



Neutral Citation Number: [2020] EWCA Civ 723

Case No: C1/2019/0675

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
Mr Justice Supperstone
CO/150/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/06/2020

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE McCOMBE
and
LORD JUSTICE GREEN

Between:

THE QUEEN (on the application of NEIL COUGHLAN)

Appellant

- and -

THE MINISTER FOR THE CABINET OFFICE

Respondent

-and-

BRAINTREE DISTRICT COUNCIL AND OTHERS

Interested Parties

Anthony Peto QC, Sarah Sackman and Natasha Simonsen (instructed by Leigh Day) for the
Appellant

Hanif Mussa and Emily MacKenzie (instructed by the Government Legal Department) for the
Respondent

Hearing date: 23 April 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Friday, 5 June 2020.

Lord Justice McCombe:

Introduction

1. This is the appeal of Mr Neil Coughlan (“the Appellant”) from the order of 20 March 2019 of Mr Justice Supperstone whereby he gave permission to the Appellant to apply for judicial review but thereafter dismissed the Appellant’s review claim. The Appellant’s claim was for the review of the decision of the Minister for the Cabinet Office (“the Respondent”) of 3 November 2018 to make orders pursuant to s.10 of the Representation of the People Act 2000 (“the 2000 Act”) for the operation of voter identification pilot schemes in respect of Braintree District Council (“Braintree”) and nine other local authorities (together “the Interested Parties”) at local elections to be held in those authorities’ areas in May 2019.
2. The Appellant lives at Witham in Essex, within Braintree’s area. He served as a district councillor for Braintree East from 2003 to 2007 and as a town councillor for Witham North from 2013 to 2015. He believes that requirements for identification of voters at elections tend to disenfranchise the poor and vulnerable and render it less likely that their electoral voices will be heard. He considered that the scheme proposed for Braintree and similar schemes were unlawful as being outside the powers conferred by the 2000 Act upon the Secretary of State and he brought the present proceedings to challenge them.
3. As the judge explained, the courts are not concerned with the merits or otherwise of the decision to introduce these pilot schemes, or with the merits of voter identification schemes in general, but only with whether the decision to introduce the pilots was lawful.

The Main Point in the Case

4. Section 10(1) of the 2000 Act enables a local authority to submit proposals to the Secretary of State for a pilot scheme under the section “to apply to particular local government elections held in the authority’s area”. If the proposals so submitted are approved by the Secretary of State, he or she:

“...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).”

5. A “scheme under this section” is defined in s.10(2) which provides:

“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.”

(Emphasis, in (a) above, added)

(There are other provisions of the 2000 Act to which I will have to refer, and these are included in the extracts collected as an Appendix to this judgment.)

6. Contrary to the Appellant’s arguments on the claim, the learned judge held that, on the true construction of the Act, the pilot scheme proposed in the present case, to require voter identification at polling stations as a pre-condition of the issue of a ballot paper, was a scheme making provision “as regards ... (a) ... **how** voting at the elections is to take place”. The Appellant contended that the scheme was not properly within that definition; the judge found that the Appellant’s case was a properly arguable one and so gave permission to apply for judicial review, but having considered it, he dismissed the claim. He refused permission to appeal to this court. The judgment below bears the neutral citation [2019] EWHC 641 (Admin); it is publicly available and can be found, for example, on the BAILII website.
7. The Appellant immediately sought to appeal against the judge’s order by Appellant’s Notice filed on 25 March 2019. He did not, however, apply for expedition of the appeal and, orders implementing the schemes having already been made in respect of the Interested Parties’ areas in February and March 2019, local elections conducted in accordance with the schemes were held in those areas in May 2019. The appeal proceedings continued nonetheless and permission to appeal was granted by order of 25 October 2019 of Simon LJ.
8. The issue on the appeal, therefore, is whether or not the judge’s construction of the Act, as to its application to the schemes in this case, was or was not correct. In my view, the judge’s judgment was correct, essentially for the reasons that he gave. I explain in the ensuing paragraphs why I have reached that conclusion and only add to the judge’s reasons out of respect for the careful argument presented by counsel for the Appellant.

Background

9. The factual background to the introduction of these pilot schemes is summarised very fully by the judge in his judgment at [6] to [31] and I will do no more here than mention some of the main features of that background.
10. The 2000 Act was preceded by three preliminary studies/papers. First, there was a 1998 report of the House of Commons’ Home Affairs Committee: its Fourth Report entitled “Electoral Law and Administration” (“the HAC Report”). Second, following the general election of 1997 the then Home Secretary directed a review of electoral procedure and a working party was set up under the chairmanship of Mr George Howarth MP. The working party produced its report in October 1999 (“Howarth”). Thirdly, the government published a response to that report in November 1999.
11. The introduction to the HAC Report stated that democracy required “the laws relating to the running of elections ... to be efficient and effective”. It explained two arguments put before the working party which it had accepted. First, it was important that participation in elections should be as high as possible and that practical steps were

needed to increase participation. Secondly, administration needed to be brought up to date to maximise effectiveness and relevance to modern needs.

12. Section D of the HAC Report was devoted to “Making it easier to cast a vote”. This concluded that the time was right to consider a range of possible reforms to the physical process of casting a vote. It said that reforms should be approached cautiously and had to be based not simply upon modernity but on whether changes were safe and effective.
13. Section E dealt with “Fraud”. It found that at that time there was no great problem with voter impersonation in UK elections, outside Northern Ireland, and saw no need to introduce any additional proof of identity requirements before a voter could be given a ballot paper.
14. Howarth made a number of recommendations for testing voting arrangements, broken down into three broad headings: “When to vote”, “Where to vote” and “How to vote”. The heading on “How to vote” suggested some possible pilot schemes, e.g. wholly postal ballots, automated voting/vote counting, telephone voting and electronic voting. Such schemes, it said, should take account of the need to safeguard the integrity of the voting arrangements. To this list, the summary of recommendations for piloting innovative approaches added other proposals for changes to polling days and polling hours, early voting, mobile polling stations and “out of area voting”. It recommended encouragement of innovation in “re-engaging the electorate”. There was nothing in the report to say that the particular suggestions were made to the exclusion of all others.
15. In its response the government accepted the recommendation to authorise and evaluate pilot schemes of alternative voting arrangements. It agreed with the HAC Report that there was at that time no great problem with impersonation at elections outside Northern Ireland.
16. We were also referred by Mr Peto QC, appearing for the Appellant, to certain short passages in Hansard, for 30 November 1999, reporting the introduction to the House of Commons of the second reading of the Bill (which became the 2000 Act) by the then Home Secretary. This referred to the three documents mentioned above as “Relevant documents”. There were comments by the Minister that “... we all have pet theories as to what might improve turnouts...” and a “... need to ensure that it is as easy as possible for the public to vote and that our electoral procedures are compatible with modern life styles...”. Mr Mussa, for the Respondent, contested the admissibility/relevance of these very short Hansard passages. The passages added little, if anything, to the earlier materials and I propose to say no more about them.
17. The judge found at [74] that up to the introduction of the Bill to Parliament “the focus” for reform was on the physical process of casting a vote.
18. Sections 10 and 11 of the 2000 Act came into force on 9 March 2000. Very shortly thereafter, as from 1 July 2001, the provisions were amended following the establishment of the Electoral Commission (“the EC”) to which important functions as regards pilot schemes were assigned. Certain of these amendments have importance for the issue before us.
19. The first pilots were conducted over a number of years from 2000 to 2018, before the launch of the pilot schemes in issue in these proceedings. Some of those schemes had

required identification mechanisms for electronic voting. Others required provision of a signature prior to issue of a ballot paper at polling stations, postal voting signature checking and postal vote tracking.

20. In January 2014, the EC published a report on electoral fraud, noting numerous examples of impersonation offences and stating that “Perceptions of fraud can be as damaging as actual incidents of fraud. Voters must be able to have confidence in the system...”. It recommended that voter identification requirements at polling stations should be introduced. This was followed by details of proposals for this in a December 2015 EC report.
21. Also in 2015, Sir Eric Pickles, appointed by the Prime Minister as “Government Anti-Corruption Champion”, carried out a review of electoral fraud and produced 50 recommendations, including one that identification at polling stations should be considered by the government and tested by pilot schemes. In December 2016, the government published a response accepting that particular recommendation, which (in turn) was welcomed by the EC. The recommendation was picked up by the Conservative party’s election manifesto for the June 2017 election.
22. As a result, pilots of voter identification schemes were employed in five local authority areas in the local elections in 2018. The EC reported favourably upon the schemes, while commenting that 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”. It was said that there was some evidence to suggest that 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”. It was thought the measures were likely “to have had some positive impact on reducing the potential for electoral fraud by impersonation at polling stations”. The EC recommended further trials in May 2019. A Cabinet Office report of July 2018 concluded that the pilots had been a success. However, it is acknowledged by the Respondent in evidence in these proceedings that the 2018 pilots were controversial and were opposed by some organisations, including the Electoral Reform Society.
23. In August 2018, the Cabinet Office produced a “Prospectus”, inviting local authorities to take part in further voter identification pilots. The introduction stated that, “We are seeking to encourage voting by improving the integrity of the voting system and voter confidence”. Other policy considerations were also set out. On 3 November 2018, the Cabinet Office announced that eleven authorities had chosen to participate, with the stated objective to “... provide further insight into how best to ensure the security of the voting process and reduce the risk of voter fraud”. This is the decision challenged by the Appellant’s judicial review claim. Orders, purportedly pursuant to s.10 of the 2000 Act, followed in February and March 2019. It seems that only ten of the original eleven interested authorities participated in the final schemes.

Statutory Scheme

24. For ease of reference, I set out s.10 of the 2000 Act in full in the Appendix, together with s.11(1). I have already quoted above the most directly significant part of s.10(2). That subsection enables a scheme under the section to make provision “differing in any respect from that made under or by virtue of the Representation of the People Acts”.

The Acts there referred to include the 2000 Act and the Representation of the People Act 1983 (“the 1983 Act”): see section 17 of the 2000 Act.

25. It will be seen from the full text that, before making an order under the section, s.10(1A) requires that the Secretary of State consults with the EC. Section 10(6) then requires that, following an election conducted under a relevant scheme, the EC must prepare a report upon the scheme. Section 10(7) requires that:

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

(a) a description of the scheme and of the respects in which the provision made by it differed from that made by or under the Representation of the People Acts;

(b) a copy of the order of the Secretary of State under subsection (1); and

(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.”

The words “in particular” at the beginning of the subsection were inserted in July 2001, upon the setting up of the EC.

26. Section 10(9) provides further that,

“If the Secretary of State so requests in writing, the report [i.e. the report under s.10(6)] shall also contain an assessment of such other matters relating to the scheme as are specified in his request.”

27. Section 11 then provides that the Secretary of State, in the light of the report, may make an order for the more general application of arrangements similar to a section 10 scheme so piloted. However, the power may only be exercised on a recommendation from the EC. Further, the order under section 11 is to be made by statutory instrument laid before, and approved by resolution of, each House of Parliament.

28. At [40] to [43] of his judgment, the judge summarises the statutory provisions under the 1983 Act for setting the franchise for local government elections, making the basic provision that entitlement to vote is by registration in the register of local government electors for the relevant area, subject to any legal incapacity, relevant citizenship and being of voting age. Registration is achieved by application to the registration officer who determines whether the applicant appears to be entitled to be entered on the register: ss. 4(3) and (4) and 10ZC of the 1983 Act. Regulations may make provision for determining applications: s.10ZC(3).

29. The Representation of the People (England and Wales) Regulations 2001 set out the details required to be furnished upon application for registration. The primary requirements are for the applicant's name and address[es], a national insurance number and a declaration of truth. Regulation 26B enables the registration officer to request additional evidence to verify identity or to determine entitlement. Identification documents specified include passports, photocard driving licences, birth and marriage certificates, financial statements, council tax statements, utility bills and so forth. In the absence of documentation, an applicant may have to provide an attestation from a person of good standing.
30. The detailed rules for the conduct of local elections are prescribed under s.36 of the 1983 Act. Those rules include The Local Elections (Principal Areas) (England and Wales) Rules 2006 ("the Principal Areas Rules"). The only identification requirements specified under those rules are contained in rule 33, which specifies two questions that may, and in certain cases must, be put to a person presenting at a polling station in order to vote. The two questions are:

“(a) Are you the person registered in the register of local government electors as follows? *Read the whole entry from the register ...* (b) Have you already voted here or elsewhere at this election ... otherwise than as proxy for some other person ...”.

It is then provided that a ballot paper must not be delivered to any person required to answer such questions unless satisfactory answers have been given. Further,

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

(See rule 33(1), (3) and (4).)

31. The final pieces in the legislative jigsaw are the orders that brought the pilot schemes into effect. The Order in respect of Braintree is the Braintree District Council (Identification in Polling Stations) Order 2019. By way of modification to the Principal Areas Rules, it is provided that a ballot paper must not be delivered to a voter unless the voter has produced “a specified document” to the relevant official at the polling station. Those specified include a passport, a photocard driving licence, various financial documents, a utility bill and a birth or marriage certificate: para. (2A), (2B), (2F) and (2H).

Arguments before Supperstone J

32. As indicated, the Appellant argued before the judge that the scheme orders were outside the power conferred by s.10 of the 2000 Act: first, because the schemes were not within the statutory definition in s.10(2), and secondly, because they were contrary to the statutory purpose of s.10 which is to facilitate and encourage voting at elections.
33. The Appellant argued that, since “when” and “where” referred to the *manner* in which votes are to be cast, they are to do with the practicalities of voting as regards the time and place of voting. Accordingly, “how” a vote is to be cast is also to be seen as dealing with the physical manner in which voting is to take place and not with whether a vote is to be cast at all. It was submitted that a wider meaning would render s.10(2)(b) and

(c) redundant. The judge rejected those arguments and, as I have said, I would do so also. However, I now turn to the grounds of appeal and the reasons (which are essentially no different from those of the judge) why I would reject those grounds.

The Appeal

34. The grounds of appeal raised are that the judge's conclusion was wrong because:

“7. (1) it is inconsistent with the ordinary meaning of “how”. In this context “how” refers to the “manner or means” of communicating a voting intention ...

(2) it is inconsistent with the statutory text of s.10 when that is read as a whole, and in particular, with the specific requirement for the pilot schemes to be assessed in terms of their “success or otherwise” in facilitating voting at the elections: s.10(7)(c)(i) ... and

(3) it is inconsistent with, indeed it frustrates, the dominant legislative purpose behind s.10 which is to facilitate and encourage voting ...” (Grounds of Appeal, para. 7)

35. To summarise paragraphs 9 to 11 of the Grounds, it is submitted further that the implications of the pilot schemes stretch beyond the May 2019 elections and may possibly introduce radical new schemes on a permanent basis by statutory instrument under s.11 of the 2000 Act, leading to a “profound change in the English electoral landscape”. This argument was developed in the context of the principle of legality, i.e. that the voter identification scheme was an interference by Ministerial order (with potential for future extension by statutory instrument) with the fundamental right of the citizen to vote, not properly to be done by general words of the type found in s.10(2)(a).

Statutory Language (Grounds para. 7(1))

36. In my judgment, as a matter of ordinary language, the words “how voting ... is to take place”, looked at alone, are indeed quite general and do not indicate a restriction merely to the physical methods of communicating voting intention, as the Appellant contends. If such a restriction had been intended, it would have been quite simple for Parliament to introduce it. It did not do so. The words simply indicate how, i.e. the steps by which, electors achieve the casting of a lawful vote. If the words are clear, as I think they are, Parliament did render lawful pilot schemes of the present type. It seems to me that the construction contended for by the Appellant would require additional words to be imported into the Act which are simply not there in s.10 as enacted.

37. I think the following is a fair test. If (hypothetically) one assumes a legal requirement to present identification at a polling station (as in the present case) and a new voter were to ask, “How do I vote in this election?”, the answer would be likely to be: “You go to the polling station, produce your ID to the clerk and answer a couple of formal questions, if asked. He or she then gives you a ballot paper. You go into a booth and mark a cross on the ballot paper against the name of the person for whom you wish to vote and then you put your paper into a sealed box at the exit to the polling station”. The question would hardly be properly answered by confining the answer to going to

the polling station, getting a ballot paper, marking it with a cross and putting the paper in the box: the furnishing of identification would readily be described in such circumstances as an integral part and parcel of the essential procedure of **how** you vote. If the answer given to the new voter omitted that part of the process it would be incomplete. If the new voter then went to the polling station without the necessary ID and was turned away, he would complain to his informer that he had not been given the information that he asked for about *how* he could vote.

38. Mr Peto QC for the Appellant suggested that if the words were to be construed broadly, then a scheme could go so far as to introduce procedures to limit the secrecy of the ballot, e.g. perhaps by publishing names of the voters on a screen or on the internet. For my part, I do not see that that would relate to “how” votes were to be cast all. By that stage, the voter would have completed the phase of “how” to vote and the new procedure would be a step further. It would be gratuitous publication and it would not be necessary or incidental to how to vote or even to the counting of votes, envisaged by s.10(2)(b). If such a pilot were attempted the challenge to it might not be simply one of *vires*, but also one of proportionality/rationality.
39. The Respondent points out that it is common ground that a scheme under s.10 could permit electronic voting and that some means would be needed to identify a voter’s entitlement to vote in such a poll. It is argued that this means that identification requirements must have been contemplated as being necessary for some admittedly lawful schemes. The Appellant answers that point by saying that such an arrangement would be an incident of a *new* scheme to facilitate voting; it would not introduce, as this scheme does, an additional pre-condition of using the *existing* voting procedures for the traditional method of voting in person at a polling station. It is submitted also that the hypothetical new electronic scheme would expand voting facilities without restricting existing ones.
40. I do not accept, however, that a requirement of suitable identification is a restriction on voting at all. It is merely a means of trying to ensure that those who vote are entitled to do so.
41. The present questions permitted to be asked of voters at a polling station are themselves identification questions and the facilitation of what such questions are designed to achieve, i.e. confirmation of entitlement to vote, is hardly the radical departure from present rules that the Appellant’s case asserts. Further, it seems entirely consistent with the idea of electronic voting with ID checks (a scheme that it is accepted would be within the statutory definition), that a pilot scheme under section 10 should seek to explore the potential to prevent similar fraud by those seeking to vote in person at a polling station.
42. I was initially inclined to think that the registration process for electors, summarised by the judge, and less fully by me above, contained copious provisions for voter identification, affording parallels to what the present pilot schemes envisage. However, following the hearing, we received (uninvited) further written submissions from counsel for the Appellant upon the voter registration provisions, arguing that they form no useful analogy. Counsel for the Respondent provided a short note in response, indicating no desire to respond to those submissions and, in the circumstances, I will say no more about them.

43. On another of the Appellant's points on the language of the Act, I do not find that the Respondent's favoured construction renders s.10(2)(b) and/or (c) otiose as the Appellant argues. In my judgment, those paragraphs are clearly dealing with pilot schemes for the separate matters of how votes are counted and/or for the sending of candidates' election communications free of charge. They do not have anything to do with *how* voting is to take place. They are distinct and separate from the process of how to vote. It was surely sensible, therefore, to make additional provision for those matters, if required, as is done by (b) and (c) of s.10(2). Those provisions are not rendered otiose or redundant if one adopts the construction of s.10(2) for which the Respondent contends.

44. So much for the language of s.10(2)(a) itself, I turn to the broader statutory context.

Statutory Context (Grounds para. 7(2))

45. It is argued that the wider statutory context indicates that a voter identification scheme at polling stations is outside the statutory language because of other indications in the Act. Such indications are said to be provided by s.10(3) (express permission for voting on more than one day and at places other than polling stations) and by s.10(7)(c) and (8)(a) and (b) (the requirement for an EC report assessing a scheme's success or otherwise in facilitating voting and statement by the authority whether turnout was higher and whether voters found assistance provided by the scheme easy to use).

46. In my view, s.10(3) provides no assistance on the present matter as the statement that a scheme may make provision for voting on different days and at different places is preceded by the words, "Without prejudice to the generality of the preceding provisions ...". The express provision as to particular permitted schemes says nothing as to what the "generality" of the earlier provisions may permit.

47. In similar vein, s.10(7) provides for what the report on a scheme by the EC shall "in particular" contain. One such provision in s.10(7)(c) requires an assessment of a scheme's "success or otherwise" in facilitating voting. The words "in particular" are to be noted, as are the words "success or otherwise". It is clearly envisaged here that the report may include other matters apart from facilitating voting. Further, the provisions contemplate, it seems to me, that a scheme that has other advantages might nonetheless fail to facilitate voting or indeed might render voting less easy. That is what is meant by the "success or otherwise" in facilitating voting. That, of course, is the purpose of any pilot: it is to test the advantages and the disadvantages of possible new voting schemes and to assess them overall in that light.

48. On the same level, the requirement in section 10(8) that, in the EC's report, the assessment by the EC shall "include" the authority's assessment of the effect on turnout and whether voters found the procedures provided for their assistance by the scheme easy to use says nothing about what else the report must contain or what the features of a s.10(2) scheme might be.

49. Section 10(8)(c) also requires the EC report to include an assessment by the authority as to whether the scheme procedures led to "any increase in personation or other electoral offences or in any other malpractice". It can hardly be suggested that an EC report cannot include (conversely) an assessment of any *decrease* in malpractice or that a s.10(2) scheme cannot be directed to discouraging it.

50. It must also be noted that the matters expressly referred to in s.10(7) and (8) are not exclusively the matters that may be covered in an EC report. Quite apart from the express words of inclusion of the specific matters at the beginning of each of those subsections, s.10(9) provides that the EC must also assess other matters relating to a scheme which have been specified by the Secretary of State.
51. What is provided for by s.10(2) is pilot schemes. Such schemes naturally will have advantages and disadvantages. The pilot enables such things to be assessed to see whether the schemes in question deserve further consideration or should be avoided. They are confined to particular elections for the purpose of informing decision makers for the future; they are not necessarily likely to have absolute success in the particular elections at which they are first trialled. Even in a scheme primarily designed to encourage voting, it is not the success in absolute terms in that objective that will necessarily be achieved. The Act envisages that failure (“success or otherwise”) in facilitating voting might also have to be reported: see again s.10(7)(c).
52. In conclusion on this point, therefore, I do not find that the wider statutory context or the features to which attention is drawn by the Appellant do anything to contradict the general and broad meaning of the word “how” in s.10(2)(a).

Statutory Purpose (Grounds para. 7(2) and (3))

53. I look next at the Appellant’s arguments as to the wider statutory purpose and what is to be derived from the various extraneous sources to which we were referred (para. 7(3) of the Grounds of Appeal).
54. It is, of course, necessary to ascertain and give effect to the true meaning of a statute having regard to “the purpose which Parliament intended to achieve when it enacted the statute”: *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, per Lord Bingham of Cornhill at [8]. To quote Lord Reid 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 ... [I]f the Minister, by reason of having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.”

55. Bringing the matter forward, in *R (Rights of Women) v Lord Chancellor and Secretary of State for Justice* [2016] 1 WLR 2453 at [50], Longmore LJ said,

“[F]or the purposes of the *Padfield* doctrine it is for the court to ascertain the parliamentary purpose from the words of the statute.”

56. Mr Peto QC argues that the purpose of the power under s.10(1) (or at least its dominant purpose) is to facilitate and encourage voting at elections and that these schemes frustrate that purpose by putting in place obstacles to voting. In seeking to identify this statutory purpose, Mr Peto laid emphasis upon some of the features of the HAC Report, Howarth and the government response, and to the short extracts from Hansard, to which I have referred above.
57. I do not accept that the present schemes are contrary to the purpose of that part of the 2000 Act which provides for the pilot schemes. Taking the words of Lord Reid and Longmore LJ, quoted immediately above, I have found that the words of the section and the context of the statute as a whole do not draw the boundaries of the purpose of these provisions as narrowly as Mr Peto would have it.
58. I accept that the extraneous material produced suggests that the most immediate prompt for this part of the legislation was a perceived decline in voter participation in these elections and Parliament wished to address that. However, I do not consider that the materials to which we were taken indicate that Parliament was not interested in any other features of the voting system. It seems to me that it was anxious to promote modernisation of the system and its integrity. Clearly, the HAC Report had considered the issue of fraud and thought that it was not an immediate problem in Great Britain (in contrast to Northern Ireland). However, I do not think that when Parliament adopted such general words as it did in s.10(2)(a), it should be taken as having prohibited ministers from even looking at schemes that might have the effect of reducing malpractice. I think that that is particularly so when one bears in mind that the Act was for the use of pilots to test voting systems *for the future* and not just to achieve a higher participation in the very narrow field of the particular elections to which such schemes might be applied. Further, it is to be recalled that these provisions were not limited to the when, where and how of voting, but also to the counting of votes and the rules for free distribution of candidates' election communications. The desire for improvement and modification seems to have been quite general.
59. Assessment of a pilot assumes that, even allowing for natural optimism in promoting a scheme, disadvantages of a new scheme might be thrown into stark relief by the results. As I have said, the Act expressly contemplated "success or otherwise" in facilitating voting, as already noted above. Further, the aim of facilitating voting must surely be to facilitate lawful voting and to render the opposite more difficult.
60. In examining the background materials, as the judge succinctly put it (at [79] in his judgment),
- "... it is important to distinguish the reasons for establishing the power and the purposes to which it can be used."
- I agree.
61. In my judgment, therefore, neither the purpose, nor even the dominant purpose of these provisions, is as limited as Mr Peto contends. The facilitating of voting might have been a prominent reason for the Bill, but that is not to say that a forward-looking Act, using very general and broad words, must be taken to have precluded schemes designed to investigate improvements in the voting system overall.

62. It is not, therefore, necessary to examine Mr Peto's reliance upon the House of Lords decision in *R v Southwark Crown Court, ex p. Bowles* [1998] AC 641, but I would add the following.
63. In that case, the House upheld a Divisional Court order quashing a production order, sought and obtained in the Crown Court, against an accountant under s.93H of the Criminal Justice Act 1998, a provision enabling an order to be made "... for the purposes of an investigation into whether any person has benefited from any criminal conduct or into the extent or whereabouts of the proceeds of any criminal conduct ...". It was found that the order had been sought not for that purpose but for the dominant purpose of investigating whether an offence had been committed in the conduct of a client's business. Thus, the power had been invoked for purposes outside that for which it was expressly conferred by the section. However, in contrast, when one looks at s.10(2) of the Act I cannot see that the introduction of these schemes went outside a purpose for which the power was expressly conferred.
64. In the circumstances, therefore, I see nothing in what one underlying purpose of these statutory provisions might have been, as derived from the Act itself and the mischief which inspired its enactment, to show that the present schemes frustrated any such purpose.

Legality (Grounds paras. 9-11)

65. Finally, I would turn to Mr Peto's further point that the use of the power in the present case served to undermine the fundamental constitutional right to cast a vote in local elections. He submits that the power is being applied to restrict by a simple ministerial order a right to vote conferred by primary legislation, not merely by a change to delegated legislation as to how a vote is cast. It is submitted that the general words here, if employed to sanction a scheme restricting the right to vote, would infringe the principle of legality.
66. As Mr Mussa observed, the Appellant did not press this argument before the judge: see the judgment at [83]. However, it is squarely raised now and is a pure legal issue of construction of the Act. I will, therefore, address it.
67. The principle invoked by Mr Peto is perhaps best and conveniently encapsulated, for present purposes, in a short passage in the speech of Lord Hoffmann in the House of Lords in *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115 at 131, as follows:

"... [T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of

constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”

68. There was debate before us as to whether the right to vote in certain local elections, which might be governed by a “one-off” pilot scheme, fell within the concept of a “fundamental right” for these purposes. Clearly, the right to vote at any election is an important right and courts will be vigilant to prevent the use of so-called “Henry VIII” powers of this type by ministers to curtail such an important right by mere order, unless the claimed use of the power has been clearly and distinctly conferred by Parliament. In my judgment, however, the use of the power in section 10 to test a pilot scheme of this type does not in truth override or abrogate the right to vote at all. The voter remains entitled to vote and must only produce sensible means of demonstrating that entitlement. The words in section 10(2)(a) used, on these specific occasions, to launch an experimental scheme requiring identification at the polling station do not, in my judgment, “override” the important right to vote at the particular elections concerned.
69. I also think that Mr Peto overemphasised the potential for more general schemes being enacted under s. 11. It is important to recall, however, that the power to make more general provision similar to any scheme can only be exercisable on a recommendation of the EC. Moreover, any draft order exercising that power has to be laid before both Houses of Parliament and must be accompanied by every s.10 report relating to a scheme making similar provision. Any such order is also subject to the affirmative resolution procedure in both Houses.

Conclusion

70. For these reasons, for my part, I would dismiss this appeal.

Lord Justice Green:

71. I agree with both judgments and can detect no material difference between them.

Lord Justice Underhill:

72. I have found the arguments in this case quite finely balanced, and although I have come to the same conclusion as McCombe LJ I should like to give my reasons in my own words. I can do so shortly as a result of the comprehensive way in which he has set out the background and the rival submissions, and also because I do not in fact think that the issue is one which bears a great deal of analysis. I need address only those points that seem to me central to the argument.
73. The ultimate question is whether the provision in section 10 (2) (a) of the 2000 Act authorising the piloting of changes in “... *how* voting at ... elections is to take place” covers the piloting of requirements for voters to produce proof of identity before being permitted to vote. Mr Peto, praying in aid the definition of “how” in the Oxford English Dictionary, submitted that that phrase in its plain and ordinary meaning applies only to “the manner or means by which electors communicate their vote”, so that in practice what it connotes is alternatives to the present method of placing a cross next to a name on a ballot paper – what I will call the actual mechanics of voting. But, at least in the case of a phrase of this generality, I do not find it helpful to start by trying to identify a

“natural meaning” without reference to the context (see the observations of Lord Mance in *Bloomsbury International Ltd v Sea Fish Industry Authority and Department for Environment, Food and Rural Affairs* [2011] UKSC, [2011] 1 WLR 1546, at para. 10). The Appellant’s version of what the phrase conveys is certainly a very possible one; but so also is the version espoused by McCombe LJ at para. 37 of his judgment, which extends to the broader process by which the elector is enabled to place his or her vote – what I will call the voting process. It is only possible to form a view about which meaning is correct by considering the phrase against the background of the overall statutory purpose, as determined by reference both to the other provisions of the statute and to any other admissible materials.

74. My starting-point in that exercise is that I regard it as inherently more probable that Parliament intended to enable the piloting of changes to the voting process in the broader sense than that it intended to limit the scope of the piloting power to the actual mechanics of voting. There is no reason in principle why changes to the actual mechanics should be the only kind of change in the voting process which Government might in due course wish to consider; and it would be unsatisfactory if it had to return to Parliament to obtain authority to pilot such other changes if the occasion arose. It is more likely that the intention was that the Act should convey a wide power to pilot changes to the voting process in response to such concerns as might arise from time to time.
75. There is some support for that approach in the immediate statutory context. The heading to sections 10 and 11 of the Act is “New Electoral Procedures”. The other kinds of change which may be piloted under section 10 (2) – both as to “when [and] where ... voting is to take place” under (a) and as to counting and the sending of election communications under (b) and (c) – are expressed in very general language. I do not suggest that these features give any decisive support to the broader construction of the specific phrase with which we are concerned, but they seem to me consonant with it.
76. Mr Peto’s primary submission in response is that it can clearly be seen that the statutory purpose, as regards section 10 (2) (a), was – and, he submits, was only – to assess changes which might increase voter turn-out. He says that that is apparent from
- (a) the pre-legislative materials summarised by McCombe LJ at paras. 10-15 above (and the passages from Hansard quoted at para. 16) and
 - (b) the terms of section 10 (7) of the Act, as glossed in subsection (8), (see para. 25 above), which require the Electoral Commission in its post-pilot report to include an assessment of the success or otherwise of the pilot scheme in (so far as relevant) “encouraging voting at the elections in question”.

He submits that that is a wholly separate purpose from the prevention of voter fraud, which indeed the HAC Report said in terms was not currently a matter of concern. (As regards (b), I have been a little uneasy about Mr Peto’s reliance on extraneous materials, for what I may call the usual reasons; but I think that the use which he seeks to make of them here is legitimate to the extent that it is directed to identifying the statutory purpose – in older language, the mischief.)

77. Those points have given me some pause but I do not in the end think that they bear the weight that Mr Peto places on them. I accept, as Supperstone J did, and as McCombe

LJ does, that as a matter of legislative history the primary focus of section 10 (2) (a) was on increasing voter turn-out; even if there were any objection to the use of the pre-legislative materials, that could be inferred from the words which are relied on in section 10 (7). But it does not follow that the relevant statutory purpose is to be defined so precisely. It could equally be the case that that was simply one aspect, albeit the one which was as a matter of history of particular interest at the time of enactment, of a wider purpose of improving the voting process. In my view that is the better characterisation of the statutory purpose here, for the reasons given at paras. 74-75 above.

78. It would obviously weigh heavily against my view if the Commission were not empowered in its post-pilot report to offer any assessment of the effect of any voter identification procedures which were piloted; a pilot is not much use if there is no-one authorised to assess its results. Mr Peto submitted that that is the case here, because subsection (7) refers only (so far as relevant) to impact on turn-out. But, as Mr Mussa pointed out, subsection (9) requires the Commission, if asked by the Secretary of State, to report on “matters relating to the scheme” other than those specified in subsection (7): see para. 26 above. A report on the piloting of voter identification procedures would plainly fall within the terms of that provision. (I should, however, say that I do not find any real assistance in another provision of section 10 relied on by Mr Mussa, namely the requirement in subsection (8) (c) that the Commission in its report consider whether the procedures piloted led to any increase in personation: while that shows that Parliament had the possibility of voter fraud in mind, it cannot be read as a reference to procedures which are themselves directed at reducing it.)
79. Mr Mussa also submitted that even if the power under section 10 (2) (a) could indeed only be used to pilot measures aimed at increasing turn-out, the view could reasonably be taken that measures to prevent voter fraud might have that effect. Supperstone J refers at para. 82 of his judgment to an observation in the Cabinet Office’s “prospectus” (see para. 23 above) that “if voters have confidence in the integrity of the electoral system then they are more likely to participate in that process”. I have to say that I do not find it very plausible that any significant number of voters are deterred from voting by the perception that other people may be voting when they are not entitled to, but I must respect the fact that the Cabinet Office apparently takes a different view. Fortunately, it is unnecessary for me to express a concluded view on this point since it does not arise in view of my conclusion on the prior issue.
80. I turn to Mr Peto’s submission based on the principle of legality. I can understand the Appellant’s concern that the introduction of an identification requirement may inhibit some voters from voting, and that the impact may be greater on the more disadvantaged groups. But I do not think that it is right to approach the construction of section 10 of the Act on the basis that Parliament cannot have intended to authorise the *piloting* of procedures that might have that effect. Part of the purpose of a pilot scheme in relation to voter identification requirements is to establish whether they would in fact have such an impact, and if so to what extent. The decision whether, in the light of the evidence produced by the pilot, to introduce such requirements universally and on a permanent basis – no doubt weighing such impact as there may be against the perceived benefits – is a distinct matter. I appreciate of course that the effect of section 11 is that that decision can be made by the Secretary of State without further primary legislation; but it would be conditional on both (a) the Electoral Commission recommending the change

(subsection (1)) and (b) approval by both Houses of Parliament under the affirmative resolution procedure (subsection (3)). Those are significant safeguards, deliberately introduced, and in the light of them I do not believe that we should approach the construction of section 10 on the basis that Parliament cannot have contemplated the possibility of permanent voter identification requirements being introduced under the section 11 procedure.

81. For those reasons I too would dismiss this appeal.

APPENDIX

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).

(1A) Subsection (1) applies to proposals falling within that subsection which are submitted by a relevant local authority jointly with the Electoral Commission as if in that subsection—

(a) the first reference to any such authority in paragraph (a), and

(b) the reference to the authority in paragraph (b)(ii),

were each a reference to the authority and the Commission; and, in a case where any such proposals are not jointly so submitted, the Secretary of State must consult the Commission before making an order under that subsection.]

(2) 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.

(3) Without prejudice to the generality of the preceding provisions of this section, a scheme under this section may make provision—

(a) for voting to take place on more than one day (whether each of those days is designated as a day of the poll or otherwise) and at places other than polling stations,

(b) for postal charges incurred in respect of the sending of candidates' election communications as mentioned in subsection (2)(c) to be paid by the authority concerned,

and where a scheme makes such provision as is mentioned in paragraph (b), the Secretary of State's order under subsection (1) may make provision for disapplying section 75(1) of the 1983 Act (restriction on third party election expenditure) in relation to the payment of such charges by the authority.

(4) In subsection (2) the reference to local government elections in the area of a relevant local authority is a reference to such elections—

- (a) throughout that area, or
 - (b) in any particular part or parts of it,
- as the scheme may provide.

(5) Where the Secretary of State makes an order under subsection (1)—

(a) he shall send a copy of the order to the authority concerned and to the Electoral Commission; and

(b) that authority shall publish the order in their area in such manner as they think fit.

(6) Once any elections in relation to which a scheme under this section applied have taken place, the Electoral Commission shall prepare a report on the scheme.

(6A) The report shall be prepared by the Electoral Commission in consultation with the authority concerned; and that authority shall provide the Commission with such assistance as they may reasonably require in connection with the preparation of the report (which may, in particular, include the making by the authority of arrangements for ascertaining the views of voters about the operation of the scheme).

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

(a) a description of the scheme and of the respects in which the provision made by it differed from that made by or under the Representation of the People Acts;

(b) a copy of the order of the Secretary of State under subsection (1); and

(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 subsection (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 elections;

(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.

(10) Once the Electoral Commission have prepared the report, they shall send a copy of the report—

(a) to the Secretary of State, and

(b) to the authority concerned,

and that authority shall publish the report in their area, in such manner as they think fit, by the end of the period of three months beginning with the date of the declaration of the result of the elections in question.

(11) In this section “relevant local authority” means—

(a) as respects England—

(i) a county council, a district council or a London borough council, or

(ii) once established, the Greater London Authority;

(b) as respects Wales, a county council or a county borough council;

(12) For the purposes of this section proposals falling within subsection (1) and submitted to the Secretary of State before the date on which this Act is passed shall be as effective as those so submitted on or after that date.

11 Revision of procedures in the light of pilot schemes.

(1) If it appears to the Secretary of State, in the light of any report made under section 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). [F1The power of the Secretary of State to make such an order shall, however, be exercisable only on a recommendation of the Electoral Commission. ...