure, or to any savings, by the authority.

(9) If the Secretary of State so requests in writing, the report shall also contain an assessment of such other matters relating to the scheme as are specified in his request.”

37. Section 11 provides for the revision of electoral procedures in the light of successful pilot schemes conducted under s.10. S.11(1) provides as follows:

“If it appears to the Secretary of State, in the light of any report made under s.10 on a scheme under that section, that it would be desirable for provision similar to that made by the scheme to apply generally, and on a permanent basis, in relation to—

(a) local government elections in England and Wales, or

(b) any particular description of such elections,

he may by order make such provision for and in connection with achieving that result as he considers appropriate (which may include provision modifying or disapplying any provision of an Act, including this Act).

The power of the Secretary of State to make such an order shall, however, be exercisable only on a recommendation of the Electoral Commission.”

38. S.11(3) provides that an order under sub-section (1) “shall be made by statutory instrument; and no such order shall be made unless a draft of the statutory instrument containing the order has been laid before, and approved by a resolution of, each House of Parliament”.

39. Section 11(6) provides that where an order is made under s.11(1), the Secretary of State has further powers to make provisions in connection with local government election rules: “Rules made under section 36 of the 1983 Act (local elections in England and Wales) may make such provision as the Secretary of State considers appropriate in connection with any provision made by an order under sub-section (1)”.

Representation of the People Act 1983

40. Section 2(1) of the 1983 Act prescribes the franchise for local government elections. It provides that “A person is entitled to vote as an elector at a local government election in any electoral area if on the date of the poll” he “is registered in the register of local government electors for that area” and satisfies certain further conditions: (i) he is not subject to any legal incapacity to vote; (ii) he has relevant citizenship; and (iii) he is of voting age. No person is entitled to vote more than once in the same electoral area at any local government election (s.2(2)).
41. Section 4(3) provides that “A person is entitled to be registered in the register of local government electors for any electoral area if on the relevant date he—(a) is resident in that area..”, and satisfies the three further conditions set out above. However, s.4(4)(a)(ii) clarifies that the right under s.4(3) is subject to “compliance with any prescribed requirements”.
42. Section 10ZC provides for the registration of electors:
 - “(1) A registration officer in Great Britain must enter a person (‘P’) in a register maintained by the officer if—
 - (a) an application for registration is made by someone who appears to the officer to be P,
 - (b) any requirements imposed by or under this Act in relation to the application are met, and
 - (c) P appears to the officer to be entitled to be registered in the register.”
43. S.10ZC(3) states that regulations may make provision about the procedure for determining applications made under this section.

Representation of the People (England and Wales) Regulations 2001

44. The Representation of the People (England and Wales) Regulations 2001 make provision in respect of registration. Regulation 26 addresses applications for registration as a parliamentary or local government elector (or both) under s.10ZC of the 1983 Act. The details required include the applicant’s full name, the address at which the person wishes to apply to be registered, details of other addresses and previous addresses, a national insurance number, and a declaration of truth. Regulation 26B provides a power to request additional evidence where certain information is unavailable or where the registration officer considers it necessary “to verify the identity of a person or determine their entitlement to register in respect of their application” under s.10ZC (reg.26B(1)). Regulations 26B(2)-(4) identify identification documents that may be requested. These include copies, or where the registration officer considers it appropriate, originals of passports, photocard driving licences, birth certificates, marriage certificates, various financial statements, council tax statements, utility bills as well as other documents. Regulations 26B(5) and (6) provide that if such documentation is not available, the applicant may be required to provide an attestation

from a person of good standing in the community. Regulations 29ZA-31A make provision for the determination of applications for registration.

The Local Elections (Principal Areas) (England and Wales) Rules 2006 and the Local Elections (Parishes and Communities) (England and Wales) Rules 2006

- 45. The existing local government election rules, so far as relevant, are contained in the Local Elections (Principal Areas) (England and Wales) Rules 2006 (“the Principal Areas Rules”), and the Local Elections (Parishes and Communities) (England and Wales) Rules 2006 (“the Parishes Rules”). There is no material difference between the two sets of rules.
- 46. Section 36(1) of the 1983 Act provides that elections of councillors for local government areas in England and Wales shall be conducted in accordance with rules made by the Secretary of State. Section 36(2) provides that “Rules made under this section shall apply the parliamentary elections rules in Schedule 1 to this Act, subject to such adaptations, alterations and exceptions as seem appropriate to the Secretary of State”.
- 47. The Principal Areas Rules make provision regarding the procedure for voting at local government elections.
- 48. Chapter 3 of Schedule II to the Principal Appeal Rules titled “The Poll” includes rule 33 which provides, so far as is relevant, as follows:

“33—Questions to be put to voters

(1) At the time of the application (but not afterwards), the questions specified in the second column of the following Table—

(a) may be put by the presiding officer to a person applying for a ballot paper who is mentioned in the first column, and

(b) must be put if the letter ‘R’ appears after the question and the candidate or his election or polling agent requires the question to be put:

| Q. No. | Person applying for ballot paper | Question |
|---------------|-----------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. | A person applying as an elector | (a) Are you the person registered in the register of local government electors for this election as follows? <i>read the whole entry from the register [R]</i> (b) Have you already voted here or elsewhere at this election... |

| | | |
|--|--|---------------------------------------------------|
| | | otherwise than as proxy for some other person [R] |
|--|--|---------------------------------------------------|

...

(3) A ballot paper must not be delivered to any person required to answer any of the above questions unless he has answered each question satisfactorily.

(4) Except as authorised by this rule, no enquiry shall be permitted as to the right of any person to vote.”

- 49. The material part of rule 33 set out above is in a similar form to rule 35 of Schedule 3 to the 1983 Act made in respect of parliamentary elections.
- 50. Rule 35 is titled “**Voting procedure**”. Rule 35(1) provides: “A ballot paper must be delivered to a voter who applies for one, and immediately before delivery (a) the number and ... name of the elector as stated in the copy of the register of electors must be called out...”.

The Pilot Schemes

- 51. The Pilot Schemes will have effect in ten local authority areas so as to permit the testing of new identification requirements at the polling stations during the local government elections due to take place in May 2019. The relevant Orders, so far as is material, are all in the same form. The Braintree District Council (Identification in Polling Stations) Pilot Order 2019 made on 4 March 2019 provides, so far as is relevant, as follows:

“This Order is made in the exercise of the powers conferred by section 10(1) of the Representation of the People Act 2000 (‘the 2000 Act’).

...

The Minister for the Cabinet Office makes the following Order:

... **Conduct of elections**

3—(1) In relation to the election, the enactments specified in this article shall have effect subject to the substitutions and modifications made by this article.

(2) The provisions in Schedule 2 to the 2006 Principal Areas Rules set out in column (1) of the Table in Schedule 1 to this Order shall have effect subject to the modifications in column (2) of that Table.

...

Schedule 1

Modifications to Schedule 2 to the 2006 Principal Areas Rules

Table

| <i>(1)</i> | <i>(2)</i> |
|-------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Rule</i> | <i>Modification</i> |
| ... | |
| 35 | At the beginning of paragraph (1) insert ‘Subject to paragraph (2A) to (2J).’ |
| Voting Procedure | <p>After paragraph (2) insert—</p> <p>‘(2A) A ballot paper must not be delivered to a voter unless that voter has produced a specified document to the presiding officer or a clerk.</p> <p>(2B) Where a voter produces a specified document, the presiding officer or clerk to whom it is produced must deliver a ballot paper to the voter in accordance with paragraph (1) unless the officer or clerk decides that the document raises a reasonable doubt as to whether the voter is the elector or proxy he represents himself to be.’”</p> |

Specified documents include a passport, a photocard driving licence, various financial documents, a utility bill, birth certificate and a marriage certificate (see para (2F)-(2H)).

52. Rule 35A contains detailed rules as to how a person who is entered in the register of local government elections in England and Wales and is entitled to vote in the election may obtain an “Electoral identity document”.

The Parties’ Submissions and Discussion

53. The Defendant contends that the pilot scheme orders she has made which prohibit ballot papers from being delivered to individuals unless a requirement to produce particular forms of identification has been met fall within the scope of s.10(2)(a) of the 2000 Act. This is because the pilot schemes, as permitted by the 2000 Act, make provision differing in a relevant respect from that made under or by virtue of the Representation of the People Acts as regards “how voting at the elections is to take place”. Current procedures under rule 33 of the Principal Areas Rules (see para 48 above) permit identity to be checked through questioning.
54. Further, the Defendant contends that the pilot schemes are being undertaken for a lawful purpose under s.10(1). Mr Hanif Mussa, on behalf of the Defendant, submits that the s.10(1) power was intended to allow proposed changes to local government electoral procedures, from time to time existing, to be tested. He submits that “the testing is with a view to improving the integrity of the electoral system and voter confidence by modernising electoral procedures and reducing the opportunity for fraud” (Skeleton Argument, para 3). He says that it is no part of the Minister’s purpose to prevent those who are lawfully entitled to vote from doing so. Indeed, improving the integrity of the

electoral system and voter confidence may over the longer term encourage greater participation in the electoral process. Every voter who lacks relevant identification documents will be able to obtain a locally-produced document free of charge (see para 52 above).

55. The Claimant contends that in making the pilot scheme orders the Defendant has acted *ultra vires*. This is for two reasons: first, because they are not within the meaning of “provision differing... from that made under or by virtue of the Representation of the People Acts as regards... how voting at the elections is to take place”. The requirement to produce voter ID does not concern “how” voting is to take place, but “whether” voting can take place at all. Second, they are contrary to the statutory purpose of s.10 which is to “facilitate” and “encourage” voting at elections.

The meaning of the words used in s.10(2)(a)

56. The Claimant’s pleaded case (albeit not one which Mr Michael Fordham QC, on behalf of the Claimant, appeared to advance in his written and oral submissions as a discrete argument to any great extent), is that the definition of the word “how”, which accords with its natural and ordinary meaning, is “in what way or by what means” (OED definition) (see Claimant’s combined statement of facts and grounds (“SFG”), para 50). In this context, the Claimant contends that it refers to the way or manner in which voting occurs, or the (physical) means by which votes are cast, and does not encompass matters relating to a person’s eligibility and entitlement to vote.
57. Further, that interpretation of the word “how” the Claimant contends accords with the straightforward construction of s.10(2)(a) when read as a whole. The words “when” and “where” refer to the way or manner in which votes are to be cast, in particular the time and the place where voting is to take place. They are concerned with the practicalities of voting. The Claimant’s pleaded case is that “The word ‘*how*’ should be given a meaning which is consistent with the rest of this clause, one which concerns the physical manner or way in which voting takes place, not whether it can take place at all” (SFG, para 52). Any wider meaning given to the word “how”, such as that suggested by Mr Mussa would, Mr Fordham submits, make s.10(2)(b) and (c) redundant.
58. I do not accept these submissions. I prefer Mr Mussa’s construction of the word “how”. First, s.10(2)(a) is dealing with voting procedures. On their natural and ordinary meaning the words “how voting at elections is to take place” are broad enough to encompass procedures for demonstrating an entitlement to vote, including by proving identity, as part of a voting process. Had Parliament intended to confine the provision to refer to the physical mechanism by which an individual vote is cast, it could have made that clear (see language used in s.10(2)(b)).
59. The Claimant accepts that the statutory language permits remote electronic voting, for example over the internet, to be tested. Mr Fordham also accepts that such an alternative mechanism for voting could not be utilised safely without at least imposing some further conditions relating to the identification of eligible voters. He submits that the imposition of such conditions is incidental to the introduction of remote electronic voting. However, I agree with Mr Mussa that if the words “how voting at the elections is to take place” are broad enough to encompass the imposition of identification requirements in the context of remote voting arrangements, that is some indication that

they are broad enough to encompass such requirements where voting does not take place remotely.

60. Second, as Mr Mussa submits, the scope of the power to establish a pilot scheme is defined by reference to the provision “made under or by virtue of the Representation of the People Acts”. Pilot schemes permitted under s.10(2)(a) are schemes which differ “in any respect” from that provision so far as concerns “how voting at the elections is to take place”. The existing relevant provision made in the Principal Area Rules, rule 33, in relation to how voting at the elections is to take place includes requirements as to identification and eligibility to vote which must be satisfied before a voter is provided with a ballot paper (see para 48 above). This, it seems to me, supports Mr Mussa’s broader definition of the word “how”. The pilot schemes modify these provisions concerned with ascertaining eligibility to vote by amending rule 35 of the Principal Areas Rules (see para 51 above).

The purposes for which the power under s.10(1) may be exercised

61. Section 10(1) of the 2000 Act confers a discretion on the Minister in relation to the approval of proposals submitted to her for a scheme under s.10(2).
62. In his written and oral submissions Mr Fordham focussed on the purposes for which the power under s.10(1) may be exercised.
63. Mr Fordham starts his legal analysis with three principles of law. First, legislation is to be interpreted by reference to its purpose and the mischief at which it was aimed, in its historical context, which interpretation is a question of law for the court. In *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, Lord Bingham (with whom Lords Steyn, Hoffmann and Scott agreed) explained at paragraph 8: “The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed”, having regard to “the purpose which Parliament intended to achieve when it enacted the statute”.
64. Second, a public authority can only use a statutory power conferred on it for the purpose for which the power was conferred, which purpose it is for the reviewing court to identify as a question of law (*R v Tower Hamlets London Borough Council, ex parte Chetnik* [1988] 1 AC 858, per Lord Bridge at 872; see also *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, per Lady Hale at para 199).
65. Third, a public authority must use a statutory power to promote the statutory policy and objects, which it is for the reviewing court to identify as a question of law. As Lord Reid explained in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030: “Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter for the court”.
66. The Claimant contends that the purpose (or at least the dominant purpose: see *R v Southwark Crown Court ex p Bowles* [1998] AC 641, per Lord Hutton at 651) of the power under s.10(1) is to facilitate or encourage voting at elections. The Defendant accepts that facilitating and encouraging voting at elections is a policy or object which can be pursued under s.10(1). However, the Defendant contends that the policy and

objects of the power under s.10(1) are wider, and are the modernisation of electoral procedures in the public interest.

67. It is common ground that in ascertaining the policy and objects which may be pursued using a statutory power the principal focus must be on the words Parliament has used. In *R (Rights of Women) v Lord Chancellor and Secretary of State for Justice* [2016] 1 WLR 2453 (CA) Longmore LJ said at para 50: “[F]or the purposes of the *Padfield* doctrine it is for the court to ascertain the parliamentary purpose from the words of the statute”.
68. In conducting this exercise Mr Fordham emphasises the s.10(7)(c) assessment which Parliament required should be included within the post-election report of the pilot under s.10(6). The report shall, in particular, contain an assessment of the scheme’s success or otherwise in facilitating voting at the elections in question, and (if it made provision as respects the counting of votes cast at those elections) the counting of votes, or encouraging voting at the elections in question or enabling voters to make informed decisions at those elections (see para 36 above). That mandatory assessment is, Mr Fordham submits, a strong textual and structural indicator as to what the statutory purpose of the pilot schemes was: it was facilitatory.
69. By contrast, whilst s.10(8)(c) requires the report to say whether “the procedures provided for by the scheme led to any increase in personation or other electoral offences or in any other malpractice in connection with the election” (see para 36 above), that “personation” feature appears only within a “statement” which is itself within the s.10(7)(b) assessment of facilitatory success. Mr Fordham submits that the way in which personation features in the statutory scheme is a clear indicator against the suggestion that the nature and purpose of the pilot scheme is to trial new restrictions preventing personation.
70. However, pursuant to s.10(9) the Secretary of State may, by making a request in writing, require the report to contain an assessment of such other matters as he chooses to specify. I agree with Mr Mussa that this indicates that Parliament did intend that pilot schemes could test a range of matters other than those expressly identified in s.10(7)(c)(i) and 10(8). Further, following the establishment of the Electoral Commission the opening words of s.10(7) were amended to include the words “in particular”. This change also indicates that the matters specified in s.10(7) were not the only matters on which the Electoral Commission should report. Again, I agree with Mr Mussa that there may be a range of important public interest considerations associated with the modernisation of electoral procedures extending beyond those specified matters.
71. Mr Fordham also places considerable emphasis on the Explanatory Notes to the 2000 Act which record that s.10 was enacted to allow for “experiments involving innovative electoral procedures” (para 3, and also see para 65) in an Act enacted to give effect to the Howarth Report (paras 6-7). Paragraph 17 of the Explanatory Notes records:

“The Working Party recommended that pilot schemes of innovative electoral procedures—such as weekend voting, electronic voting, early voting, mobility polling stations—should be run so that their effectiveness could be evaluated and that successful ones should be rolled out more widely.”

72. Those examples of “innovative electoral procedures” and the full detail of the different voting arrangements that the Howarth Report recommended should be tested in pilot schemes for local government elections (see paras 13 and 15 above), Mr Fordham submits, support the Claimant’s contention that the purpose of s.10 was to facilitate and encourage voting at elections.
73. I am not persuaded that the Howarth Report supports the Claimant’s contention that the only (or dominant) public interest to which the power under s.10(1) can be directed is to facilitate and encourage voting at elections. The Working Party was concerned with the “fundamental modernisation of the electoral process” (see para 12 above). It was of the view that without such modernisation there was a risk of losing public trust. Accordingly, as the heading to the relevant section of the Howarth Report (“Improving voting arrangements and making voting easier”) indicated, facilitating and encouraging voting at elections was an important objective of any reform. However, it was not the only public interest to be considered. The Report recognised that pilot schemes should take account of the need to safeguard the integrity of the proposed voting arrangements (see para 14 above). ID requirements are all about electoral security.
74. The House of Commons Home Affairs’ Committee’s Fourth Report (see paras 7-10 above), the Howarth Report and the Government’s response to the Committee’s report (see para 16 above) all indicate that the focus at that time was on possible reforms to “the physical process of casting a vote”, and they broadly agreed that there was no great problem with impersonation in British elections outside Northern Ireland. However, I agree with Mr Mussa that it does not follow that the purpose of s.10 of the 2000 Act was to facilitate and encourage voting in elections.
75. I am satisfied that the s.10(1) power was intended to allow proposed changes to local government electoral procedures from time to time existing to be tested.
76. The test to be applied in the present case is that set out by Longmore LJ in *Rights of Women* (at para 42):
- “Any inquiry as to frustration of purpose must consider whether there is a rational connection between the challenge requirement and the legislation’s purpose.”
77. Applying that test, Mr Mussa makes the following points, with which I agree. First, Parliament has not specified in express terms the purposes for which the power under s.10(1) can be exercised. S.10(1) is framed in terms that are permissive: (i) the proposals made by the local authority or the Electoral Commission must simply be proposals for a scheme under s.10, rather than for a specific purpose; and (ii) the discretion conferred on the Minister to approve or modify a proposal is similarly specified in the terms of s.10(1). Where Parliament has granted a power only for the purpose of encouraging participation in elections it has done so in express terms: see s.69 of the Electoral Administration Act 2006.
78. Second, s.10(2)(b) makes clear that the s.10(1) power can be exercised for purposes other than facilitating and encouraging voters to vote at elections. It can be exercised to order a scheme as to how votes cast at the elections are to be counted.

79. Third, the s.10(1) power allows amendments to be made to local government election rules from time to time existing. The power was intended to operate to take account of developments in the future. That being so, a court should be slow to infer that the power is only intended to address a single specific concern existing at the time of its enactment. The Howarth Report understandably focussed on a matter of particular concern at the time, namely falling turnout. However, it is important to distinguish between the reasons for establishing the power and the purposes to which it can be used. This power permits amendments to be made to rules that were themselves introduced by reason of an earlier pilot. The 2000 Act is one of the Acts that falls within the definition of Representation of People Acts. S.10(2) refers to “Acts” in the plural. The s.10(1) power is in the nature of a power to approve and conduct experiments to obtain information about any reform to electoral procedure that may need to be introduced from time to time.
80. Fourth, the s.10(1) power must be considered in terms of the enactment as a whole. S.11 provides for the revision of electoral procedures in the light of successful pilot schemes conducted under s.10. S.11(1) provides for the Secretary of State to make an order “only on a recommendation of the Electoral Commission”, and s.11(3) provides that any order made under sub-section (1) shall be made by statutory instrument, and no such order shall be made unless a draft of the statutory instrument containing the order has been laid before, and approved by a resolution of, each House of Parliament. The Secretary of State is given power by s.11(1) to make an order if she considers in the light of any report made under s.10 on a scheme under that section that it would be “desirable” to do so. There is no express limitation on the public interest considerations to which the Secretary of State or the Electoral Commission or Parliament may have regard when considering these matters.
81. The pilot scheme Orders that the Minister has made are to test with the objective of mitigating risks to the integrity of the electoral process and improving voter confidence by modernising electoral procedures and reducing the perception of and opportunity for fraud (see paras 27-28 above). I am satisfied that the discretion conferred on the Minister by s.10(1) has not been exercised in a way that would frustrate the legislation’s purpose.
82. I agree with Mr Mussa that even if the Claimant has correctly identified the purpose of the s.10(1) power as being to facilitate and encourage voting at an election, that purpose must be subject to two qualifications. First, the voting that is to be facilitated and encouraged must be lawful voting by persons entitled to vote. Second, the purpose cannot be limited to pilot schemes that will facilitate or encourage voting at local government elections on the first occasion on which they are tested, rather they must lead to changes in electoral procedure that encourage voting over the longer term. The August 2018 prospectus referred to the wider objectives of the pilot schemes:
- “... the Government wishes to see in place systems that can mitigate risks to the integrity of our electoral processes and address the perception of electoral fraud. If voters have confidence in the integrity of the electoral system then they are more likely to participate in that process (p.8).”
83. There are two further matters raised by Mr Fordham which in the event he said he did not need to rely upon. First, Mr Fordham submits that the right to vote is a fundamental

constitutional right such that the individual's right to vote can only be restricted by clear statutory provisions which show that Parliament has squarely confronted the implications of what it is doing (*Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, per Lord Bingham at para 25 and Lord Rodger at paras 61 and 62). Mr Mussa submits that this argument does not assist the Claimant. The right to vote at local government elections is conferred by statute. There is no right to vote at common law, including in local government elections (see *Moohan v Lord Advocate* [2015] AC 901). Further, Mr Mussa submits that the pilot schemes do not abrogate the right to vote at local government elections. Only those persons who are in fact the persons entered on the register are entitled to vote (s.2 of the 1983 Act). Finally, he submits that in this case Parliament has applied its mind to the implications of running pilot schemes for the right to vote. I am not persuaded that the principle Mr Fordham invokes is in play in the circumstances of the present case for the reasons given by Mr Mussa. Suffice to say Mr Fordham did not press this submission commenting that he did not need to rely on it. Whether the constitutional right to vote in national elections (and referenda) extends to local elections is left for future determination.

84. Second, the Claimant's pleaded case (SFG, para 66) referred to passages in Hansard if (which is not accepted) there is any ambiguity as to the meaning of s.10(2) and its statutory purpose. Moving that the Bill be read a second time, the Home Secretary said: "We all have pet theories as to what might improve turnouts" (col.171), and, "We need to ensure that it is as easy as possible for the public to vote and that our electoral procedures are compatible with modern lifestyles" (col.173). The Defendant responded that she did not accept that the rule in *Pepper v Hart* [1993] AC 593 is satisfied in the present case or that the Claimant's use of Hansard material is appropriate. Mr Mussa submits that it is not appropriate to use Hansard (and ministerial statements) to identify the purposes for which discretionary statutory power can be used (see *R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Ltd* [2001] 2 AC 349, per Lord Bingham at 392). Mr Fordham maintained that the passages in Hansard are admissible as to mischief and purpose (see *Bennion on Statutory Interpretation* (7th ed, 2017 at pp.619-621), but he said that in the light of the statements in the Explanatory Notes and the passages in the Howarth Report on which he relied, that he did not need Hansard.
85. I consider that the power in s.10(1) can be used to allow proposed changes to local government electoral procedures to be tested by pilot schemes with a view to modernising those electoral procedures in the public interest. In my judgment the pilot schemes are made lawfully pursuant to that purpose.

Delay

86. The Defendant contends that the Claimant has not acted promptly in bringing this claim, and that the failure to do so has caused significant prejudice to administration in connection with the local government elections and the Pilot Schemes. Mr Mussa submits that the grounds to make a claim first arose when the Minister published the August 2018 prospectus and thereby announced her intention to trial identification requirements in May 2019. The claim form was not filed until 11 January 2019, more than five months after the publication of the prospectus. That was also more than three months after the Claimant became aware on 4 October 2018 of the intention to pilot identification requirements at the forthcoming local government elections.

87. I do not accept that there has been delay by the Claimant. Braintree is the local authority where the Claimant lives and is active. The Defendant announced its decision to accept Braintree's proposal to operate a pilot scheme on 3 November 2018, and the Claimant issued his claim just over two months later. The Claimant's solicitors, Leigh Day, wrote a Pre-Action Protocol letter on 4 December 2018, requiring a response within 14 days or by 18 December 2018, to which the Government Legal Department, on behalf of the Defendant, replied on 20 December 2018. In my view the Claimant was not required to challenge the decision to introduce the pilot schemes before he knew that they would affect Braintree.

Conclusion

88. I consider that the grounds of challenge are arguable. Permission is therefore granted. However, for the reasons I have given, none of the grounds of challenge advanced are made out. Accordingly, this claim is dismissed.